Judicial Inquiries and the Rule of Law

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Abstract

The aim of this thesis is to demonstrate that the conduct of judge-led commissions of inquiry in Canada could be improved, and rendered more consistent with purposive values embodied in the rule of law, were judicial commissioners to observe a principle of fidelity to adjudication.

The rule of law, practically understood as a political and legal ideal, treats independence as integral to the judicial role in interpreting and applying law, safeguarding the Constitution, and honouring individual rights. Public confidence in the independence and integrity of Canada's judiciary flows not just from constitutional safeguards, however, but from judicial observance of adjudicative procedure. So too does confidence that in exercising their functions, judges respect the boundaries commanded by the separation of powers.

Contrary to categorical distinctions that are often drawn between commissions of inquiry and courts, adjudicative procedure is an essential feature of many inquiries. This is so because the participants in such inquiries legitimately demand an assurance of justice equivalent to that associated with traditional judicial proceedings. Recognizing this commonality does not mean burdening public inquiries with the evidentiary and procedural rigidity of courts. It does suggest, however, that adjudication has a valuable (if non-exclusive) role to play in the conduct of some inquiries, establishing a compelling reason why judges should be their leaders. Fidelity to adjudication directs judicial commissioners to account for this reality when confronting common dilemmas and challenges in inquiry conduct.

I explore the methodological implications of fidelity to adjudication in two broad areas, first concerning procedural fairness, and second concerning the protection of a commissioner's independence. Finally, I consider how fidelity to adjudication establishes boundaries cautioning against judicial service in inquiries that demand different conceptions of justice, or advance different notions of truth-seeking, than those in which judges are traditionally informed. A principled alignment is thus established between judicial service on commissions of inquiry, judicial methods and skills, and observance of the rule of law.

Résumé

Cette thèse vise à démontrer qu'au Canada l'administration de commissions d'enquête par des juges pourrait être améliorée et s'accorder davantage avec les valeurs substantives associées à la primauté du droit si les juges-commissaires se conformaient à un principe de 'fidélité à l'adjudication' (*fidelity to adjudication*).

La primauté du droit, conçue de façon pratique en tant qu'idéal politique et juridique, considère l'indépendance comme étant intégrale aux fonctions judiciaires d'interprétation et d'application de la loi, de préservation de la Constitution et de protection des droits fondamentaux. Cependant, la confiance du public à l'égard de l'indépendance et de l'intégrité du pouvoir judiciaire canadien ne découle pas seulement de garanties constitutionnelles, mais aussi d'un respect plus général de la procédure judiciaire. Il en va de même de l'assurance que dans l'exercice de leurs fonctions les juges respecteront les limites imposées par la séparation des pouvoirs.

Contrairement à ce qui est suggéré par une distinction trop catégorique entre tribunaux et commissions d'enquête, l'application d'une procédure judiciaire est un aspect essentiel de plusieurs commissions d'enquêtes. Il en est ainsi parce que ceux qui participent à ces commissions demandent à juste titre une assurance de justice équivalente à celle offerte par les procédures judiciaires traditionnelles. Par contre, la reconnaissance de ce trait commun n'implique pas que l'on doive importer les procédures plutôt rigides des tribunaux devant les commissions d'enquête. Cela suggère néanmoins que l'adjudication a un rôle important (quoique non-exclusif) à jouer dans la conduite de certaines commissions d'enquête, ce qui constitue alors une bonne raison de nommer des juges pour les présider. Et le principe de fidélité à l'adjudication demande aux juges-commissaires de refléter cette réalité lorsqu'ils ou elles confrontent certains dilemmes ou problèmes en cours de commission.

J'explore les implications méthodologiques du principe de fidélité à l'adjudication en lien avec deux sujets assez généraux, soit l'équité procédurale et la protection de l'indépendance des commissaires. Finalement, j'examine de quelle façon le principe de fidélité à l'adjudication établit des balises qui militent contre l'utilisation de juges pour des commissions d'enquête qui demandent des conceptions de la justice ou de recherche de la vérité différentes de celles auxquelles les juges sont traditionnellement habitué(e)s. Un alignement de principe est donc établi entre l'utilisation de juges pour présider des commissions d'enquête, les méthodes et habiletés judiciaires, et le respect de la primauté du droit.

To Suzanne Palko – best friend, patron saint, lawyer in the greatest sense of the word.

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Prologue:
Rand the Judge, Rand the Commissioner

Few Canadian jurists are as celebrated as the late Ivan Rand, who served as a justice of Canada's Supreme Court from 1943 to 1959. Rand contributed to an early jurisprudence of Canadian civil rights, motivated by the belief that individual freedoms buttress free societies,[1] and foreshadowing Canada's eventual status as a rights-based constitutional democracy.[2] Lacking formal recognition of constitutional rights in the then *British North America Act, 1867*,[3] Rand and his judicial colleagues crafted an 'implied' bill of rights through creative exposition of the Constitution's core normative commitments.[4] In landmark decisions such as *Saumur v City of Quebec*,[5] *Switzman v Elbing*,[6] and *Roncarelli v Duplessis*,[7] the justices of the Court anchored individual rights-protections in principles of federalism, the preamble to the *BNA Act*, and in the immanent freedoms needed to sustain democracy. Rand's reasoning in these decisions was the boldest of his colleagues. He based his decision in *Roncarelli* on the simple proposition that "there is no such thing as absolute and untrammeled 'discretion'"[8] – that all official acts impacting individuals are tempered by an implied injunction against arbitrariness, a requirement

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[1] This view was shaped by the collapse of democratic institutions that preceded the rise of European fascism and the Second World War. See generally Ivan C Rand, "The Role of an Independent Judiciary in Preserving Freedom" (1951) 9 UTLJ 1, and Lorraine Weinrib, "The Supreme Court of Canada in the Age of Rights: Constitutional Democracy, the Rule of Law and Fundamental Rights Under Canada's Constitution" (2001) 80 Can Bar Rev 699.

[2] This status was crystallized by Canada's adoption of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982*, (U.K.) 1982, c 11 [*Charter*].

[3] 30 & 31 Victoria, c 3 (UK) [*BNA Act*].

[4] See David J Mullan, "Underlying Constitutional Principles: The Legacy of Justice Rand" (2010) 61 UNBLJ 73.

[5] [1953] 2 SCR 299.

[6] [1957] SCR 285.

[7] [1959] SCR 121 [*Roncarelli*].

[8] *Ibid* at 140: "In public regulation of this sort there is no such thing as absolute and untrammeled 'discretion', that is that action can be taken on any ground and for any reason that can be suggested to the mind of the administrator; no legislative Act can, without express language, be taken to contemplate an unlimited arbitrary power exercisable for any purpose, however capricious or irrelevant, regardless of the nature or purpose of the statute. … 'Discretion' necessarily implies good faith in exercising a public duty; there is always a perspective in which a statute is expected to operate; and any clear departure from its lines or objects is just as objectionable as fraud or corruption."

ingrained in the very concept of rule of law. Rand's jurisprudence reflected the philosophical foundations of a culture of justification that would later take root in the text of Canada's *Charter*[9] and in modern currents of Canadian administrative law.[10] As a judge, he was ahead of his time.

Among numerous post-judicial appointments, Rand also served as commissioner of the *Landreville Inquiry*[11] from 1964-66. Leo A Landreville was appointed a judge of Ontario's Superior Court in 1956. An exuberant former mayor of Sudbury, a francophone and a Catholic, Landreville stood out in the austere atmosphere of Osgoode Hall. He drove a Cadillac, decorated his chambers in a Mexican theme, and displayed a crucifix on the wall.[12] In 1962 the RCMP interviewed Landreville concerning his business relationship with Ralph Farris, the founder and former president of Northern Ontario Natural Gas (NONG). Farris would subsequently be convicted for perjury following an Ontario Securities Commission investigation into the distribution of NONG shares below market value. Landreville had been the recipient of some of the undervalued shares, and questions were raised as to whether he had improperly used his influence as mayor of Sudbury to benefit the company.[13] Although a preliminary inquiry conducted in 1964 found no basis to proceed with criminal charges against Landreville, he had been implicated in a wider scandal, and unwisely chose to resist subtle pressure to resign.[14] In a bizarre and unprecedented process, the Law Society of Upper Canada conducted an ex parte review of the allegations against Landreville. Affording him no notice or opportunity to be heard, the Society wrote to the federal justice minister recommending that Landreville's judicial

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[9] *Supra* note 2.

[10] See Beverley McLachlin, "The Role of Administrative Tribunals and Courts in Maintaining the Rule of Law" (1999) 12 CJALP 171; David Dyzenhaus, "Constituting the Rule of Law: Fundamental Values in Administrative Law" (2001-2002) 27 Queen's LJ 445; and Mary Liston, "'Alert, Alive and Sensitive': *Baker*, the Duty to Give Reasons, and the Ethos of Justification in Canadian Public Law" in David Dyzenhaus, ed, *The Unity of Public Law* (Portland: Hart, 2004).

[11] Canada, Royal Commission to Inquire into the Dealings of the Honourable Mr. Justice Leo A. Landreville with Northern Ontario Natural Gas Limited, *Report* (Ottawa: the Commission, 1966) (Commissioner: the Honourable Ivan C Rand), available online: http://epe.lac-bac.gc.ca/100/200/301/pco-bcp/commissions-ef/rand1966-eng/rand1966-eng.pdf.

[12] See William Kaplan, *Canadian Maverick: the Life and Times of Ivan C Rand* (Toronto: The Osgoode Society, 2009) at 331.

[13] *Ibid* at 349.

[14] *Ibid* at 350.

service be terminated for cause.[15] Upon learning of the recommendation, Landreville demanded a public inquiry to clear his name. Ivan Rand was appointed its commissioner.

Rand's conduct of the inquiry was biased, prosecutorial, and unfair. Acting well beyond his terms of reference, he converted a narrow review of Landreville's suitability for judicial office into a roaming indictment of his moral character. He ignored witnesses who spoke to Landreville's integrity.[16] He pursued irrelevant lines of questioning and fixated on minor, exaggerated criticisms derived from unreliable testimony and hearsay.[17] He interrupted Landreville's testimony frequently and denied him the chance to address accusations.[18]And he attempted to provoke witnesses with his own unflattering characterizations of Landreville.[19]

Rand's final report not only recommended Landreville's removal from the bench, it accused him of "gross contempt" for the law,[20] and of possessing "the somewhat versatile character of a modern hedonist … whose philosophy is expressed in terms of pragmatic opportunism for public prominence, financial and social success, tinctured with arrogance toward subordinates and confidence in his ability to move forward."[21] He appended the Law Society's findings to his final report, giving them unwarranted publicity and credibility, but excluded the findings of the preliminary inquiry that had acquitted Landreville. Crucially, and contrary to s 13 of the federal *Inquiries Act*,[22] Rand gave Landreville no notice of the adverse findings that were to be made against him.

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[15] *Ibid.*

[16] *Ibid* at 354.

[17] *Ibid.*

[18] *Ibid* at 356.

[19] *Ibid* at 354.

[20] *Ibid* at 366.

[21] *Ibid* at 363.

[22] RSC 1985, c I-11.

Rand had deliberately crafted his report in such a way as to leave Parliament with no alternative other than to require Landreville's removal.[23] After failing to acquit himself before a parliamentary committee, and facing imminent impeachment, Landreville resigned. He would wait a further 10 years until, in 1977, a judge of Canada's federal court struck down the findings of Rand's commission for having failed to afford Landreville procedural fairness.[24] The central basis of the judge's decision was that Rand had acted contrary to law, and outside his jurisdiction, in not giving Landreville notice and the opportunity to address misconduct allegations that were eventually crystalized in the report.

Whether Landreville had actually committed misconduct warranting his removal from the bench was never resolved. What is clear, as recounted by Rand's biographer, is that "instead of dispassionately stating the facts, applying the larger principles to Landreville, reaching a reasoned decision, and contributing to improved public policy, Rand attacked the man in an offensive and demeaning way."[25]

How is it that an individual whose judicial career was distinguished by the strident defence of civil liberties could himself become an instrument of arbitrariness and the abuse of power? The notion that Rand should have approached his task "dispassionately"; that he should have stated facts and "larger principles" on which to base his findings, and reached his conclusions through a process of "reason", is one way of stating that Rand should have behaved *judicially*. Yet the judges who conduct public inquiries, be they retired from the bench or taking temporary leave to assume the role of commissioner, are not performing a formally judicial function. As commissioners, they are delegates of the executive branch of government, tasked to investigate events and formulate recommendations that address often controversial, and highly politicized, matters of public concern. Presumably their original status as judges is part of the reason for their appointment: judges stand as figures of public trust and confidence, making them ideally suited for a task that demands an independent and assiduous mind. However, if Rand – who so

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[23] *Ibid.*

[24] *Landreville v R (No 2)*, [1977] 2 FC 726.

[25] Kaplan, *supra* note 12 at 372. See also Ed Ratushny's account of the *Landreville Inquiry* in *The Conduct of Public Inquiries: Law, Policy and Practice* (Toronto: Irwin Law, 2009) at 35-38.

amply displayed these qualities as a judge – could fail to uphold them in the inquiry context, does it not throw the propriety judicial service in public inquiries generally into doubt?

Rand's failings as an inquiry commissioner established a negative precedent that has no doubt improved the conduct of public inquiries in the present day. It also precipitated a new institutional mechanism for reviewing allegations of judicial misconduct, reinforcing the independence and self-regulating character of Canada's judiciary.[26] Yet the questions raised by Rand's example – Why use judges to conduct public inquiries? Are the assumptions underlying judicial service accurate? What do they tell us about how judicial inquiries should be conducted? – remain relevant. Indeed, they resonate strongly with challenges that have confronted judges and other participants in inquiries that are far more recent.

Ironically, the answers to these questions may lie in the very source of legal authority that Rand was so masterful at articulating: that is, in Canada's foundational commitment to the rule of law. The following dissertation considers the significance of this hypothesis.

[26] The Canadian Judicial Council was formed in 1971 to serve as the professional regulatory body of Canada's federally-appointed judiciary. It has an independent hearings process to address allegations of misconduct that might warrant dismissal of a sitting judge. See discussion in Kaplan, *supra* note 12 at 375 and Ratushny, *supra* note 25 at 38 and 95-97.

Introduction

The judge-led commission of inquiry is an institutional paradox. On its face, it raises an apparent conflict between the constitutionalized independence of Canada's judiciary, including the latter's remove from engagement with questions of politics and policy, and the formal status of inquiries as creatures of the executive branch of government, ones constituted to address some of the most controversial subjects in Canadian public life. True to their paradoxical nature, judge-led commissions of inquiry nevertheless have a distinct and valid purpose. That purpose correlates the values fulfilled by judges in court with those they fulfill as inquiry commissioners, rooted in fidelity to the rule of law. Regrettably, this correlation is under-recognized in the prevailing jurisprudence and academic commentary on judicial inquiries. Indeed, to a significant degree, it is attacked.

The accepted wisdom on public inquiries stresses a categorical distinction between the inquisitorial medium of inquiries and the adjudicative medium of courts. According to this reasoning, the formal status of inquiries as investigative bodies, empowered only to report facts and recommendations rather than enforce legally consequential decisions, signifies that they are not beholden to equivalent standards of justice as the decisions of courts. They are thus liberated from many of the procedural and substantive commitments that ordinarily characterize the work of judges. Individuals seeking high standards of due process in public inquiries are sometimes dismissed as falsely amalgamating the conduct of inquiries to the conduct of trials, while judicial commissioners are given latitude to digress from the institutionalized safeguards of impartiality that govern their conduct in courts.

These distinctions are problematic. Although it is correct to assert that inquiries and courts are distinct, both formally and functionally, excessive reliance on this distinction diminishes a credible account of why judicial service in inquiries is warranted. One way of justifying the judicial leadership of inquiries would be to suggest that judicial independence, impartiality, and evidentiary aptitude uniquely qualify judges to conduct inquiries competently and in a manner worthy of public confidence. Yet judicial independence is a constitutional protection that attaches to judges in courts; impartiality is a quality reinforced by observance of adjudicative

procedure; and a judge's evidentiary aptitude is derived from routine exposure to evidence through the analytic standards and principles of a courtroom. The distinction between inquiries and courts fails to account for how these laudable qualities follow the judge to an extra-judicial setting in which, by virtue of that distinction, judges are to behave differently and observe different standards. Rather than providing a compelling account of judicial service in inquiries, the prevailing wisdom raises fundamental questions. Are judges really the best leaders and institutional custodians of public inquiries? Can the desirable qualities they are thought to bring to inquiries be divorced from the procedural and substantive features of courts? How far can judicial commissioners go in abandoning court-like procedures without undermining the values that warranted their appointment as inquiry commissioners in the first place? These questions are not merely rhetorical. They relate centrally to proper observance of the separation of powers, and to proper enforcement of inquiry procedures that are effective and fair.

The separation of powers constitutionally protects judicial independence and, by association, corroborates public confidence in the integrity of the judiciary. It also establishes a boundary against judicial involvement in political decision-making, and thus ensures that such decision-making is properly confined to officials accountable to the citizenry. The standards and procedures observed by judges in court are designed to corroborate these values and thus protect the judicial role under the separation of powers. If judges forgo those commitments in the conduct of inquiries, they are presumably more vulnerable to trenching on the separation of powers. This will occur if the absence of constitutional safeguards for independence exposes the judge to political interference with his or her discretion; invites the judge to assume politically contentious positions; or exposes the judge to criticism by a political master, each of which may impact negatively on public esteem in the judiciary. It will also occur if an inquiry appointment enables the political branches to cynically exploit the symbolic independence and integrity of a judge to further strategic political objectives.

Closely related to concern for the separation of powers is the concern that inquiries be conducted effectively while being fair to those they impact. A coherent justification for *why* judges should lead inquiries will necessarily depend on an account of *how* judges are to behave as commissioners. The prevailing authorities on public inquiries provide two skeletal guideposts for inquiry conduct: that judicial commissioners are not obliged to duplicate the standards of courts,

but that they must afford inquiry participants procedural fairness. This leaves vast scope for inquiry commissioners to exercise individual discretion. Discretion is not, in itself, damaging to fairness or to the effective conduct of inquiries. Yet a review of the experiences of different commissions reveals inconsistency in the resolution of common dilemmas, including in such fundamental areas as the standards by which commissioners issue findings of misconduct against individuals. This inconsistency suggests that persons placed in like circumstances before inquiries are not always given like treatment. It also begs questions about the actual efficacy and fairness of inquiry procedures that have been developed on an ad hoc basis and adopted widely by judicial commissioners, but without a true attempt to reconcile them with a purposive account of the judicial leadership of inquiries.

My aim in this dissertation is to provide such a purposive account. More specifically, it is to demonstrate a commonality between the role played by Canadian judges in courts and the role played by judges in public inquiries, grounded in the relationship between judges and fundamental values comprising the rule of law. Once that commonality is defined, it can be used both as an analytic basis for distinguishing inquiry commissions suited for judicial leadership from those that are not, and as a means of structuring judicial discretion in the conduct of inquiries. It lends coherency to the conduct of judicial inquiries, while allowing commissioners to retain flexibility in devising procedures suited to context. It ensures inherent safeguards for the independence of judicial commissioners despite their status as executive agents lacking the constitutionalized security of judges in court. It ensures fairness for inquiry participants, both those who fall under the harsh scrutiny of an inquiry and those who view the inquiry as a means to redress personal experiences of injustice. And it treats commissions of inquiry as truly *public* enterprises in which participants are respected as stakeholders and not just as means to investigative ends.

The commonality between the role of a judge in court and that in a public inquiry lies in the core value of adjudication, and its importance to both proceedings. This value can be expressed as the opportunity for participants in a deliberative process to be treated with structural equality; for them to receive equal opportunity, defined in reference to the scope of their interests, to influence the outcome of the process through the presentation of proofs and reasoned

arguments to a neutral decision-maker.[1] The duty of that decision-maker to rationally hear and address their claims instills a particular assurance of justice in the outcome of the proceeding, in turn justifying its individualized effects. Although adjudicative procedure need not be observed with the same procedural rigidity in an inquiry as it is in a court, and its procedural role in an inquiry will be non-exclusive, the basic value of adjudication has a vital role to play in both forums.

For judges serving in court, adjudication constitutes a procedural means by which the judicial role under the separation of powers is enforced. It supplements the institutional safeguards of judicial independence by demanding a particular form of decision-making that excludes recourse to arbitrary considerations, and inhibits judges from engaging with political questions. The proper observance of this role is essential to the rule of law, understood as a political and legal ideal. Canada's rule of law envisages a dialogic relationship among the branches of government, in which each serves a distinct function to safeguard and advance fundamental values.[2] Adjudicative procedure is one critical means by which the distinctness of the judicial function in this respect is enforced. Individuals who go before judges to allege the infringement of their rights or other excesses of official power can expect a hearing in which they are structured as equals against a government interlocutor. They can also expect a decision that rationally and impartially addresses their claims. The particular assurance of justice of a judicial decision, one that distinctly accounts for the dignity of individuals and their right to demand justification for the individualized effects of official power, is fundamentally linked to the observance of adjudicative procedure.[3]

Judges serving as inquiry commissioners are similarly concerned with assuring the justice of official power as it affects individuals. When individuals or groups seek standing at an inquiry so that personal experiences of injustice can be acknowledged and confidence restored in the integrity of official institutions that have mistreated or failed them, they rightly expect to be

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[1] See generally Lon L Fuller, "The Forms and Limits of Adjudication" (1978-79) 92 Harv L Rev 353.

[2] See especially Mary Liston, "Governments in Miniature: The Rule of Law in the Administrative State" in Colleen M Flood and Lorne Sossin, eds, *Administrative Law in Context* (Toronto: Emond Montgomery, 2008) 78-114.

[3] See TRS Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law* (Oxford: Oxford University Press, 2001) at 8-9.

heard on structurally equal terms with the official subjects of their allegations. Conversely, when inquiries are required to confront serious allegations against individuals, the subjects of those allegations rightly expect the opportunity to be heard on equal terms with their accusers. Indeed, assurance that those individuals will receive such a hearing, and that an inquiry commissioner will rationally and impartially account for their claims in reaching final conclusions, will be essential to the just exercise of official power by the inquiry itself. The interests of both types of inquiry participant parallel the interests of participants to adjudicated public law disputes. They both legitimately demand enforcement of the core value of adjudication. By recognizing this, a principled basis is established for judicial service in certain types of public inquiry, correlating judicial methodology and skills with the special value generated by adjudication in a basic sense. The public inquiries suited to judicial leadership will be those where the interests of participants legitimately demand enforcement of that value. Conversely, those inquiries where the basic value of adjudication is not legitimately sought (or worse, where it may undermine the pursuit of other laudable public goals) will be ones to which judicial leadership is ill-suited.

While adjudication constitutes the dominant procedural format of courts, in inquiries it must be observed in a manner that is harmonious with parallel means of investigation, public consultation, and deliberation. Public inquiries inherently concern polycentric issues – those engaging diffuse societal interests and effects[4] – whose resolution cannot rely exclusively on the competing claims of participants. This characteristic is often stressed in justifying distinctions between inquiries and courts, and indeed, in classifying inquiries as inquisitorial and non-adjudicative. Responsibility to confront polycentric issues does not eliminate the relevance of adjudication to certain types of public inquiry, however. Where polycentric concerns engage disputed factual questions of serious concern to the individuals they affect, it may be necessary for commissioners to observe adjudicative procedures to address those questions in a manner that legitimately accords with the high assurance of justice sought by inquiry participants. When attention is placed on the legitimate interests of those persons, a commonality between the value sought from judges as officials in courts and judges as inquiry commissioners is brought into focus, and categorical distinctions between those roles are subverted. Analytic attention is redirected to devising procedures that account for the legitimate interests of inquiry participants

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[4] See Fuller, *supra* note 1.

while honouring the broader responsibility of inquiries to report accurate findings and craft responsive and efficacious recommendations in public policy and the law.

I develop and substantiate this thesis in five chapters. Chapter 1 outlines the legal characteristics of public inquiries, including the distinctions frequently stressed between inquiries and courts. It also provides an overview of various purposes that are frequently attributed to public inquiries. Neither a legal nor a purposive overview of public inquiries provides a satisfactory explanation of why judges are often favoured to lead them; indeed, both accounts deepen the puzzling nature of judicial service in inquiries, begging questions about the propriety of that service under the separation of powers and its efficacy in relation to various institutional goals.

Chapter 2 begins by demonstrating that the lack of a clear, consistent account of why judges should serve in public inquiries exacerbates a host of challenges that arise in inquiry conduct. Indeed, these challenges – which relate to commissioners affording procedural fairness; mitigating the political character of inquiries; navigating government claims to secrecy; and accounting for the polycentric nature of their mandates – establish the need for a clearer analytic basis to discern those inquiries suited for judicial leadership, and to structure the discretion of judicial commissioners in conducting their inquiries. The existing regulatory framework governing the service of judges on commissions of inquiry is discussed and found to be inadequate in providing this analytic basis. The remainder of the chapter is devoted to filling this analytic gap. I argue that the distinct contribution made by judges to Canada's rule of law is predicated on their observance of adjudicative procedure. Adjudication creates a particular assurance of justice in the individualized effects of an official decision, one that accounts for the dignity and equality of affected persons. This assurance is equally relevant to the conduct of certain public inquiries as it is to the work of judges in courts. These are the types of inquiry suited to judicial leadership. I therefore argue that the conduct of such inquiries would be improved and rendered consistent with the judicial role under the rule of law by judicial commissioners observing a principle of fidelity to adjudication.

Chapters 3, 4, and 5 demonstrate the operability and merit of this approach. In Chapter 3 fidelity to adjudication is employed to resolve some of the most difficult challenges confronting judicial commissioners in honouring procedural fairness. In Chapter 4 it is employed to

demonstrate how judicial commissioners can effectively confront the political nature of inquiries, insulating themselves against political manipulation, and how they can navigate government claims to secrecy in inquiries that concern matters of national security.

In Chapter 5 I return to the overarching challenge of polycentricity. Recognizing that all inquiries confront polycentric issues, I demonstrate how fidelity to adjudication – by focusing on the purposive value instilled by adjudicative procedure – can be used to identify instances where polycentric issues are of such a nature that they caution against judicial service in inquiries. While not advocating an absolute bar to judicial service in such cases, I suggest that a prudential approach is warranted. Inquiries that do not require enforcement of the basic value of adjudication are more likely to require unfamiliar methodologies and skills of a judicial commissioner, and more likely to be troubling under the separation of powers. Prospective judicial commissioners must approach them with special caution, and barring unique individual qualifications and clear safeguards for judicial independence, should ordinarily decline appointments of this type. Notably, declining such appointments signifies not just a principled boundary to the application of judicial skills, but respect for the accountability of the political branches of government to the citizenry, obliging the former to confront truly polycentric societal concerns without strategic reliance on the integrity of the judiciary.

This dissertation marries a substantive account of the judicial role under Canada's rule of law with the resolution, at a practical level, of dilemmas that often confront judicial commissioners in the conduct of public inquiries. The theoretical assumption that drives this project is that the fundamental principles underpinning Canada's system of governance are capable of elucidation and application to resolve practical problems in the formation and conduct of a legal institution. As subsequent chapters will reveal, this does not mean that those fundamental principles (the separation of powers, judicial independence, human dignity, and the principles of representative and responsible government, to name a few) necessarily dictate specific *outcomes* to the resolution of practical challenges. Rather, in most cases the principles direct a particular *process* to addressing the challenges, one which properly accounts for the constitutional values at stake and for the distinct and legitimate interests of persons affected by official power. This commitment to constitutionally legitimate and coherent process is emblemized in the notion that judicial commissioners observe a principle of fidelity to adjudication.

Any study of Canadian commissions of inquiry confronts a significant challenge in navigating the sheer volume of commissions worthy of examination. This dissertation focuses on a broad cross-section of inquiry experiences, rather than on specific case studies. Its ambition is to identify and resolve issues that affect all judge-led commissions of inquiry, raising common dilemmas that have erstwhile been resolved by judicial commissioners on an ad hoc basis with few coherent, organizing principles to lend them substantive guidance. It is nevertheless necessary to substantiate and illustrate the claims made here with practical examples. To that end, this dissertation draws from two sources of research on public inquiries. First, certain common problems in inquiry conduct have been identified through the review of existing literature and case law on commissions of inquiry. In many cases, this review was supplemented by additional reading of the primary materials generated by individual inquiries, including final reports, official accounts of inquiry procedure, and interlocutory decisions. Second, several recent commissions were studied in detail with an open-minded view to identifying common challenges and testing the application of the analytic approach advocated in this thesis. These inquiries were selected based on currency, the relative dearth of existing commentary about them, their diversity in subject-matter, and personal interest. They are discussed extensively in Chapters 3, 4, and 5, concerning the practical implications of judicial commissioners observing a principle of fidelity to adjudication.

Why 'Judicial' Inquiries?

Introduction

It is not uncommon to hear public inquiries referred to variously as "judicial inquiries", "royal commissions", and "commissions of inquiry". In popular usage, little difference in meaning is implied by these terms.[1] The fact that inquiries are often referred to as "judicial" merely signifies the common practice of either current or former judges serving as their heads. Indeed, individual inquiries are often identified eponymously with the judges who lead them: for example, the *Grange Inquiry*,[2] the *Gomery Inquiry*,[3] the *Lamer Inquiry*,[4] the *Charbonneau Commission*,[5] and the *Braidwood Inquiry*.[6] Public perceptions of the success or failure of such inquiries often become associated with an appraisal of the judge him- or herself. An inquiry that is perceived to be efficient and effective will favourably impact the reputation of the judge and, it must be said, public esteem in the judiciary as a whole. The rare inquiry may give a judge iconic status for his or her contribution to the transformed public understanding of an issue.[7] Conversely, inquiries

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[1] Peter J Carver, "Getting the Story Out: Accountability and the Law of Public Inquiries" in Coleen M Flood and Lorne Sossin, *Administrative Law in Context* (Toronto: Emond Montgomery, 2008) 359 at 362.

[2] Ontario, Royal Commission of Inquiry into Certain Deaths at the Hospital for Sick Children and Related Matters, *Report* (Toronto: Ministry of the Attorney General, 1984) (Commissioner: the Honourable SGM Grange).

[3] Canada, Commission of Inquiry into the Sponsorship Program and Advertising Activities, *Phase 1 and Phase 2 Reports* (Ottawa: Minister of Public Works and Government Services, 2005 & 2006) (Commissioner: the Honourable John H Gomery).

[4] Newfoundland and Labrador, The Lamer Commission of Inquiry into the proceedings pertaining to the Cases of Ronald Dalton, Gregory Parsons & Randy Druken, *Report* (St. John's: Government of Newfoundland and Labrador, 2006) (Commissioner: the Honourable Antonio Lamer).

[5] Québec, Commission d'enquête sur l'octroi et la gestion des contrats public dans l'industrie de la construction (Chair: the Honourable France Charbonneau), online: https://www.ceic.gouv.qc.ca/.

[6] British Columbia, Braidwood Commission on Conducted Energy Weapon Use, *Restoring Public Confidence: Restricting the Use of Conducted Energy Weapons in British Columbia* (Victoria: Government of British Columbia, 2009); *ibid*, Braidwood Commission on the Death of Robert Dziekanski, *Why? The Robert Dziekanski Tragedy* (Victoria: Government of British Columbia, 2010) (Commissioner: the Honourable Thomas R Braidwood).

[7] Perhaps the best example of this is Thomas Berger's service as Commissioner for the *Mackenzie Valley Pipeline Inquiry*, discussed in further detail in section (b) below. Berger was a judge of the BC Supreme Court at the time of his appointment. His inquiry gave unprecedented voice to northern indigenous people, creating a lasting association between Berger's name and the advancement of Aboriginal rights in Canada. Berger's later advocacy for the inclusion of Aboriginal rights in Canada's patriated *Constitution Act, 1982* would eventuate his resignation from the bench. His own account of these events can be found in Thomas R Berger, *One Man's Justice: A Life in the Law* (Vancouver: Douglas & McIntyre, 2002) at 146-64.

that are seen to be ineffective and inefficient – especially those that carry on well beyond their original deadlines, consuming large sums of public money in the process – are sometimes cast as individual failures of the presiding judge. The latter verdict may be rendered in judicial review of the inquiry process,[8] in media coverage,[9] or in political reception to the inquiry by government.[10]

Despite a strong popular association between public inquiries and judges, however, no formal legal significance attaches to judicial leadership of an inquiry. Canada's relatively flexible separation of powers permits judges to be appointed as inquiry commissioners by any express statutory instrument that fulfills constitutional requirements as to jurisdiction and manner and form. Judges who assume such roles do so not as judges per se, but as personae designata acting temporarily outside their normal jurisdiction and functions.[11] Their judicial background does not impact the legal character of the inquiry, whether it be with respect to jurisdiction, inquiry powers,[12] or procedure. The inquiry remains an ad hoc extension of the executive branch of government, ultimately beholden to a mandate set by its political master. Any status conveyed by judicial service on the inquiry is symbolic.

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[8] See, for example, the harsh treatment given to Commissioner Normand Glaude's construal of his terms of reference for the *Cornwall Public Inquiry* by the Court of Appeal for Ontario in *Ontario Provincial Police v Cornwall Public Inquiry Commissioner*, 2008 ONCA 33, per Moldaver JA (as he then was): "the Commissioner's view of his mandate runs the risk of standing the so-called 'main focus' of the inquiry on its head and creating an unwieldy, if not unmanageable, mega-inquiry that could go on for years at great public expense. Such an outcome would diminish the value to be gained from the important work that the legislature had assigned to the Commissioner" (*ibid* at para 61). The court's decision is considered in further detail in Chapter 4.

[9] Commissioner Wally Oppal's recent conduct of British Columbia's *Missing Women Commission of Inquiry* was the subject of scathing media commentary, some of which will be considered in further detail in Chapter 4. Brian Hutchison, who covered the inquiry for the *National Post*, echoed the criticism of several participants in alleging that Oppal rushed the inquiry, failed to call relevant witnesses, and failed to provide adequate opportunity for participants to examine those who were called. See Brian Hutchison, "Pickton inquiry: Whole story still untold", *The National Post* (15 June 2012) online: www.nationalpost.ca.

[10] Jean Chrétien's Liberal government was very critical of the Commissioners conducting the *Somalia Inquiry*, accusing them of jurisdictional excess and unacceptable delay. Ultimately the government would deny a requested extension to the Commissioner's reporting deadline, resulting in the premature conclusion of the inquiry. The *Somalia Inquiry* is discussed in further detail later in this chapter.

[11] The term "personae designata" means "in a personal capacity", as opposed to a judicial one, and is borrowed from both Australia and Canadian jurisprudence. It is explained in further detail in Chapter 2.

[12] An exception arises under Alberta's *Public Inquiries Act*, RSA 2000, c P-39, which empowers a commissioner to hold witnesses in contempt (s 6) and to order the inspection of public buildings (s 7), but only when the commissioner (or one commissioner among a panel) is a judge.

That is, unless the judge serving as an inquiry commissioner decides of his or her own accord, and within applicable jurisdiction and terms of reference, to abide by certain judicial tenets as a matter of ethics. If that were the case, then the status of an inquiry as a "judicial inquiry" would assume additional significance, signaling the observance of specific substantive and procedural commitments. The central focus of this dissertation is to argue that this should be the case, and to articulate what those substantive and procedural commitments should be. In order to develop this argument, however, it is first necessary to explain more precisely the legal character and purpose of inquiries, providing a foundation for the unique dilemmas confronted by judges upon assuming their leadership.

This chapter begins with an account of the legal characteristics of public inquiries. The formal status of inquiries as executive instruments is explained, and an overview provided of the governing statutory landscape. I also introduce basic principles that emerge from the case law on public inquiries, specifically concerning their use of coercive authority and the due process rights of witnesses. I suggest that the accepted wisdom surrounding public inquiries is that they should depart from the procedural and substantive standards of courts, owing to their investigative character and inability to reach enforceable legal findings. This observation helps underscore the paradox of their judicial leadership, begging the question of why judges are best-suited to lead a process formally distinct from courtroom litigation. I then turn to various accounts of the purpose of public inquiries. I suggest that inquiries defy a straightforward purposive characterization: they blend political and governance objectives with diverse meanings attributed to them by the public and by participants. They are also iterative processes whose significance may evolve once they are underway. As such, a summary purposive account of public inquiries is insufficient in seeking justification for judicial leadership. The variable meanings and purposes of public inquiries demands that judicial leadership be assessed on a case-by-case basis, linking the skills and commitments of judges to the characteristics of individual inquiries. The development of a method to that effect is the subject of the next chapter.

1. The Legal Characteristics of Public Inquiries

Public inquiries are ad hoc extensions of the executive branch of government, appointed by Order in Council to investigate defined subject-matter and to provide a report to government consisting of investigative conclusions and, where so-tasked, recommendations for related

changes to public policy. Their reports are non-binding and have no immediate legal consequences or effects. While inquiries may be functionally independent, they have no free-standing legal status or authority apart from the Orders in Council that create them and the statutes that vest them with investigative powers. As a matter of law, they are definitively creatures of the executive branch.[13]

The executive status of inquiries presents an initial puzzle concerning judicial service within them: is it appropriate that judges be involved in an executive, investigatory process, one directed at questions of policy rather than law and often confronting highly politicized subject-matter?[14] Deepening our understanding of the legal nature of inquiries provides no clear answer to this question.

(a) Statutory Landscape

Each of Canada's provinces and territories, together with the federal government, have legislation allowing for the creation of public inquiries within their respective jurisdictions.[15] These statutes share broad similarities. They confer authority on the executive branch of government, acting via Order in Council, to appoint a public inquiry for virtually any reason. Once created, inquiries are empowered with a range of statutory powers, the most consequential being the ability to compel the attendance of witnesses to give sworn testimony. This coercive authority may be buttressed by specific statutory penalties, or by conferral of the ability for inquiries to refer matters of non-compliance to a court where witnesses are prosecuted for contempt.[16] Inquiries are also empowered to require the production of documentary and other evidence, and sometimes to exercise powers of search and seizure.[17]

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[13] See generally the Federal Court of Appeal's decision in *Dixon v Canada (Commission of Inquiry into the Deployment of Canadian Forces to Somalia)* (1997), 149 DLR (4th) 269 [*Dixon*]. See also the Supreme Court of Canada's decision in *MacKeigan v Hickman*, [1989] 2 SCR 796, in which the majority stressed the executive status of a public inquiry in finding that the latter cannot require the testimony of judges concerning either deliberative or administrative matters, even when an inquiry is constituted to investigate a miscarriage of justice.

[14] See Allan Manson and David Mullan, "Introduction" in *ibid*, *Commissions of Inquiry: Praise or Reappraise?* (Toronto: Irwin Law, 2003) 1 at 5-7; Justice Archie Campbell, "The Bernardo Investigation Review" in *ibid*, 381 at 391-92; and Ed Ratushny, *The Conduct of Public Inquiries: Law, Policy and Practice* (Toronto: Irwin Law, 2009) at 154-57.

[15] A complete list of Canada's current public inquiries statutes is included in the Bibliography.

[16] See e.g. Ontario's *Public Inquiries Act, 2009*, SO 2009, c 33, Sch 6, ss 30, 33(5), which empowers a commissioner to state a case to the Divisional Court concerning any person who fails to attend at an inquiry after having been summoned, or who refuses to take an oath or affirmation, answer any question, or produce any item of evidence.

Concurrent with these powers are certain basic safeguards for witnesses. Most inquiry statutes specify that a compelled witness is entitled to representation by counsel, and that testimony given at an inquiry cannot be admitted against the witness in subsequent proceedings other than a prosecution for perjury. Moreover, most require that before an inquiry may issue formal findings of misconduct, the subjects of such findings receive notice and a meaningful opportunity to respond. Even where these protections are not specified in inquiry statutes, they arise from other sources. The prohibition against the subsequent use of inquiry testimony is secured by the *Canada Evidence Act*[18] and its provincial counterparts,[19] and in the case of subsequent criminal prosecution, by ss 7, 11(c), and 13 of the *Charter*.[20] The right to representation by counsel, notice of possible findings of misconduct, and an opportunity of reply, are each likely the minimal requirements of procedural fairness at a public inquiry.[21]

With these basic features accounted for, broad discretion is left to the executive to stipulate limits on the jurisdiction of an inquiry or additional procedural requirements via the constituting Order in Council. Moreover, broad discretion over inquiry procedure is typically reserved to the

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The Divisional Court, after hearing from the individual, may find that he or she is in contempt of court and punish the individual accordingly (*ibid*).

[17] For example, Ontario's *Public Inquiries Act, 2009* specifies that where authorized in an appointing Order in Council, a commissioner or his or her delegate may apply to a justice of the peace for a warrant to enter and search premises and to collect evidence relevant to the inquiry (*ibid* at s 13). Alberta's *Public Inquiries Act*, *supra* note 12 specifies that a judicial commissioner may directly order to the inspection of public buildings – defined as those housing activities financed by the provincial government – and the seizure of relevant evidence (*ibid* at s 7(3),(5)). A non-judicial commissioner must apply to a court for a warrant to execute equivalent search powers (*ibid* at s 7(4)). Unlike the Ontario statute, the *Act* does not empower commissioners to seek the examination of private premises.

[18] RSC 1985, c C-5, s 5. The *Act* specifies that witnesses to any civil, criminal, or other proceeding within federal jurisdiction are not permitted to decline testimony on the basis of self-incrimination, but may object to testifying under s 5(2) of the *Act*, and thus their testimony will be protected from disclosure in subsequent proceedings. The *Act* does not preclude the exercise of applicable *Charter* rights against self-incrimination in criminal proceedings.

[19] See e.g. Ontario's *Evidence Act*, RSO 1990, c E.23, ss 9(1),(2); Alberta's *Alberta Evidence Act*, RSA 2000, c A-18, ss 6(1),(2); and British Columbia's *Evidence Act*, RSBC 1996, c 124, ss 4(2),(3).

[20] See Cory J's influential concurring reasons in *Phillips v Nova Scotia (Westray Mine Inquiry)*, [1995] 2 SCR 97 [*Phillips*] at 151.

[21] See e.g. Simon Ruel, *The Law of Public Inquiries in Canada* (Toronto: Carswell, 2010) at 141ff.

commissioner him- or herself. Canada's inquiry statutes are often skeletal[22] and surprisingly static. The federal *Inquiries Act*[23] has remained effectively unchanged since 1912, when it was amended to include basic procedural rights for witnesses.[24] Law commission studies completed for Canada in 1979,[25] and for Ontario[26] and Alberta[27] in 1992, each recommended significant changes to their inquiries legislation – focused largely on codifying procedure and stronger witness rights – but none were adopted. A possible explanation for the failure of these studies to motivate legislative change is that the flexibility of inquiry procedures is their most desirable feature from the perspective of an appointing government; that is, appointing governments may be loath to introduce greater procedural rigidity to inquiries, with consequent impacts on duration and cost. It is also possible that reform to existing inquiry statutes simply doesn't rate highly on the political agendas of most governments.[28]

Only Newfoundland and Labrador, Ontario, and British Columbia have undertaken recent, significant revisions to their inquiries legislation (in 2006, 2009, and 2007, respectively).[29] In each case, the new statutes codify guidelines to govern the issuance of standing to inquiry participants;[30] clarify and strengthen the power of inquiries to instigate search and seizure

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[22] For example, the federal *Inquiries Act*, RSC 1985, c I-11 contains only fourteen sections; the Nova Scotia *Public Inquiries Act*, RSNS 1989, c 372 has only six; Prince Edward Island's *Public Inquiries Act*, RSPEI 1988, c P-31 contains eight.

[23] *Ibid.*

[24] See Ruel, *supra* note 21 at xxvi.

[25] Law Reform Commission of Canada, *Advisory and Investigative Commissions* (Ottawa: Law Reform Commission of Canada, 1979). The report was preceded by a discussion paper: Law Reform Commission of Canada, *Working Paper 17: Commissions of Inquiry* (Ottawa: Law Reform Commission of Canada, 1977).

[26] Ontario Law Reform Commission, *Report on Public Inquiries* (Toronto: Ontario Law Reform Commission, 1992).

[27] Alberta Law Reform Institute, *Proposals for the Reform of the Public Inquiries Act* (Edmonton: Alberta Law Reform Institute, 1992). See also the preceding discussion paper: Alberta Law Reform Institute, *Public Inquiries (Issues Paper No. 3)* (Edmonton: Alberta Law Reform Institute, 1991).

[28] See Roderick A Macdonald, "Interrogating Inquiries" in Allan Manson and David Mullan, eds, *supra* note 14, 473 at 475.

[29] See *Public Inquiries Act, 2006*, SN 2006, c P-38.1 (Nfld); *Public Inquiries Act, 2009*, *supra* note 16 (Ont); and *Public Inquiry Act*, SBC 2007, c 9 (BC).

[30] See s 5 (Nfld); s 15 (Ont); and s 11(4) (BC).

processes;[31] codify certain legal immunities for commissioners;[32] and introduce strict privative clauses limiting the scope of judicial review.[33] The Newfoundland and Ontario statutes also provide guidelines for the financial administration of inquiries, which appear to strengthen the role of the executive in stipulating a budgetary framework within which an inquiry must operate. Although both statutes specify that an inquiry's budget be determined in consultation with the commissioner, they nevertheless empower an appointing Minister with authority (and responsibility) to set an inquiry budget him- or herself.[34] The influence of budgetary control on an inquiry's independence will be the subject of further discussion in Chapter 4.

Finally, the new Ontario legislation contains an intriguing codification of a commissioner's responsibility to conduct an inquiry "faithfully, honestly and impartially"[35] and "effectively, expeditiously, and in accordance with the principle of proportionality."[36] The notion that inquiries should be conducted "proportionately" is likely derived from the *Goudge Inquiry*,[37] and implies that the time and resources consumed by different matters at an inquiry should be proportionate to their relevance to the commission's mandate. The discussion in Chapters 2 and 3 will suggest the relevance of a proportionality principle in a much broader context.

(b) The Advisory-Investigative Distinction

It should be noted that not all inquiries appointed under the various Canadian statutes make use of the statutory powers of coercion available to them. Moreover, some inquiries are not appointed under statutory authority at all. Canada inherited the inquiry instrument from the United Kingdom, where it originated as a function of royal prerogative and was later codified by Parliament.[38] In both jurisdictions, a residual prerogative exists for the executive to appoint a

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[31] Sections 10-11 (Nfld); s 14 (Ont); ss 10, 23 (BC).

[32] Section 24 (Nfld); ss 22-23 (Ont); ss 31-32 (BC).

[33] Section 26 (Nfld); s 24 (Ont); s 19 (BC).

[34] Section 22 (Nfld); ss 25-27 (Ont).

[35] *Supra* note 16, s 5(a).

[36] *Ibid*, s 5(b).

[37] See discussion in Ratushny, *supra* note 14 at 184-85.

[38] Ruel recounts that "One of the earliest reported cases of a commission of inquiry is the compilation in 1080 and 1086 of the Doomsday survey in England by Royal Commissioners appointed by William I, to ascertain the

commission of inquiry on its own accord.[39] Such inquiries will simply lack the statutory power to compel witnesses. Contemporary prerogative appointments are rare, however. It is far more common that an inquiry appointed under standing legislation simply not exercise coercive powers where the latter are not envisaged by its mandate.

The distinction between inquiries that compel witnesses and those that don't will typically mirror a further distinction, often repeated in the literature, between inquiries that "advise" and those that "investigate."[40] Advisory inquiries consider broad questions of public policy engaging diffuse societal interests – for example, the status and rights of Canada's Aboriginal people;[41] the future of Canadian healthcare;[42] national economic development;[43] and official support for bilingualism and biculturalism.[44] Perhaps due to their historical association with the crown prerogative, these inquiries are often (although not exclusively) referred to as "royal commissions."[45]

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ownership of estates of land … and [their] value for the purposes of taxation" (*supra* note 21 at xxv). Prerogative inquiries declined in prominence relative to parliamentary committees during the 17th and 18th centuries, but returned with the adoption of the *Tribunals of Inquiry (Evidence) Act, 1921* (UK), 11 & 12 Geo V, c 7: see Ruel, *ibid*, and Ratushny, *supra* note 14 at 11-13.

[39] Ratushny, *supra* note 14 at 24; RA Macdonald, "The Commission of Inquiry in the Perspective of Administrative Law" (1980) 18 Alta L Rev 366 at 368 [Macdonald, "Commission of Inquiry"].

[40] The Law Reform Commission of Canada's 1979 report on public inquiries recommended that the federal *Inquiries Act* be amended to confer separate legal features on investigative and advisory inquiries: *supra* note 25. British Columbia's *Public Inquiry Act*, *supra* note 29, is the only Canadian statute to formally reflect such a distinction. The Ontario Law Reform Commission and Alberta Law Reform Institutes reports, *supra* note 26 at 146-50 and note 27 at 17, respectively, also comment on the functional distinction between advisory and investigative commissions, albeit with some reservations about its analytic merit and accuracy. For critical reflection on the distinction as it arises in academic literature, see Macdonald, "Interrogating Inquiries", *supra* note 28 at 477-79.

[41] Canada, Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples* (Ottawa: The Commission, 1996) (Chairs: the Honourable René Dussault and George Erasmus, OC).

[42] Canada, Commission on the Future of Health Care in Canada, *Building on Values: the Future of Healthcare in Canada* (Ottawa: The Commission, 2002) (Commissioner: the Honourable Roy Romanow).

[43] Canada, Royal Commission on the Economic Union and Development Prospects for Canada, *Report* (Ottawa: Minister of Supply and Services, 1985) (Commissioner: the Honourable Donald S Macdonald).

[44] Canada, Royal Commission on Bilingualism and Biculturalism, *Report of the Royal Commission on Bilingualism and Biculturalism* (Ottawa: The Commission, 1967) (Chairs: André Laurendeau and Arnold Davidson Dunton, CC).

[45] See Carver, *supra* note 1.

Conversely, investigative inquiries will typically focus on a defined event or controversy that has provoked public alarm: for example, a miscarriage of justice,[46] an industrial accident,[47] an allegation of official corruption or malfeasance,[48] or a failure to protect public health and safety.[49] These inquiries are often tasked with explaining "what happened" or "who did what to whom."[50] They may involve the allocation of responsibility or blame at either an individual or an organizational level, and their coercive authority may be necessary to conduct a thorough investigation, compel recalcitrant witnesses, weigh competing testimony, or ascertain controversial facts. Judges or former judges are appointed to lead the vast majority of inquiries of this sort. The terms "public inquiry" or "judicial inquiry" are commonly associated with them.

Just as the literature notes a distinction between advisory and investigative commissions, it also stresses that the distinction can be easily overstated.[51] Most inquiries blend advisory and investigative functions. Indeed, a typical judge-led inquiry, while focused on a specific event or controversy, is also tasked with making forward-looking policy recommendations to address public concern. This almost inevitably involves looking beyond the specific facts of a controversy to understand broader context, viewpoints, and societal interests at play. It is thus very common that inquiries with even highly focused investigative mandates combine formal witness examinations with additional methods of research and consultation, such as solicited research studies, non-adversarial roundtable discussions, expert panels, informal community hearings, and open-ended requests for written submissions from the public.

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[46] See e.g. the *Lamer Inquiry*, *supra* note 4.

[47] See e.g. Nova Scotia, The Westray Mine Public Inquiry, *The Westray Story: A Predictable Path to Disaster: Report of the Westray Mine Public Inquiry* (Halifax: The Inquiry, 1997) (Commissioner: the Honourable Peter K Richard).

[48] See e.g. the *Charbonneau Commission*, *supra* note 5; the *Gomery Inquiry*, *supra* note 3.

[49] See e.g. Ontario, The Walkerton Commission of Inquiry, *Report of the Walkerton Inquiry* (Toronto: Ministry of the Attorney General, 2002) (Commissioner: the Honourable Dennis O'Connor); Canada, Royal Commission on the Blood System in Canada, *Final Report* (Ottawa: The Commission, 1997) (Commissioner: the Honourable Horace Krever).

[50] This language is taken from Macdonald, "Interrogating Inquiries", *supra* note 28 at 477.

[51] See especially the report of the Ontario Law Reform Commission, *supra* note 26 at 148-50.

In some cases, the "hybrid" status of an inquiry is made express by its terms of reference, with different powers and procedures applicable to different phases of its work. Commissioner Braidwood's recent investigation into the death of Robert Dziekanski at the Vancouver Airport and the use of conducted energy weapons by police in British Columbia, while sometimes mistaken as a single process, was in fact two separate inquiries[52] appointed under Divisions I and II of British Columbia's *Public Inquiry Act*.[53] The first was, in the language of the statute, a joint "study" and "hearings" commission, focused on explaining the cause of Mr Dziekanski's death and any related misconduct by police, and directed to making forward-looking recommendations to prevent similar tragedies. The second "study commission" considered policy issues surrounding the safety, effectiveness, and regulation of conducted energy weapons as a law enforcement device in British Columbia. Other inquiries, such British Columbia's recent *Missing Women Commission of Inquiry*,[54] combine "study" and "hearings" phases within a single mandate.

(c) Coercive Authority and the Investigatory-Adjudicative Distinction

As several commentators have argued, a more meaningful way of distinguishing between inquiries, and of determining appropriate procedural content, is to focus on their potential effects on individuals.[55] The fact that "investigative" inquiries typically involve the use of coercive authority to compel witnesses is of far greater legal and analytic significance than the fact that they may tend more toward "investigation" than "advice."

Compulsion as a witness at a public inquiry exposes an individual to an exceptional form of public scrutiny. Only the highest-profile civil or criminal trials attract the publicity accompanying a typical public inquiry. Since public inquiries are a form of investigation carried out in full public view, they may expose witnesses to allegations and innuendo long before final

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[52] *Supra* note 6.

[53] *Supra* note 29.

[54] British Columbia, Missing Women Commission of Inquiry, *Foresaken: The Report of the Missing Women Commission of Inquiry* (Vancouver: Missing Women Commission of Inquiry, 2012) (Commissioner: the Honourable Wally Oppal).

[55] See especially Patrick Robardet, "Should We Abandon the Adversarial Model in Favour of the Inquisitorial Model in Commissions of Inquiry?" in A Paul Pross et al., *Commissions of Inquiry* (Toronto: Carswell, 1990) 111, and Gordon F Henderson, *Abuse of Power by Royal Commissions* (1979) (unpublished; available in the Brian Dickson Law Library, Gordon F Henderson Collection, University of Ottawa).

conclusions are reached. The vigorous and adversarial[56] examination of some witnesses may be necessary to discern contested facts central to an inquiry's mandate, even when a witness is ultimately determined to be credible.[57] The mere fact that an individual faces aggressive cross-examination, or allegations postulated by commission counsel or other participants, is obviously not determinative of actual culpability. Yet it inevitably subjects the individual to negative publicity and to the danger of being judged by public opinion before an inquiry's final "verdict" has been rendered. Although it is appropriate and common inquiry practice to call impugned witnesses late in a hearings schedule, so that they may address the allegations of witnesses who preceded them, this also enables public opinion against an assailed individual to build.[58] The situation is exacerbated when commissioners fail to rigorously enforce boundaries of relevance and propriety in the examinations conducted by inquiry participants, or worse, fail to observe those boundaries themselves.[59]

In defining procedural rights appropriate to the prejudice that may be engendered by an inquiry, the case law often stresses a distinction between inquiries and courts.[60] Courts, the reasoning goes, decide disputes structured by the adversarial claims of parties. They adjudicate between competing claims and evidence, and reach conclusions – whether civil or criminal – that have a definite and enforceable legal quality. The significance and finality of these decisions demands

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[56] Use of the term "adversarial" to describe inquiry proceedings is not without controversy, as it connotes a similarity between inquiries and courtroom litigation that the case law is loath to acknowledge. The characterization of inquiry proceedings as "adversarial" will be substantiated more fully in Chapter 2.

[57] See John Sopinka, QC (as he then was), "The Role of the Commission Counsel" in Pross et al., *supra* note 55, 75 at 82.

[58] The Honourable SGM Grange made a related point when he argued that, due to the intense scrutiny of inquiries, counsel cannot "always wait leisurely to refute some adverse evidence": *ibid*, "How Should Lawyers and Legal Profession Adapt?" in Pross et al., *supra* note 55, 151 at 155.

[59] Some problematic instances of commissioners' conduct in the treatment of witnesses will be considered in Chapters 2 and 3.

[60] See especially the Supreme Court of Canada's decisions in *Canada (AG) v Canada (Commission of Inquiry on the Blood System)*, [1997] 3 SCR 440 [*Krever*] quoted *infra* in note 61, and *Consortium Developments (Clearwater) Ltd v Sarnia*, [1998] 3 SCR 3 [*Consortium*] at para 41; the Federal Court of Appeal's decisions in *Beno v Somalia Inquiry Commission*, [1997] 2 FC 527 [*Beno*], and *Dixon*, *supra* note 13; the Court of Appeal for Ontario's decision in *Episcopal Corporation of the Diocese of Alexandria-Cornwall v Cornwall Public Inquiry Commissioner*, (2007) 219 OAC 129, 278 DLR (4th) 550 at para 68 [*Episcopal*]; and the Court of Appeal for Quebec's decision in *Fonds de solidarité des travailleurs du Québec (FTQ) v Commission d'enquête sur l'octroi et la gestion des contrats publics dans l'industrie de la construction*, 2014 QCCA 1811 at paras 11 at 43.

strong, predictable standards of evidence and procedure. Public inquiries, by contrast, do not reach legally enforceable findings. Indeed, the case law has affirmed that public inquiries cannot state, let alone enforce, findings of criminal or civil culpability. As put by the Supreme Court in *Krever*:

> 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 are simply findings of fact and statements of opinion reached by the commissioner at the end of the inquiry. They are based upon and flow from a procedure which is not bound by the evidentiary and 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. … To put it another way, even if a commissioner's findings could possibly be seen as determinations of responsibility by members of the public, they are not and cannot be findings of civil or criminal responsibility. [61]

The Federal Court of Appeal similarly observed in *Beno v Canada (Somalia Inquiry Commission)*:

> A public inquiry is not equivalent to a civil or criminal trial. … In a trial, the judge sits as an adjudicator, and it is the responsibility of the parties alone to present the evidence. In an inquiry, the commissioners are endowed with wide-ranging investigative powers to fulfill their investigative mandate. … The rules of evidence and procedure are therefore considerably less strict for an inquiry than for a court. Judges determine rights as between parties; the Commission can only 'inquire' and 'report'.[62]

Given the lack of immediate enforceability to inquiry findings, the jurisprudence typically characterizes the harms occasioned by public inquiries as "reputational." For example, the Federal Court in *Beno* held that "the only potential consequence of an adverse finding of the Somalia Inquiry is that reputations could be tarnished", despite the fact that that inquiry engaged particularly grave subject-matter.[63] Similarly, the Supreme Court concluded in *Krever* that in the absence of immediate concern for civil or criminal liability, the appellants in that case could only assert the threat of injury to their reputations.[64] While recognizing that "for most, a good reputation is their most highly prized attribute",[65] Justice Cory reasoned that "damaged

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[61] *Ibid* at para 34.

[62] *Supra* note 60 at para 23.

[63] *Ibid.*

[64] *Supra* note 60 at para 35.

[65] *Krever*, *ibid* at para 55.

reputations may be the price which must be paid to ensure that if a tragedy such as that presented to the Commission in this case can be prevented, it will be."[66]

It follows from this reasoning that since inquiry participants do not face equivalent legal prejudice as in a trial, and because inquiries are intended to uncover facts and formulate recommendations rather than determine legal questions of right, they are not beholden to equivalent standards of evidence and procedure. Their relative procedural and evidentiary flexibility accords with their *investigative* character, contrasted with the *adjudicative* character of courts. Indeed, it is this evidentiary and procedural flexibility that presumably makes them a desirable instrument to be employed by governments in the first place.

The investigative-adjudicative distinction is emphasized repeatedly in the inquiry case law. In *Episcopal Corporation of the Diocese of Alexandria-Cornwall v Cornwall Public Inquiry Commissioner*,[67] the Court of Appeal for Ontario observed:

> The commission is not asked to resolve a bi-polar dispute over a specific legal or factual issue. The Commissioner is not entitled to make findings of civil or criminal responsibility. He is faced, rather, with a broad issue of policy affecting the public at large. His mandate concerns … a 'polycentric issue' involving 'a large number of interlocking and interacting interests and considerations.'[68]

The court thus affirmed the authority of the inquiry to hear allegations of sexual assault against an individual who had been previously acquitted of such allegations in court (indeed, with the presiding judge opining that the individual was factually innocent). While recognizing that the adverse publicity drawn to the individual was potentially unfair, it was tolerable in light of the inquiry's role in publicly addressing a community concern.[69]

The Federal Court of Appeal reasoned in *Dixon v Canada (Somalia Inquiry Commission)*:[70]

[66] *Ibid* at para 39.

[67] *Supra* note 60.

[68] *Ibid* at para 26.

[69] *Ibid* at para 51.

[70] *Supra* note 13.

> Courts of law are designed, if civil, to settle disputes between opposing parties and, if criminal, to establish guilt or innocence. They must arrive at definitive conclusions; they cannot leave a problem aside for lack of evidence or absence of a clear solution. … It is their responsibility to dispose of issues before them, to judge. … Commissions of inquiry … are not, in any way, under the same duty. As investigative bodies, they are called upon to seek the truth. … But nowhere do we find the imposition upon them of a duty to conclude. On the contrary, their purpose … is not conducive to settling issues or drawing definitive conclusions.[71]

The case law thus distinguishes public inquiries from trials on the basis of *purpose*, *effect*, and *procedure*. Inquiries are purposively different in that they are intended to find facts and inform opinions, not resolve disputes. Their effects are different in that they pursue recommendatory and non-binding conclusions, not enforceable legal findings. Their procedures are flexible and adaptable rather than predictable and rigid, recognizing the primacy of their investigative ends and the lesser prejudice they pose to individuals than a proceeding in court.

(d) The Paradox of Judicial Leadership

To return to a paradox alluded to earlier, the formal distinctions between inquiries and courts beg an obvious question: if inquiries are categorically different than courts, then why are current or former judges so frequently appointed to lead them?

Inquiries are certainly expected to be carried out impartially and with fairness to their participants. Given that inquiries also often focus on the failures of public officials and institutions, it would seem appropriate that they be conducted with a high level of independence. Moreover, the conduct of inquiries demands the ability to scrutinize and weigh evidence, and to assess the credibility of witnesses. Each of these skills and qualities – impartiality and fair-mindedness, independence, evidentiary aptitude – are strongly associated with judicial service, and could inform cogent arguments for the appointment of judges to inquiry commissions.[72] So too could the fact that inquiry commissioners often face interlocutory questions or challenges to their jurisdiction. Judges, being adept in statutory interpretation and the administrative and constitutional law standards that surround questions of vires, would seem well-placed to address these concerns.

[71] *Ibid* at para 14.

[72] See e.g. Ruel, *supra* note 21 at 13-14.

Judges are not the only officials who possess these qualities, however. Ombudsmen, auditors general, ethics commissioners, privacy commissioners and other independent officers of parliament, coroners, and the chairs of numerous standing regulatory agencies and commissions are each expected to demonstrate impartiality, independence, and evidentiary aptitude to varying degrees according to the context and mandate of their positions. Indeed, the investigative mandates of some of these officials might suggest a skillset even more closely attuned to the work of an inquiry than would be the case with a judge. Judges may have special skill and experience in deciding questions of jurisdiction, but such questions arise in a host of administrative proceedings, where they are managed routinely by the present capacities of administrative officials and the availability of judicial review.

Preferring judicial leadership for public inquiries thus suggests that it is not just the qualities themselves that recommend judges to the role, but the particular manner or degree to which those qualities are exemplified by the judge. Judges are not just independent in some general sense, for example, but have constitutional protection for their independence flowing from the separation of powers. The judge's aptitude for weighing evidence and testimony is augmented by the particularly stringent demands of courtroom litigation, with which the judge will have had deep experience.

Yet these explanations beget further and more challenging questions. While it is true that judges enjoy an especially high degree of independence as a result of their constitutional status, and that a consequently high degree of impartiality is expected of them, it is less clear that this status follows them into an inquiry appointment. In *Dixon*,[73] the Federal Court of Appeal rejected the claim that the political decision to terminate a judicial inquiry violated either a basic rule of law principle or the independence of the judiciary. The Commission in question – the *Somalia Inquiry* – was led by a panel of two judges and one journalist. When Canada's then Minister of Defence denied an extension to the Commissioners' reporting deadline, effectively forcing them to stop their investigative mandate short, a prospective witness alleged that he had been unfairly denied the opportunity to vindicate himself. The court affirmed the vires of the Order in Council limiting the duration of the inquiry, reasoning that no principle of law enables an inquiry to

[73] *Supra* note 13.

"acquire, once created, the independence and autonomy necessary to allow it to prevail over the will of the Governor in Council as to its structure and its existence".[74] Ed Ratushny notes that this simply affirms the status of inquiries as an executive instrument, "a temporary appendage of the executive branch of government, created or potentially extinguished at its will or whim."[75]

If inquiries are temporary appendages of the executive branch, with no constitutional protections for independence arising by virtue of their judicial leadership, then at least one of the explanations for such leadership is cast into doubt. Indeed, if inquiries are at best beholden to the overriding discretion of an executive master, and at worst vulnerable to intercession or manipulation by the executive, the very propriety of judicial service within them should be called into question. The independence of the judiciary itself – the very source of public esteem and confidence in judges – could be threatened by the unseemly use of judicial commissioners to further political ends. As the United States Supreme Court observed in *Mistretta v United States*,[76] judicial independence should not be "borrowed by the political branches to cloak their work in the neutral colors of judicial action."[77] If the constitutional protections for judicial independence suggest a reason why judges should be appointed as inquiry commissioners, they would seem equally to suggest other reasons why they shouldn't.

Finally, if the laudable judicial qualities of independence, impartiality, and evidentiary aptitude are the primary reasons for judicial appointment to inquiries, we might question the extent to which those qualities can be divorced from the courtroom setting in which they arise. The adjudicative format of judicial decision-making intrinsically reinforces independence and impartiality by affording disputants primary control over the facts and arguments placed before a judge; irrelevant or arbitrary influences are mitigated by the judge's duty to give dispassionate consideration to a dispute as framed by the parties, and to issue judgment in terms that

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[74] *Ibid* at 277.

[75] *Supra* note 14 at 281.

[76] *Mistretta v United States*, 488 US 361 (1989).

[77] *Ibid* at 407.

meaningfully address their claims.[78] The jurisprudence on public inquiries emphasizes these qualities of courtroom proceedings in *distinguishing* them from the investigative structure of inquiries. Yet it is adjudicative procedure that, in large part, assures the fairness and impartiality of judges. It is also via adjudication that judges gain their skill, and familiar methods, for critically assessing evidence. A contradiction thus lies in lauding the importance of judicial values to the inquiry context while simultaneously rejecting procedures from which those values are largely derived.

A richer and more satisfying justification for judicial service on public inquiries is needed: one that addresses the propriety of this service from a separation of powers perspective, and explains how laudable judicial qualities are to be maintained in an ostensibly non-judicial setting. An important prerequisite to such an explanation, however, is to define the distinct purpose of public inquiries, quite apart from their formal legal characteristics. Such a purposive understanding of public inquiries is integral to answering whether judges are truly their best institutional custodians.

2. The Purpose of Public Inquiries

The most obvious way to account for the purpose of public inquiries would be to observe the stated goals of their various terms of reference. The preceding discussion emphasized the importance of distinguishing between inquiries that exercise coercive powers and those that do not, based on the significant difference in their effects on individuals. The very use of coercive authority implies an important public purpose behind it. Anecdotally, inquiries making use of such powers have investigated miscarriages of criminal justice; failures of public safety and national security; the abuse of power by officials; instances of corruption in the organs of government; and the cause of preventable disasters, among other issues. While these subjects are diverse, it is reasonable to observe that they share in common the pursuit or restoration of "public confidence" as an important civic value.[79]

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[78] The classic account of adjudication in these terms is given by Lon L Fuller, "The Forms and Limits of Adjudication" (1978-79) 92 Harv L Rev 353, which will be considered in further detail in the next chapter and serve as one of the crucial analytic guides to this dissertation.

[79] See Ratushny, *supra* note 14 at 16-17, discussing Cory J's reasoning in *Phillips*, *supra* note 20. See also Campbell, *supra* note 14 at 389: "The common element addressed by most public inquiries … is a problem that transcends the capacity of these ordinary institutional vehicles. This common element is typically public concern, often mingled with suspicion of authority, around issues involving health, safety, wrongdoing by officials, wrongful conviction,

(a) Public Confidence

Public confidence might be expressed simply as the belief that government works: that its officials have integrity, are accountable to the public and held responsible for their actions, that they act within the law, keep people safe, and honour their rights. Restoring public confidence where it has faltered may subsume a number of other, specific priorities which vary in the case of individual inquiries: for example, allocating blame; developing new policy safeguards; recommending compensation for victims. Each of these goals, and the larger value of public confidence they embody, are critical to understanding the purpose of public inquiries. But they do not provide a complete account of that purpose. As Ratushny notes, we must still ask why public inquiries, specifically, are valuable institutions for the pursuit of public confidence?[80] What distinguishes them from other alternatives, including the standing institutions of public administration and democratic government?[81] Answering these deeper questions provides a much more nuanced understanding of inquiry purpose.

(b) Political and Social Utility

A classic jurisprudential statement of the purpose of public inquiries was given by Justice Cory in his concurring reasons in *Phillips v Nova Scotia (Westray Mine Inquiry)*:[82]

> 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 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 excellent means of informing and educating members of the public.[83]

This statement contains a number of important points. The first is its acknowledgment, albeit attributed to a cynical viewpoint, that inquiries are a political device which may be constituted to fulfill certain strategic ends of governments. The second is its recognition that the value of

breakdowns in institutional integrity or accountability, or some public policy issue that cannot be adequately addressed through these standing institutions."

[80] *Ibid* at 17.

[81] *Ibid*.

[82] *Supra* note 20.

[83] *Ibid* at para 62.

public inquiries lies not just in instrumental political goals, but in broader societal values: facilitating education and understanding about the cause of a problem, participation in its solution, and restoring confidence in the integrity of public institutions and of government. Although the latter values have a political quality in that they concern the interaction of the public with an official process, their worth cannot be measured in purely instrumental terms. Rather, they have a subjective quality, their worth lying in the perceptions of participants and observers of public inquiries.

Roderick Macdonald similarly situates the functions of public inquiries along both political and social axes.[84] His identification of "six principal inquiry functions" was cited approvingly by the Ontario Law Reform Commission in its 1992 *Report on Public Inquiries*:

> (a) they enable the government to secure information as the basis for developing or implementing policy; (b) they serve to educate the public or legislative branch; (c) 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 action to be postponed.[85]

Again, these functions blend governmental priorities – securing information, sampling opinion, effecting delay – with priorities that may arise from more diffuse social interests – education, the scrutiny of executive and administrative conduct, the voicing of grievances. They similarly blend "outputs" that can be observed in the content of legal and political reforms flowing from an inquiry (or the lack thereof), with those that are experienced subjectively by the individuals and groups affected by the inquiry process.

(c) Inquiries as 'Residual' Instruments

Of course, a statement of the goods pursued by an inquiry provides only a partial account of why governments or other parties may seek to have one established. As Justice Cory's statement implies, the purpose of inquiries lies not just in their productive outcomes, but in the distinct institutional and procedural attributes brought to bear on those outcomes. Taking up this theme, Ratushny refers to inquiries as "residual" institutions, ones that will be resorted to when "other institutions or processes are inadequate."[86] This is not to suggest that the selection

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[84] Macdonald, "Commission of Inquiry", *supra* note 39.

[85] *Ibid* at 372.

[86] *Supra* note 14 at 20.

of an inquiry flows from the reasoned elimination of alternatives. Ratushny is not naïve to the fact that inquiries may, on occasion, be struck for purely politicized or cynical reasons. He nevertheless observes that public inquiries model a number of attributes which, while possessed individually by other institutions of state, are uniquely instantiated by inquiry processes simultaneously. These attributes are: (1) independence, flowing from the operation of inquiries outside the ordinary bureaucracy and, often, under judicial leadership;[87] (2) effectiveness, signified by the devotion of exclusive attention and resources to a defined problem;[88] (3) mandate, meaning the ability to respond to very specifically stated questions in terms of reference, which in turn may be tailored to specific community concerns;[89] (4) power, specifically the ability to compel witnesses and evidence;[90] and (5) transparency, reflecting the considerable scrutiny of inquiries, particularly by the media.[91] Not all inquiries are exemplary models of these attributes, and in some cases they may be more perceived than real. However, the crucial point is that other processes – parliamentary committees, standing regulatory bodies and commissions, criminal prosecutions, or internal departmental investigations, for example – signify these attributes only partially, not collectively. For those "residual" cases where governments, or others, perceive value in the collective embodiment of these attributes in a single instrument, the public inquiry will hold distinct appeal.

(d) Inquiries as Iterative Social Processes

The fact that multiple actors – such as governments, political parties, civic advocacy groups, and individual citizens – may perceive benefits in calling for an inquiry, also implies that inquiries embody multiple (although not necessarily consistent) values and aims. The reconciliation, or at least management, of these different perspectives may itself be part of the purpose of a public inquiry. Macdonald emphasizes this point in describing the deliberative nature of inquiries: "there are problems, issues *and solutions* which both the government … and the public … are either unable or unwilling to articulate in a given moment: this inarticulateness

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[87] *Ibid* at 17.

[88] *Ibid*.

[89] *Ibid*.

[90] *Ibid* at 17-18.

[91] *Ibid* at 18.

finds expression in a commission of inquiry."[92] By "inarticulateness", Macdonald refers to the fact that the values, perspectives and goals brought by different participants to an inquiry are not necessarily fixed or even fully-formed. The inquiry process contributes to their crystallization by requiring participants to respond to the positions of others, to the unfolding events and investigative discoveries, and to the ultimate imperative of the commission of formulating conclusions and recommendations informed by the submissions of participants. This process of moving from "inarticulateness" to "articulateness" is itself a highly productive feature of inquiries.

Importantly, if the objectives pursued by participants and the inquiry process exist in a dynamic, mutually-informing relationship, then the social goods ultimately achieved by an inquiry will be highly contingent on choices of *procedure*. This point is best illustrated by way of an example. Among Canada's most celebrated public inquiries was Thomas Berger's 1974-77 review of the proposed Mackenzie Valley Pipeline in the Yukon and Northwest Territories.[93] Berger was appointed under relatively focused terms of reference that asked him to appraise the 'pros' and 'cons' of developing a natural gas pipeline in Canada's north, and to recommend a manner of proceeding to the federal government. While satisfying these terms – Berger recommended a moratorium on development pending resolution of outstanding Aboriginal land claims – the commission accomplished much more: it served as a watershed moment in recognizing the status and experiences of northern Aboriginal peoples. Berger paired formal evidentiary hearings, in which expert witnesses – government and industry officials, engineers, biologists and environmentalists, among others – were examined by counsel, with consultative public hearings in the communities most directly affected by the proposed development. In Berger's own words, "At these community hearings, the people living in the communities were given the opportunity to speak in their own language and in their own way. Something like one thousand witnesses, many of them speaking through interpreters, spoke at these hearings."[94] The

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[92] Macdonald, "Commission of Inquiry", *supra* note 39 at 388.

[93] Canada, Mackenzie Valley Pipeline Inquiry, *Northern Frontier, Northern Homeland: The Report of the Mackenzie Valley Pipeline Inquiry* (Ottawa: Minister of Supply and Services Canada) (Commissioner: the Honourable Thomas R Berger).

[94] Thomas Berger, "Canadian Commissions of Inquiry: An Insider's Perspective" in Manson and Mullan, *supra* note 14, 13 at 17.

community hearings were broadcast simultaneously on public radio and documented in nightly television news. Their effect was to engender broader awareness of Canada's north as a "homeland", and not just a "frontier" for natural resource development. This would not have been the case had Berger interpreted his terms of reference narrowly and limited himself to formal evidentiary hearings that heard only from sophisticated witnesses represented by counsel. His creative, and ultimately precedent-setting,[95] choice of procedure thus directly sculpted the values generated by his inquiry.

Liora Salter cites the *Mackenzie Valley Pipeline Inquiry* as an example of an inquiry that was "radically transformative", in that it altered the very nature of public understanding and dialogue on a given issue.[96] In her view, this constitutes the exception rather than the norm. Most inquiries sustain only incremental, or "reformist" changes in public policy. This results from the fact that inquiries typically rely heavily on the views of experts and professionals within relevant fields of study; hence, their recommendations will tend to reinforce the prevailing viewpoints within those fields.[97] Indeed, part of the novelty of Berger's inquiry was that he attributed equal weight to the informal testimony and experiences of community participants as he did to the professional opinions of experts.[98]

Salter does not necessarily mean to criticize inquiries that work toward "reformist" ends. Rather, she is simply underscoring the connection between different inquiry potentials and different procedures. She observes that the usual conduct of inquiries embodies two "contradictions".

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[95] It is routine practice for contemporary public inquiries to facilitate community participation by means that obviate the need for representation by counsel or the submission of formal evidence. Quebec's *Charbonneau Commission*, *supra* note 5, invites written submissions from the public on its website, and has publicized an email address and telephone number by which individuals can report information that may be relevant to the inquiry: see the Commission's website at www.ceic.gouv.qc.ca/consultations-publiques.html. The *Missing Women Commission of Inquiry*, *supra* note 54, while originally constituted as purely a "hearings" commission, was subsequently expanded to include a "study" mandate involving broad community consultation. The distinct challenges that confronted the inquiry in brokering community participation will be considered in Chapter 4.

[96] See Liora Salter, "The Two Contradictions in Public Inquiries" in Pross et al., *supra* note 52 at 173.

[97] Salter derives this observation largely from Richard Simeon's account of the *Commission on the Economic Union and Development Prospects for Canada*, *supra* note 39, which laid the groundwork for Canada's eventual entry into NAFTA: see Richard Simeon, "Inside the Macdonald Commission" (1987) 22 Studies in Political Economy 167 (cited in Salter, *ibid* at 177-78).

[98] Salter, *ibid* at 179.

The first is that, while inquiries present a rare opportunity to facilitate transformative dialogue by bringing together diverse and sometimes marginalized groups, their terms of reference (and the exigencies of completing them on time) will often orient commissioners to limited and pragmatic policy goals.[99] The second is that, while inquiries are ostensibly liberated from the evidentiary and procedural commitments of courts, the motivation for affected parties to treat inquiries are proxies for legal interests (insulating themselves against prosecution or liability, or putting offending parties "on trial") will often transform them into highly "legalized" processes. The resolution of these contradictions will fundamentally impact an inquiry's choice of procedure, and its orientation to reformist or transformative ends. Importantly, their resolution may not just depend on the procedural discretion of the commissioner, but on the expectations and pressures exerted by inquiry participants themselves.

These observations reveal the impact of different value calculations by inquiry participants on the procedural forms inquiries assume and, consequently, the effects they produce. Echoing Macdonald, Salter underscores that the relationship between inquiry procedures and the objectives of participants is a dynamic one, and that inquiries embody multiple normative perspectives. She writes of the *Mackenzie Valley Pipeline Inquiry*:

> Berger understood that inquiries can be used by their participants for different purposes and that this might be desirable. The briefs addressed to the inquiry, and designed to fashion its recommendations, were also addressed to a wider public made available through media coverage of the inquiry. At the same time, participants also used the inquiry as a forum to address their own constituencies. In this last task, representatives of political organizations … were able to take the diverse and often diffuse comments from the members of their constituencies and shape them into coherent presentations. … The Berger inquiry recognized the importance of this process of developing consciousness and of its articulation and it afforded its participants many opportunities to "come into their own" as advocate groups through the process of speaking to the inquiry.[100]

Inquiries may thus serve as forums by which new political projects, civic causes, and political identities are formed and strategically conveyed to a broader constituency.

(e) Summary: The Inquiry Kaleidoscope

Articulating the purpose of a given public inquiry, let alone of public inquiries at a general level, is far from a straightforward exercise. A public inquiry is a political instrument that

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[99] *Ibid* at 174.

[100] *Ibid* at 179-80.

enables strategic government ends; a deliberative institution that facilitates dialogue, debate, education, and awareness raising; a remedial instrument against corruption, abuse of power, and systemic flaws in official institutions; a locus for the development of new civic and political identities; a locus for legal brinksmanship and a prelude to litigation; and much more. Inquiries are all of these things, and to make matters more complicated, they can be all of these things at once. The objectives and that motivate different parties to call for a public inquiry, or to participate in one, may be reshaped by the inquiry process itself. The values generated by an inquiry – and whether an inquiry succeeds in generated value at all – may accordingly be very much a matter of perspective and individualized experience. At several points in this dissertation, the metaphor of a kaleidoscope will be used as a reminder of the diverse, convergent purposes of public inquiries. Kaleidoscopes combine mirrors with light and brightly-coloured objects to produce a variety of patterns depending on the different angles from which they are viewed. Their beauty lies very much in the eye of the beholder. Inquiries are similarly colourful, rich normative sites vested with a range of meanings by observers and participants, some of which are shared, many of which are individually distinct. This multiplicity of purposes must be borne in mind whenever inquiries are assessed; their worth can certainly be evaluated along specific axes – contribution to public policy, the resolution of controversy, allocation of blame, political expediency – but taken in isolation these will never capture the public meaning vested in a given inquiry.

Conclusion

This chapter began by posing the question of why judges are so frequently appointed to lead public inquiries. An account of the legal status and features of inquiries deepened the paradoxical root of this question, by underscoring the formal status of inquiries as executive instruments and their departure from the adjudicative methodologies and commitments of courts. While superficial explanations for judicial service on inquiries exist, evoking independence, impartiality, and evidentiary skill, these explanations ignore the vesting of similar attributes in other actors, and don't speak at all to the unique separation of powers concerns that surround the mingling of the judicial and executive branches. Finally, a purposive account of public inquiries, while supporting a general connection between the use of coercive powers and the broad goal of "public confidence", also underscores that inquiries are nuanced; more than

simply being official institutions calibrated to stated policy ends, they are part of dynamic "social processes", as Gerald Le Dain once presciently observed:

> [A public inquiry's] general way of looking at things is probably more important in the long run than its specific recommendations. It is the general approach towards a social problem that determines the way in which a society responds to it. There is much more than law and governmental action involved in the social response to a problem. The attitudes and responses of individuals at the various places at which they can affect the problem are of profound importance.
>
> What gives an inquiry … its social function is that it becomes, whether it likes it or not, part of this ongoing social process.[101]

The issue of judicial service on public inquiries is not just of academic concern. That such service may injure the separation of powers and the integrity of the judiciary has been suggested briefly above, and will be considered in greater detail in the next Chapter. The present analysis should serve to underscore another point, however, which is that it is by no means clear than judicial leadership is ideally suited to the optimization of inquiry conduct. Inquiry potential is closely linked to procedure, with the social value of an inquiry lying as much in its process – the particular dynamic it establishes amongst participants, and the perception it instills among observers – as it does in concrete policy outcomes. The most obvious symbolism inspired by judicial leadership of an inquiry, or the methodologies a judge might be expected to deploy, or the expectations he or she might be expected to instill among participants, are those linked to the traditional status of judges in *courts*. Yet not only does the case law stress substantive and categorical distinctions between inquiries and courts; the duplication of court-like procedures and methodologies in the inquiry context may foreclose the type of social value that an inquiry will generate. An inquiry that adopts a highly court-like procedure is certainly more likely to facilitate the type of "reformist" deliberations described by Salter than it is to fulfill a "radical potential." That may not be a bad thing, but it certainly calls for a more express and articulate alignment between inquiry goals and the decision to appoint a judicial commissioner in a given context.

Thomas Berger was a judicial commissioner, but the success of his inquiry did not lie in the deployment of traditional judicial skills and methods; indeed, it lay in his creative ability to diverge from them. Can the same wisdom be expected of all judicial commissioners? Is there a

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[101] 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) 80 at 85.

risk that appointment of a judge may stifle the potential of an inquiry by allowing the inquiry to become simply a proxy for the protection of legal interests amongst participants with the savvy and resources to procure legal representation? Conversely, is there a danger that a judicial commissioner, encouraged by the distinctions drawn in case law, may too readily abandon judicial fidelity to principles of independence, impartiality and fairness and fail to instantiate them when they constitute the very basis for his or her appointment?

In the next Chapter, some problematic instances of judicial service on commissions of inquiry will be discussed to underscore these problems and demonstrate that they are not just hypothetical. An attempt will also be made to furbish a more coherent and precise statement of why, and when, it is appropriate for judges to accept appointment to a public inquiry. In the absence of clear guidance from the legal status and purpose of public inquiries, resort must be taken to some of the basic principles that undergird Canada's system of justice – principles that connect public inquiries, like all official institutions, to a foundational concept of rule of law. This methodology subverts the prevailing wisdom that judge-led inquiries can be categorically distinguished from the substantive and procedural commitments of adjudication.

Public Inquiries and Adjudication

Introduction

The preceding chapter introduced, but did not resolve, the paradoxical nature of judicial service in public inquiries. The root of this paradox lies in the formal status of inquiries as executive institutions, and in the categorical distinction drawn by many judicial and academic authorities between the investigative nature of inquiries and the adjudicative work of courts. These characteristics beg basic questions about the propriety of judicial service in public inquiries. One question is whether it is appropriate, from a separation of powers perspective, that judges serve at the head of an executive institution lacking the institutional independence of courts. Another is whether judges are best-equipped to complete inquiry mandates if inquiry conduct is so distinct from the standards and procedures of courts.

In this chapter I begin to confront these questions directly, outlining an argument that will be tested in the remainder of this dissertation. The argument is that judges are suited to the leadership of inquiries that demand observance of fidelity to adjudication in a basic sense. Moreover, it is that a principle of fidelity to adjudication can serve as a guide to judges in deciding whether or not to accept an inquiry commission, and in resolving common procedural and substantive dilemmas that arise in conducting an inquiry.

Distinguishing those inquiries suited for judicial leadership from those that are not requires reconciling the work of inquiries with the skills and normative commitments of judges. This is not a superficial exercise: it is not enough to point out that inquiries, like courts, hear and weigh evidence, or that they must be conducted independently and fairly, and to thereby conclude that judges are their best custodians. Judges do not have a monopoly on evidentiary aptitude, independence, or fairness. They do, however, have special status under the Constitution as the ultimate arbiters of legal rights. Their independence, not as commissioners but as judges, is constitutionally entrenched. Moreover, it is intrinsically reinforced by judicial – that is, adjudicative – procedure. The reconciliation of judges with public inquiries involves developing a substantive account of the constitutional role played by judges (including its procedural and methodological dimensions), and then mapping that account onto the mandates of inquiries on

a case-by-case basis. The fact that inquiries are kaleidoscopic institutions combining multiple purposes and expectations among participants makes this task especially complex. Nevertheless, in some cases, the judicial role will be found to map well onto the mandate of a given inquiry. This will be the case when an inquiry legitimately demands an assurance of justice equivalent to that of a judicially-presided, adjudicative proceeding. More specifically, it will be the case when the participants in an inquiry require the type of structural equality characteristic of adjudication in order for their legitimate demands of justice to be met. This is a nuanced concept, and the present chapter is devoted to its clarification.

Part 1 outlines several challenges confronted by judges in the conduct of public inquiries. It is intended to show that the paradox of judicial leadership of an inquiry is more than simply a rhetorical observation. Rather, judges face unique dilemmas upon assuming the leadership of an inquiry, with serious implications for public confidence in the judiciary, procedural fairness, and effective inquiry conduct. I group these challenges under categories that are intended to be illustrative but by no means exhaustive, namely: the challenge of ensuring fairness for inquiry participants; the challenge of confronting politics, and the politicization of inquiries generally; the challenge of confronting government claims to secrecy; and the challenge of confronting polycentricity. The examples given serve to problematize the use of judges as inquiry commissioners. They establish the need for an analytic method distinguishing inquiries suited for judicial leadership from those that are not.

The chapter then considers the present regulatory framework governing the service of judges as inquiry commissioners. I explain Canada's doctrine of separation of powers, its statutory and common law rules concerning the extra-judicial work of judges, and ethical guidelines developed by the Canadian judiciary itself. While deepening our understanding of the constitutional roles of Canadian judges and of concerns judges themselves experience in assuming leadership of inquiries, these sources do not provide adequate guidance in addressing the challenges discussed earlier. Nor do they truly confront the basic question of whether judges should serve on public inquiries to begin with.

In Part 3, I develop an analytic approach that is intended to address these gaps. I begin with a brief review of the practices of a different jurisdiction, explaining how Australia's strict

separation of powers has led to clearer constitutional guidelines for the extra-judicial work of judges. Despite differences in the formal characteristics of the Canadian and Australian Constitutions, I suggest that the Australian approach helps illuminate constitutional values relevant to the governance of Canada's judiciary. Specifically, it highlights a dynamic relationship between the constitutional principles of judicial independence and of representative and responsible government. Moreover, the Australian jurisprudence helps establish a preliminary link between the preservation of important constitutional values and the observance of judicial procedure, even in non-traditional judicial roles.

I then attempt to deepen that link. I review Lon Fuller's classic account of the forms and limits of adjudication, using it to distil the unique societal value generated by adjudicative decision-making. This value can be expressed as the opportunity for participants to be treated with structural equality; for them to receive opportunity to influence the outcome of a proceeding by presenting proofs and reasoned arguments to a neutral arbiter, thus instilling a high level of confidence in the justice of that official's decisions. I suggest that this value, reduced to its core, is highly relevant to the conduct of certain public inquiries. Not all public inquiries require adjudication, and for those that do not the service of judges as inquiry commissioners may contribute to an improper judicialization of proceedings and weaken their substantive outcome. Many public inquiries do, however, demand adjudication – not exclusively, but to an extent appropriate to assure procedural fairness and concurrently protect the integrity of the presiding judge. Recognizing this requires subverting the accepted wisdom that public inquiries are non-adjudicative, and thus not beholden to many of the procedural and substantive commitments of courts. Some public inquiries *are* adjudicative, albeit in contexts where adjudication is blended with other procedural forms. The key is to distinguish one type of inquiry from the other, and thereby discern the proper forms and limits of judicial service within them.

I conclude by suggesting that judicial fidelity to adjudicative methods intrinsically reinforces the constitutional role judges are intended to play in fostering the rule of law. A mutually sustaining link is thus established between judicial procedure, purposive enforcement of Canada's most basic constitutional values, and the efficacy of judicial inquiries. The remaining chapters will test the merit of this approach by revisiting the challenges confronting judicial inquiry commissioners, and arguing how they should best be resolved.

1. Challenges Confronting Judicial Commissioners

In the Introduction I outlined two basic questions regarding the propriety of judicial service in public inquiries. The first is one of constitutional principle: is it appropriate under the separation of powers that judges assume the leadership of an institution ultimately beholden to the executive branch of government? The second is one of expediency: are judicial values and the judicial skillset likely to help or hinder a given inquiry in the pursuit of its mandate? It is relatively easy to hypothesize scenarios that would raise disconcerting replies to these questions. For example, terms of reference that required a judicial commissioner to vet his or her preliminary findings with a government minister, and accept any changes that the minister directed, would clearly subvert the commissioner's independence. Acceptance of such an inquiry would very likely diminish confidence in the judiciary, as it would signal a willingness by the judge to subsume his or her discretion to the political imperatives of the executive. Similarly, were a judge to assume leadership of an inquiry oriented to broad, inclusiveness consultation on a matter of policy – a royal commission on healthcare or aboriginal people, for example – we would consider it improper for the judge to instill a litigious and adversarial style of hearings, with witnesses compelled and subjected to accusatory cross-examination. Such a procedure would be at odds with the inquiry's facilitative and consultative ends.

Fortunately, these examples are unlikely to occur in the extreme forms in which they have been stated. More realistically concerning, however, are the grey areas that shade close to these extremes. Does it interfere with a commissioner's independence, for example, for a government to evoke national security concerns in limiting the release of a commissioner's final report, when the commissioner him- of herself has determined that the full content of the report can be safely disclosed? Does it interfere with independence for the government to deny funding to inquiry participants who require it in order to retain counsel, and whose participation the commissioner has deemed essential to the effective conduct of the inquiry? Does it diminish the truth-seeking function of an inquiry to allow participants ample procedural rights, where such rights may be exercised to stage strategic interests inimical to uncovering the truth? These questions are borne out by real world examples, and while they will be challenging for any commissioner, whether a judge or not, they take on special complexity when their resolution requires consistency with a judicial sense of propriety, as the examples below will demonstrate.

In this Part I canvass a number of challenges that may confront judicial commissioners in the conduct of inquiries, paying particular attention to how those challenges bear distinctly on judicial methods and epistemologies. The examples considered here include both current and former judges serving as inquiry commissioners. Critics of judicial service in public inquiries sometimes argue that former judges should be preferred for inquiry appointments:[1] inquiries would then benefit from a commissioner possessing judicial values and skills, and attracting symbolic independence and public confidence, while avoiding the separation of powers concerns that attend the use of sitting judges. In my view, this distinction is illusory. Any individual approached to conduct an inquiry because he or she is (or was) a judge must treat their judicial status as indicative of the manner in which the inquiry is expected to be conducted; otherwise, there is no compelling explanation as to why a different individual, possessing different professional experience and skills, would not be better-suited to complete the task. Participants who reasonably base expectations of fairness and independence on a commissioner's judicial status will be unmoved by whether that status is "current" or "former." Moreover, the appointing government will benefit from (or, some might say, take advantage of) the same symbolism of independence, integrity, and fairness as it would in appointing a serving judge. The choice of judicial symbolism and skills should engage a sense of duty on the commissioner to observe a judicial comportment so as to affirm the original basis of appointment and honour public confidence in the judiciary. This ethical responsibility should be no less burdensome on the former judge as it is on those still serving on the bench.

(a) Honouring Fairness to Inquiry Participants

The preceding chapter introduced a distinction between the standards of fairness required of a trial and those required of a public inquiry. It is beyond controversy that public inquiries do not engage equivalent security or liberty concerns as a criminal prosecution, and therefor do not require as stringent procedural and evidentiary safeguards for individuals who fall within their scrutiny. The same logic underlies the distinction between inquiries and civil trials, albeit with less force: civil trials engage immediate legal consequences for participants by

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[1] See e.g. Patrick Monahan and Byron Shaw, "The impact of extra-judicial service on the Canadian judiciary: the need for reform" in HP Lee, ed, *Judiciaries in Comparative Perspective* (Cambridge: Cambridge University Press, 2011) 428 at 451 (Monahan and Shaw imply that there may be some cases warranting appointment of a sitting judge, but – reinforcing the argument presented in this thesis – suggest these be limited to circumstances demanding "the unique skills, ability and training of a judge"; otherwise there is no reason not to rely on a skilled lawyer or former judge: *ibid*); Denise Meyerson, "Judicial Independence in Australia and South Africa: Comparative Lessons" (2007) Macquarie Law Working Paper Series, WP 2007-9 at 10 [Meyerson, "Judicial Independence"]; George Winterton, "Judges as Royal Commissioners" (1987) 10 UNSW LJ 108.

settling questions of right, while the less concrete and immediate effects of inquiries command lesser standards of procedure. The investigatory nature of inquiries means that, at most, they issue findings of fact that may damage reputations or trigger indirect legal or personal consequences. They do not issue "decisions" enforceable as matters of law.[2]

While accurate as formal statements of law, these distinctions raise challenges for judicial commissioners responsible for determining appropriate standards of fairness for inquiry witnesses and participants. Administrative law standards of fairness escalate in proportion to the severity of the potential effects of a proceeding on individuals.[3] There is strong precedent to show that some inquiries – in particular, those confronting serious and individualized allegations of wrongdoing – necessitate high standards of fairness, with ample opportunities of notice, legal representation, cross-examination and reply for affected individuals.[4] Moreover, while inquiries

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[2] Recall *Canada (AG) v Canada (Commission of Inquiry on the Blood System),* [1997] 3 SCR 440 [*Krever*] per Cory J at para 34: "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." In Part 3, below, I challenge the extent to which the non-enforceable quality of an inquiry's findings warrants departure from the procedural values of courts.

[3] Two of the five non-exhaustive factors determining the degree of fairness owed in an administrative proceeding – as set-out by the Supreme Court in *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 [*Baker*] – are "the nature of the decision being made" and "the importance of the decision to the individual affected" (*ibid* at paras 23 and 25). Both invite attention to the severity of consequences that may flow to an individual from participation in the proceeding.

[4] See especially the application of the *Baker* criteria in *Chrétien v Gomery*, 2008 FC 802, [2009] 2 FRC 417, where Teitelbaum DJ concluded (by way of summary): "Although the nature of the proceedings do not provide for the same level of procedural fairness required in a trial, the potential damage that the findings of the Commission could have on the reputations of the parties involved in the investigation was of such serious consequence that a high degree of fairness was required" (*ibid* at para 61). See also the comments of Binnie J for the Supreme Court in *Consortium Developments (Clearwater) Ltd v Sarnia (City)*, [1998] 3 SCR 3 [*Consortium Developments*] at para 41: "I want to emphasize that the concerns of individuals caught up in judicial inquiries are real and understandable. Unlike an ordinary lawsuit or prosecution where there has been preliminary disclosure and the trial proceeds at a measured pace in accordance with well-established procedures, a judicial inquiry often resembles a giant, multi-party examination for discovery where there are no pleadings, minimal pre-hearing disclosure … and relaxed rules of evidence. … The inquiry necessarily moves in a convoy carrying participants of widely different interests, motives, information and exposure. It is a tall order to ask any Commissioner to orchestrate this process to further the public interest in getting at the truth without risking unnecessary, avoidable or wrongful collateral damage on the participants." Accounting for these dangers, the Court endorsed the view that procedural requirements become more stringent the more inquiry participants are legitimately threatened by a proceeding: "At the most sensitive end of the spectrum, where misconduct is alleged that may have the consequence of civil or criminal liability … the full strictures of natural justice will protect those who are reasonably seen as potential targets" (*ibid* at para 29). Finally, see Simon Ruel, *The Law of Public Inquiries in Canada* (Toronto: Carswell, 2010) at 132 ("… the requirements of fairness would be minimal in the case of a policy inquiry, while the requirements of fairness for an investigative inquiry would be much higher") and 135 ("The duty of fairness owed to individuals who may be subject adverse

are no doubt different from trials, the use of judges to conduct them implies the propriety of judicial qualities to inquiry conduct.[5] How, then, are judges to determine the right balance between familiar methodological commitments drawn from the courtroom (and the standards of fairness they enforce), and the investigative imperatives of an inquiry?

Regrettably, it would appear that this tension is sometimes resolved by overreliance on the categorical distinction between inquiries and courts. Freed from the constraints of the bench, at least some commissioners appear to embrace the opportunity to depart from judicial standards of conduct. Commissioner Rand's conduct in the *Landreville Commission*,[6] considered in the Prologue, is an example. A less severe but more recent example is offered by the *Gomery Inquiry*[7] into the federal sponsorship scandal.

Justice John Gomery's 2003-2005 inquiry is unique for having summoned the testimony of two prime ministers, one of whom was still in office at the time of his appearance before the Commission. Few inquiries in recent memory have attracted the same public profile, or been the focal point of as much scandal. Commissioner Gomery himself may be most remembered for his colourful indulgence of media questions outside the inquiry hearings. In interviews given prior to the completion of the inquiry, the Commissioner characterized a central witness (who would later face criminal prosecution) as a "charming scamp … [who] got himself promoted just before retirement and thereby built up his pension."[8] He notoriously referred to golf balls

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findings by a public inquiry will generally be considered as being high, although not as high as that applicable in the judicial context").

[5] In *Consortium Developments*, the Supreme Court emphasized the judicial quality of an inquiry as providing participants a special assurance of fairness: "The fact a s. 100 inquiry is a <u>judicial</u> inquiry clearly seeks to balance the municipality's desire to have accurate information and useful recommendations from an independent Commissioner against the right of private citizens and others to have their legitimate interests recognized and protected. A good deal of confidence is inevitably and properly placed in the ability of the Commissioner to ensure the fairness of the inquiry" (*ibid* at para 27; emphasis in original).

[6] Canada, Royal Commission to Inquire into the Dealings of the Honourable Mr. Justice Leo A. Landreville with Northern Ontario Natural Gas Limited, *Report* (Ottawa: the Commission, 1966) (Commissioner: the Honourable Ivan C Rand), available online: <http://epe.lac-bac.gc.ca/100/200/301/pco-bcp/commissions-ef/rand1966-eng/rand1966-eng.pdf.>

[7] Canada, Commission of Inquiry into the Sponsorship Program and Advertising Activities, *Phase 1 and Phase 2 Reports* (Ottawa: Minister of Public Works and Government Services, 2005 & 2006) (Commissioner: the Honourable John H Gomery).

[8] See *Chrétien v Gomery*, *supra* note 4 at para 95.

bearing the signature of former Prime Minister Jean Chrétien as "small town cheap",[9] and commented that his role as Commissioner afforded him "the best seat in the house for the best show in town."[10] Subsequent to the inquiry, the Commissioner endorsed comments made by his director of media relations concerning the content of emails sent to the Commission from the general public. It would turn out that this official had greatly exaggerated the extent to which the emails expressed critical or suspicious views of Chrétien.[11]

The consequence of these actions was that Commissioner Gomery had some of his more important findings, including those attributing responsibility to Prime Minister Chrétien for inadequate oversight of the sponsorship program, overturned for unfairness by the Federal Court. In his reasons for judgment, Teitelbaum DJ reinforced several of the traditional distinctions between inquiries and trials:

> [U]nlike trials, commissions of inquiry are inquisitorial in nature rather than adversarial. … Although there are similarities in procedure, the role played by Commissioners is distinct from the role of a judge presiding over a trial. The nature of a Commissioner's report and recommendations are also vastly different than judicial decisions. This suggests that a lower content of procedural fairness is required.[12]

The judge nevertheless found that a high standard of procedural fairness was owed to Chrétien, applying the criteria from *Baker v Minister of Citizenship and Immigration*[13] and accounting for the gravity of reputational consequences to witnesses within the inquiry's scrutiny.[14] This required that the Commissioner observe stringent safeguards against bias, meeting the objective judgment of a reasonable and informed observer. Teitelbaum DJ found that Commissioner Gomery had failed to meet this standard, instead giving the impression that he had prejudged material issues and was biased against Chrétien.[15] He squarely rejected the Commissioner's claim that his

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[9] *Ibid* at para 93.

[10] *Ibid* at para 99.

[11] *Ibid* at paras 89-92.

[12] *Ibid* at paras 47-49.

[13] *Supra* note 3.

[14] *Supra* note 4 at para 60.

[15] *Ibid* at para 106.

engagement with the media was suitable to a commissioner's role in informing and educating the public:

> I agree with the Applicant that the Commissioner became preoccupied with ensuring that the spotlight of the media remained on the Commission's inquiry, and he went to great lengths to ensure that the public's interest in the Commission did not wane. This preoccupation with the media outside the hearing room had a detrimental impact on the fairness of the proceedings.
>
> …
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> The media is not an appropriate forum in which a decision-maker is to become engaged while presiding over a commission of inquiry, a trial, or any other type of hearing or proceeding. Indeed, the only appropriate forum in which a decision-maker is to become engaged is within the hearing room of the very proceeding over which he or she is presiding.[16]

While differentiating between the inquiry and a trial, Teitelbaum DJ thus emphasized an important respect in which the roles of commissioner and judge align. Both are to confine themselves to the sober and detached assessment of the evidence placed before them. Their public face should mirror (and ideally, be limited to) the face they present in hearings, and their advocacy for given conclusions and recommendations limited to reasoned articulation in a final report. In Teitelbaum DJ's words, they should "Let the decision speak for itself."[17]

One need not subscribe to the view of Commissioner Gomery's harshest detractors[18] to recognize that the error he committed was one of departure from judicial standards of behaviour. On the most sympathetic view, his engagement with the media may have been a well-intended attempt to encourage public understanding of the inquiry process, and done no more than confirm the impressions of most informed observers about the credibility of inquiry witnesses. The Commissioner was nevertheless wrong to believe he could make comments that, if he had made them as a judge presiding over a trial, would have clearly tarnished his impartiality. His miscalculation lay in the apparent belief that respite from a formally judicial role relieved him from judicial decorum.

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[16] *Ibid* at paras 101-104.

[17] *Ibid* at 105.

[18] See Ed Ratushny, *The Conduct of Public Inquiries: Law, Policy, and Practice* (Toronto: Irwin Law, 2009) at 173: "[Gomery] felt that his commission was popular because it exposed his personality to the public. In reality, he played fast and loose with the reputations of others for self-aggrandizement. He is probably a good person and does have a good reputation as a judge but the conduct described above is a demonstration of how a commissioner should not act. Besides the danger of having findings struck down, a commissioner has a legal obligation to treat witnesses with fairness, and a human obligation to treat them with dignity, respect and sensitivity."

The *Gomery Inquiry* is a relatively easy target for criticism, since asking that a commissioner behave "judicially" in the sense of refraining from inappropriate public commentary should not at all diminish the investigative strength or character of his proceedings (indeed, it should strengthen them by lending them greater credibility). Other circumstances will present judicial commissioners with more difficulty in balancing judicial propriety with the investigative context of an inquiry, however. One such area is the commissioner's role in the examination of witnesses.

It will be recalled that in distinguishing between inquiries and trials, the case law places considerable emphasis on a judge's passivity in court. That is, a judge presiding over a trial hears facts and arguments structured by the litigants themselves. It is these parties who effectively determine the legal and evidentiary bases on which their dispute is to be resolved. The judge may intervene in examinations or cross-examinations to ask questions, and she may direct the parties' lawyers to address matters of law that she considers essential to the disposition of the case. But the judge does not assume primary initiative in defining and testing the factual disputes that drive the case. This reflects more than simply a methodological difference between trials and inquiries. The judicial method embodies a particular conception of fairness (one that will be unpackaged in greater detail later in this chapter): it would be unfair for a judge to seize control over the factual issues and arguments that drive a trial, because she would thereby deprive the parties of their own opportunity to frame their dispute. Accordingly, a judge who intervenes frequently in a court proceeding to directly cross-examine witnesses, or who precludes the parties from making what they consider to be complete and relevant arguments, will be found to have acted unfairly.

An inquiry commissioner, however, has very direct responsibility to take control of the investigative task that he has been assigned: it is the commissioner, appointed under Order in Council, who must find answers to the questions posed in his terms of reference. If a commissioner is to satisfy his conscience in this respect, he cannot completely surrender control of his proceedings to participants, no matter how central their interest may be or how much their disputes mirror those of a litigated proceeding. The commissioner must get to the facts he needs in order to answer the important questions that have been put to him, and to formulate

credible and informed recommendations in his final report. It is therefor appropriate, and necessary, that a commissioner assume leadership in structuring the focus of evidentiary hearings and directing participants to concentrate their submissions on those issues that he accepts as relevant.

This account touches again on the central question of why judges should be appointed to lead inquiries. If the judge considers that his judicial status is a central reason for his appointment to the inquiry, he must confront a tension between his sense of due process drawn from experience in court, and his formal assignment as an investigator. This tension will produce practical dilemmas along the following lines: To what extent should a judicial commissioner intervene to examine witnesses directly, and to what extent should he defer to the work of counsel? How great a voice should the commissioner afford participants in determining the focus of inquiry hearings, including the identification of relevant witnesses and lines of examination? Should a commissioner confront witnesses he suspects of deception, or maintain an air of neutral observation throughout the hearings? Should the commissioner be involved in the pre-hearing gathering and scrutiny of evidence, or attempt to preserve detachment and thus an open mind until that evidence is presented publicly and can be contested by inquiry participants?

Each of these questions requires the commissioner to determine a position along what might be termed an adjudicative-investigative spectrum. The more the commissioner chooses procedures that visibly reinforce his neutrality and detachment – allowing commission counsel and participants to "take the lead" in structuring the presentation and scrutiny of evidence – the more the commissioner constructs a process resembling a trial. By so doing, however, the commissioner cedes a measure of control over the investigation itself. Conversely, by strongly taking command of the investigation – for example, by directing the calling of witnesses, conducting direct examinations, or requiring participants to focus their examinations on issues defined by the commissioner – the commissioner may increase the perception that he or she has adopted a prosecutorial posture, or has formed factual assumptions that he or she is seeking to verify. This may be at odds with the standards of fairness traditionally associated with judicial oversight of a proceeding. It may also diminish the extent to which inquiry participants are treated as stakeholders and not as means to a commissioner's investigative ends.

These dilemmas inevitably blend into related issues surrounding a commissioner's relationship with his or her counsel. Commission counsel is literally the commissioner's lawyer, acting in his service and at his direction.[19] While different commissioners may structure their relationships with counsel in different ways, the actions of commission counsel will always (at a minimum) be authorized by the commissioner, and may sometimes be directed by him. Accordingly, when commission counsel conducts a vigorous and adverse cross-examination, it is not unreasonable for a witness to question whether the commissioner himself has formulated adverse assumptions that he is seeking to verify. Similarly, when participants to an inquiry raise interlocutory motions that are opposed by commission counsel, they may question whether counsel is acting autonomously and pursuant to his or her own sense of the commission's best interest, or at the commissioner's direction; if the latter, it raises the question of whether the commissioner is standing as a judge in his own cause. If commission counsel assists the commissioner in drafting a final report, and advises him on conclusions, participants may question whether those conclusions are impacted by an apparently adverse mindset assumed by counsel in conducting cross-examinations.[20]

In Chapter 3 these dilemmas will be considered in detail, and resolutions proposed. For present purposes the point is to illustrate that determining appropriate standards of fairness in an inquiry proceeding requires a judicial commissioner to calculate the appropriate degree of fidelity to, or departure from, the judicial role instantiated in a courtroom. That the issues canvassed above

[19] See the Honourable Dennis O'Connor, "The Role of Commission Counsel in a Public Inquiry" (2003) 22:1 Advocates' Society Journal 9 at 10, in which O'Connor identifies commission counsel as the commissioner's "alter ego." O'Connor draws from this that commission counsel must guard against advancing any particular point of view, and ensure the complete and unbiased presentation of evidence to the commissioner (*ibid*). This characterization of the role of commission counsel will be considered again in Chapter 3. A commissioner's relationship with counsel, and the particular ethical dilemmas and imperatives to which it gives rise, has also been given valuable treatment by Ratushny, *supra* note 18 at 215-57, and John Sopinka, QC (as he then was), "The Role of Commission Counsel" in A Paul Pross et al., eds, *Commissions of Inquiry* (Toronto: Carswell, 1990) at 75-85.

[20] Sopinka cautions: "If [counsel] has been regarded as an adversary or a prosecutor and plays a role in the writing of the report, justice will not be seen to be done. … A commissioner who intends to enlist the aid of his counsel in preparing the report must, therefore, bear in mind that if he allows his gladiator to thrash about in the arena, the latter's transition to the dias may evoke a public clamour" (*ibid* at 85).

have elicited controversy in case law[21] should underscore that a judge's navigation of this dilemma is by no means straightforward.

(b) Navigating the Political Character of Inquiries

Ed Ratushny has astutely observed that "It seems contradictory to describe commissions of inquiry as both a 'check on politics' and a 'political tool' but both aspects are a reality."[22] It is trite to point out that inquiries are often constituted for the ostensible purpose of holding government organs or officials accountable for suspected misconduct. It is equally clear that, as executive instruments, they are political: whether constituted for politically strategic purposes (insulating a government from criticism, punishing a political rival, deferring responsibility for controversial decisions) or simply as a matter of exigency in the face of public pressure, political calculations inevitably underlie a government's choice of the inquiry instrument. Moreover, participants may seize on an inquiry to stage political goals.

Judicial service in a public inquiry is closely associated with the goal of accountability: as figures institutionally removed from the political process, judges are trusted to bring independent and credible scrutiny to controversial subjects. Yet the assumption of an inquiry commission means leadership of a process that is, to some extent at least, inherently politicized. Judges must confront the question of how much politicization is acceptable before their independence and integrity are unacceptably diminished. Public confidence in the judiciary would be threatened were judges to step outside their traditional role and serve as agents for the political fortunes of governments. Discerning whether this is the case will not always be an easy exercise, however. The governments that commission public inquiries are liable to politically influencing them in several ways: through strategic drafting of terms of reference, limiting funding to participants, and manipulating reporting deadlines, among other measures. The following examples are intended to illustrate the challenge of detecting these cases, and the difficulty judicial commissioners face in assessing whether their independence can be adequately preserved in the conduct of a given inquiry.

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[21] Allegations of unfairness arising from the relationship between a commissioner and counsel have been considered by the Supreme Court in *Krever*, *supra* note 2, and by the Federal Court (Trial Division), in *Stevens v Canada (AG)*, [2005] 2 FCR 629. These cases are each considered in Chapter 3.

[22] *Supra* note 18 at 20.

In the 2014 Ontario election, the leader of the province's opposition Progressive Conservative party promised that, if elected premier, he would commission a "judicial inquiry" into the provincial gas plant scandal.[23] The scandal arose from decisions made by Ontario's Liberal government to cancel construction of two gas-fueled power plants in the Greater Toronto Area in 2010 and 2011. The cancellations were seen to protect Liberal seats in the ridings where the developments were to take place, but at considerable cost to the public, as the government was required to indemnify contractors for the cancelled works. Subsequent disputes would arise as to the true cost of cancellation, and whether the government adequately safeguarded provincial interests in negotiating terms of indemnity with the contractors. The Liberal government resisted production of documents related to the cancellations when requested by a parliamentary committee, ultimately precipitating a motion that the then Minister of Energy was in contempt of Provincial Parliament.[24] An investigation by the provincial Auditor General found that the government had understated the true costs of the cancellations.[25] Moreover, an investigation by the provincial Privacy Commissioner suggested that political staffers had deliberately erased email records concerning the plant cancellations so as to conceal the true motives for the government's decision-making.[26] At the time of writing, a police investigation into the affair was ongoing.

The call for a judge-led inquiry into the gas plant scandal provides a strong hypothetical to illustrate the dilemmas a judge would face in deciding whether to accept such a commission. Clearly, the issues involved would be politically volatile. Given that the gas plant controversy

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[23] "Ontario Votes: Tim Hudack vows gas plants judicial inquiry", *CBC News* (18 May 2014) online: <http://www.cbc.ca/news/canada/toronto/ontario-votes-tim-hudak-vows-gas-plants-judicial-inquiry-1.2646863>: "I fully expect both Dalton McGuinty and Kathleen Wynne will have to stand before a judge and testify about their actions under oath to tell us exactly what happened, and why they made those decisions."

[24] Robert Benzie and Rob Ferguson, "Chris Bentley could face jail time if found in contempt of parliament", *Toronto Star* (2 October 2012) online: <http://www.thestar.com/news/canada/2012/10/02/chris_bentley_could_face_jail_if_found_in_contempt_of_parliament.html>.

[25] See Ontario, Office of the Auditor General of Ontario, *Oakville Power Plant Cancellation Costs – Special Report, October 2013* (Toronto: Queen's Printer for Ontario, 2013), and *ibid*, *Mississauga Power Plant Cancellation Costs – Special Report, April 2013* (Toronto: Queen's Printer for Ontario, 2013).

[26] Ontario, Office of the Information and Privacy Commission, *Deleting Accountability: Record Management Practices of Political Staff – A Special Investigation Report* (Toronto: Office of the Information and Privacy Commissioner, 2013) (Commissioner: Ann Cavoukian) online: <http://www.ipc.on.ca/images/Findings/2013-06-05-Ministry-of-Energy.pdf>.

occurred entirely during the mandate of a previous government, an inquiry would pose an excellent opportunity for a new government to expose a political adversary to harsh scrutiny while assuming little risk to itself. No matter how assiduously a judicial commissioner observed standards of fairness and judicial impartiality, any adverse conclusions against the subjects of his inquiry would be politically advantageous to the commissioning government. For this reason alone, a prospective judicial commissioner would have to approach the task with diffidence. The judge's reluctance might by exacerbated by the fact that other accountability institutions – a parliamentary committee, the Auditor General, the Privacy Commissioner, and the provincial police – had already been brought to bear on the controversy. He or she might question whether an inquiry would usurp the considered roles of these institutions in enforcing the checks-and-balances of a mature democracy. Should this be the case, the judge would be well-advised to decline the commission: rather than putting judicial independence and impartiality in the service of a worthy public cause, he or she would be liable to undermine the authority of existing accountability mechanisms whose work is interrupted or obscured by the publicity of an inquiry.

It would be false to assume that the judge's decision is clear-cut, however, as credible arguments can also be made in favour of accepting the commission. A government elected on the promise of commissioning an inquiry has a strong mandate to do so: a prospective commissioner would have to consider that the public has affirmed the importance of the inquiry through the democratic legitimacy it has conferred on the government. Moreover, an argument concerning the role of standing accountability mechanisms is susceptible to inversion. Recall Ratushny's classification of public inquiries as residual institutions that governments will evoke when other mechanisms fail to collectively embody a needed set of powers and values.[27] A judge might consider that recourse to an inquiry has been necessitated by the exhaustion of institutional alternatives, each of which have exposed concerning information within their respective spheres of authority, but none of which have the requisite jurisdiction to expose the whole story. Finally, a judge might decide that while political motives possibly underlie an inquiry, these are not for him or her to question. Just as the judge dutifully applies laws validly enacted, regardless of his personal appraisal of their merit, he may be prepared to accept an inquiry appointment that is validly enacted within the commissioning government's jurisdiction, believing that to do

[27] See Chapter 2, Part 2(c).

otherwise would be to engage in a kind of political judgment forbidden under the separation of powers.

I consider a possible resolution to this dilemma in Chapter 4. The point here is to illustrate the complexity of the issue for the prospective judicial commissioner, and in particular the manner in which a sense of judicial propriety (and respect for the separation of powers) may pull in two directions: one cautioning against involvement in a politicized task, the other cautioning against judicial scrutiny of the political motives underlying a jurisdictionally valid appointment.

Even after accepting an inquiry commission, political factors may intervene to affect a commissioner's independence in unforeseen ways. One area is in the financing of legal representation for inquiry participants. It is customary that prior to the public hearings phase of an inquiry, a commissioner receive applications from individuals and groups seeking standing to participate in those hearings. Provided the hearings are to proceed by way of the examination and cross-examination of witnesses, a grant of standing typically enables the recipient to be represented by his or her own lawyer, who conducts examinations, raises interlocutory motions, and makes formal submissions on a client's behalf. While discretion regarding who receives standing is typically reserved to the commissioner, the provision of public funds to support legal representation by participants is left to government. The commissioner will nevertheless recommend funding at specified rates, and for specified purposes (for example, the retention of one senior and one junior counsel for a limited duration of time) as part of his or her rulings on standing. In the ordinary course, he or she can expect the government to honour these recommendations. A negative precedent has recently arisen from British Columbia's *Missing Women Commission of Inquiry* (*MWCI*),[28] however.

The *MWCI* was appointed by the British Columbia government to scrutinize police investigations carried out over a five-year period concerning the disappearance of women from Vancouver's downtown eastside. It was alleged by friends and family members of the women, together with several community groups, that the disappearances had received inadequate attention and investigative resources. Following the conviction of serial murderer Robert

[28] British Columbia, Missing Women Commission of Inquiry, *Forsaken: The Report of the Missing Women Commission of Inquiry* (British Columbia: The Commission, 2012) (Commissioner: the Honourable Wally Oppal) [Oppal, *Report*].

Pickton in 2007 and the exhaustion of his legal appeals, the provincial government capitulated to public pressure and commissioned an inquiry focused on the adequacy of the police investigations. The Honourable Wally Oppal, a former provincial Attorney General and judge of the British Columbia Court of Appeal, served as Commissioner.

Commissioner Oppal granted standing to a number of individuals and groups whom he felt had a direct and substantial interest in the subject-matter of the inquiry. This included several community organizations who provided frontline services to survival sex workers and drug users in Vancouver's downtown eastside, and who thus possessed unique knowledge of the circumstances surrounding the missing women and a strong capacity to express community experiences, perspectives, and concerns.[29]

The Ministry of the Attorney General, which held discretion over the funding of inquiry participants, declined to fund legal representation for all but one of the groups – that representing surviving family members of Pickton's victims. This decision significantly curtailed the ability of the groups to participate in the inquiry, which involved the review of voluminous evidence and the ability to examine and cross-examine relevant witnesses. Despite Commissioner Oppal's attempt to facilitate their participation – both through a separate "Study Commission" process,[30] involving less formal hearings which obviated the need for legal representation, and by appointing special counsel to represent "Aboriginal Interests" and "Downtown Eastside Interests" in the formal evidentiary hearings[31] – several of the groups opted to boycott the inquiry. By denying them participation on equal terms with well-funded

[29] The Commissioner's own reasons recognizing the special value of these participants are contained in his Ruling on Participation and Funding Recommendations, 2 May 2011, available on the Commission's website: <www.missingwomeninquiry.ca/wp-content/uploads/2011/05/RulingonParticipationandFundingRecommendations.pdf>.

[30] The appointment of the Study Commission required an amendment to the inquiry's original terms of reference, which had conceived of the inquiry as a purely "hearings inquiry" under the provincial *Public Inquiries Act*, SBC 2007, C 9. This amendment was made before the Commissioner's ruling on standing, and as such was not a direct response to the denial of funding for certain participants. It nevertheless was intended to facilitate a broader and less formal means of community consultation than the evidentiary hearings allowed. The Study Commission included community forums in British Columbia's north and northwest; several expert roundtables; community hearings in the downtown eastside; and direct consultations with the family members of missing and murdered women. For an overview of the Study Commission process, see Oppal, *Report*, *supra* note 28, Volume IV: *The Commission's Process*, at 24-26 [Oppal, *Process*].

[31] Commissioner Oppal explains the appointment of special counsel in *Process*, *ibid* at 10: "Although unique to public inquiries, these appointments were, in some ways, akin to the role of amicus curiae."

organizational interests, such as the government and police, the groups regarding the inquiry as reproducing the societal prejudices at play in the subject-matter of the inquiry itself.[32]

Commissioner Oppal was very critical of the government's decision. In a private voicemail to the Attorney General, he complained:

> … These are the women who complained to the police about women being missing and were given the back of their hands … the police gave them the back of their hands to these women and disregarded what they had to say. So they can't cross-examine the police, who are of course well-armed with publicly funded lawyers …
>
> So anyway, I just wanted you to know that, it's how important this all is. And the government is now being seen as funding the people who allegedly [sic] done everything wrong and ignored the women, ignored the victims but [sic] not funding … will not go and fund the victims, and not fund the women, the poor aboriginal women. That's what the government is seen as. I just want you to know that.[33]

The Ministry of the Attorney General, itself a party to the inquiry's proceedings through its Criminal Justice Branch, subsequently alleged that this message implied the prejudgment of material issues. The Commissioner was forced to disclose the contents of the voicemail and publicly reiterate his impartiality.[34]

Unfortunately, these events weakened the reception of the Commissioner's report among the very individuals and groups whose confidence it was intended to restore.[35] A joint-statement by the Native Women's Association of Canada (NWAC) and Canadian Feminist Alliance for International Action (FAIA) powerfully expressed their disapproval:

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[32] See e.g. British Columbia Civil Liberties Association (BCCLA) et al., *Blueprint for an Inquiry: Learning from the Failures of the Missing Women Commission of Inquiry* (Vancouver: British Columbia Civil Liberties Association, 2012) at 5 and 25-26. The authors make the stark point that the public funds expended on legal fees for one senior commission counsel would likely have supported legal representation for all of the excluded participant groups combined, or financed the operation of a women's drop-in centre for a year (*ibid* at 26). The Commissioner himself addresses the boycott in Oppal, *Process*, *supra* note 30 at 9-10.

[33] British Columbia, Missing Women Commission of Inquiry, "Statement by Missing Women Commission of Inquiry Commissioner Wally Oppal", 30 June 2011, online: http://www.missingwomeninquiry.ca/wp-content/uploads/2011/08/2011-08-29-Statement-of-the-MWI-Commissioner.pdf.

[34] See the Commissioner's statement, *ibid*. It is noteworthy that the Commissioner emphasized his judicial background in attempting to provide assurance of his impartiality: "I hope that my judicial record, including 23 years on the County, Supreme and Appeal Court bench, demonstrates that I understood the need not to come to any conclusion before all of the evidence and submissions have been heard."

[35] See generally BCCLA, *supra* note 32 and Kim Stanton, "Intransigent Injustice: Truth, Reconciliation and the Missing Women Inquiry in Canada" (2013) 1 Transitional Justice Review 59 at 73-79.

> "The Native Women's Association of Canada was shut out of the B.C. Missing Women Commission of Inquiry," said Sharon McIvor of FAFIA. "The inquiry proceeded without Aboriginal women's organizations, without any Aboriginal organizations, and without the women's organizations who know about the lives of vulnerable women," ...
>
> "This process was discriminatory, and a betrayal of Aboriginal women and girls. Because the Government of British Columbia refused to provide funding for legal counsel for parties granted standing at the Missing Women Commission of Inquiry, the Inquiry itself violated the rights of the most vulnerable women. It excluded them; it did not listen to them; and it refused to put them on an equal footing with police and government representatives," said McIvor.[36]

In his final report, Commissioner Oppal lamented that the withdrawal of the groups diminished his access to high-quality, representative information and perspectives from members of the downtown eastside community. He reiterated that the denial of funding "was not in the public interest" and presented "a significant hurdle … and no doubt made the work of the Commission more difficult."[37]

The *MWCI* illustrates how politics may impact a Commissioner's discretion in a manner that will not be readily apparent on an inquiry's terms of reference. Commissioner Oppal wanted the affected community groups to participate in his inquiry, no doubt both so that they might have the dignity of being heard and so that their valuable knowledge and perspectives could contribute to his ultimate investigative task. His lack of authority over the legal funding of participants thus had a significant and negative impact on the manner in which he saw fit to conduct his inquiry. Indeed, it prompted many community stakeholders to reject the authority of the inquiry before Commissioner Oppal had even formulated his report. The decision to deny funding to the community groups was explicitly political: the government, having initiated the inquiry, sought to curtail its costs by limiting legal funding to those it identified as the most crucial participants.[38] By removing this discretion from the Commissioner, the government

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[36] Press Release: "Native Women's Association of Canada and Canadian Feminist Alliance for International Action Respond to Oppal by Calling for a National Public Inquiry and a Framework for Action to End Violence", Native Women's Association of Canada, 21 January 2013, online: www.nwac.ca/media/release/17-12-12.

[37] Oppal, *Process*, *supra* note 30 at 9-10.

[38] The Honourable Barry Penner, then British Columbia Attorney General, cited fiscal restraint as the driver of the government's decision to refuse funding to the groups: The Canadian Press, "Advocacy groups denied funding for missing women inquiry", 25 May 2011, CBC News BC, online: <http://www.cbc.ca/news/canada/british-columbia/story/2011/05/25/bc-missing-women-advocacy-funding.html>.

impacted the inquiry's fairness, the quality of its investigation, and its perceived legitimacy. I return to the example of the *MWCI* in Chapter 4 to consider how similar political pitfalls might be avoided in the conduct of future commissions.

A final example of political influence on a public inquiry warrants mention. As inquiries are creatures of Orders in Council, it is always possible for the appointing government to modify or terminate them by simply repealing or replacing the original Order. The case law suggests that once a government so acts, no principle of rule of law, fairness to inquiry participants, or judicial independence will impede this political decision.[39] The *Somalia Inquiry*[40] was appointed by the Chrétien government in 1995 to review the conduct of Canadian forces in Somalia. It was given broad and ambitious terms of reference, with a clearly impractical reporting deadline only nine months subsequent to its date of appointment.[41] Moreover, the Commissioners faced immediate difficulty obtaining document production from officials within the Department of National Defence (DND). Ultimately, they would be required to conduct special hearings focused

[39] See especially *Dixon v Canada (Somalia Inquiry Commission)*, [1997] 3 FC 169. See also Ruel, *supra* note 4 at 20-21: "The Executive may, in its discretion, revoke, amend or vary the appointment or the terms of reference of a commission of inquiry. When not specifically provided in public inquiry legislation, the Executive's power to revoke, amend or vary derives by necessary implication from the broad power under inquiries legislation to appoint commissioners of inquiry. The decision to create or revoke a commission of inquiry or amend or vary its appointment or terms of reference is political and not within the purview of the judiciary to review." Although never tested before a Canadian court, I suspect one caveat to this principle would arise were a government to vary an Order in Council in such a way as to explicitly interfere with the focus of a commissioner's investigation for politically strategic purposes – for example, by shutting-down questioning of government witnesses and directing the commissioner to scrutinize the conduct of individuals adverse in interest to the government. Such blatant interference with the commission's independence would prompt any principled commissioner to resign, and the unfairness it would eventuate to participants and witnesses would likely invalidate the inquiry by fundamentally denying natural justice.

[40] Canada, Commission of Inquiry into the Deployment of Canadian Forces in Somalia, *Dishonoured Legacy: The Lessons of Somalia Affair*, (Ottawa: Minister of Public Works and Government Service, 1997) (Chair: the Honourable Gilles Létourneau).

[41] The inquiry was originally constituted with Order in Council PC 1995 – 442. The Order required that the commissioners investigate and report on nine items pertaining the "pre-deployment" phase of the Canadian Forces' involvement in Somalia; nine items pertaining to the "In-Theatre" phase; one item "Post-Deployment"; and generally concerning "the chain of command system, leadership within the chain of command, discipline, operations, actions and decisions of the Canadian Forces and the actions and decisions of the Department of National Defence …". The Order was issued on 20 March 1995, and the inquiry – having not yet even acquired office space or basic administrative resources – and tasked with reporting by 22 December 1995. For commentary on the unfeasibility of the original appointment, see Ratushny, *supra* note 18 at 180, where he surmises that the inquiry may in fact have been "designed to fail."

exclusively on document production, precipitating considerable delay.[42] The Commissioners received several piecemeal extensions to their reporting deadline, but were eventually denied the timeframe they considered necessary and forced to accept a deadline that resulted in the inquiry's premature termination. They tendered an incomplete report, a considerable portion of which was devoted to criticism of the government for failing to marshal compliance with the inquiry's summoning of relevant evidence.[43]

While ostensibly taken to curtail ballooning costs and delay, the decision to terminate the inquiry was rendered just prior to the summoning of senior officials within the federal government.[44] Critics suggest that the decision was taken to insulate government officials from escalating "bad news" and criticism.[45] The Chrétien government nonetheless suffered no long-term political consequences from the decision, and was subsequently re-elected with a parliamentary majority.[46]

The *Somalia Inquiry* provides a cautionary reminder that judicial commissioners do not enjoy the same independence as that afforded by security of tenure on the bench. They may always face the threat of a government terminating (or threatening to terminate) their inquiry, together with the threat of criticism by the very governments that appoint them. Whether the commissioner

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[42] The Commissioners' problems with document production are chronicled in detail in Chapter 39 of their Report ("Openness and Disclosure of Documents"), *supra* note 40, Vol. 5.

[43] The Commissioners' account of the premature termination of their inquiry is contained in their Report, *supra* note 40 at Chapter 42: "The Inquiry's Unfinished Mandate", 1401-42.

[44] The Commissioners observed in their Report: "Our schedule was aborted just as we were beginning to question the highest levels of leadership of the Canadian Forces and the Department of National Defence and to [investigate] the allegations of cover-up with respect to some incidents. An immediate result was the withdrawal of a number of notices already sent to individuals warning them of possible adverse comment on their conduct. Thus, we could address systemic issues arising out of in-theatre and post-deployment events, but could not, in our report, identify any individual misconduct or failings involved. The Government's decision effectively allowed many of those in senior leadership positions during the deployment to avoid entirely accountability for their conduct, decisions, and actions during and after the mission": *supra* note 40, Executive Summary at 42.

[45] See e.g. Ratushny, *supra* note 18 at 46-50 and Tamar Witelson, "Declaration of Independence: Examining the Independence of Federal Public Inquiries" in Allan Manson and David Mullan, eds, *Commissions of Inquiry: Praise or Reappraise?* (Toronto: Irwin Law, 2003) 301 at 317-18.

[46] Ratushny suggests: "The implication is that, if the government wants a superficial or shoddy report and a commissioner is willing to accept a corresponding mandate, that is the end of the matter. Such a commissioner has no guaranty of independence to conduct a thorough inquiry" (*ibid* at 280).

can rely on public backlash as insulation against such forms of political interference will be a matter of context. Certainly, where judicial commissioners are criticized by their appointing government – for example, by calling into question their efficiency or fidelity to their terms of reference – the consequent danger lurks that the judiciary itself is indirectly censured.[47]

(c) Confronting Secrecy and National Security Claims

Three of the past six inquiries commissioned by Canada's federal government have concerned the efficacy and integrity of Canadian agencies responsible for maintaining national security. The *Arar Inquiry*,[48] commissioned in 2004, investigated the conduct of Canadian officials in relation to Maher Arar, a Canadian citizen falsely suspected of involvement in a terrorist group and extradited by American officials to Syria where he was detained and tortured. The Honourable Dennis O'Connor, then Associate Chief Justice of Ontario, served as Commissioner. The *Iacobucci Internal Inquiry*[49] was appointed in 2006 pursuant to a recommendation of the *Arar Inquiry*, and reviewed the conduct of Canadian officials concerning the detention of three additional citizens in Syria and Egypt.[50] Its Commissioner was the Honourable Frank Iacobucci, a former justice of the Supreme Court of Canada. Commissioner Iacobucci's inquiry was distinguished by its "private" nature. As the Commissioner himself explained:

> The inquiry was required to be internal and presumptively private. The terms of reference were very specific in describing the inquiry as an "internal inquiry" and in requiring that I take all steps necessary to ensure that the inquiry was conducted in private, except to the extent that I determined that, to ensure the effective conduct of the inquiry, specific portions should be conducted in public.[51]

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[47] This observation is made outside the Canadian context by the Honourable Jack Beatson, Justice of the High Court of England and Wales (Queen's Bench Division), in his 2004 Lionel Cohen Lecture to the Faculty of Law, Hebrew University in 2004, "Should Judges Conduct Public Inquiries" (2003-2004) 37 Isr L Rev 238 at 257-61.

[48] Canada, Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, *Report of the Events Relating to Maher Arar: Analysis and Recommendations* (Ottawa: Public Works and Government Services Canada, 2006) (Commissioner: the Honourable Dennis O'Connor) [O'Connor, *Report*].

[49] Canada, Internal Inquiry into the Actions of Canadian Officials in Relation to Abdullah Almalki, Ahmad Abou-Elmaati, and Muayyed Nureddin, *Public Report* (Ottawa: Public Works and Government Services Canada, 2008) (Commissioner: the Honourable Frank Iacobucci) [Iacobucci, *Report*].

[50] See O'Connor, *Report* at 267-78, especially 277-78, in which the Commissioner recommends that "these cases should be reviewed and … the reviews should be done through an independent and credible process that is able to address the integrated nature of the underlying investigations" [O'Connor, *Final Report*]. The Commissioner cautioned against creation of a new, full-scale public inquiry: see note 68, *infra*.

[51] Iacobucci, *Report* at 30.

Finally, the *Air India Inquiry*[52] was appointed in 2006 to review the conduct of Canadian law enforcement, transportation, and security agencies in failing to prevent the bombing of Air India Flight 182, Canada's worst case of domestic terrorism. The Honourable John Major, a former justice of the Supreme Court, served as Commissioner.

Each of these inquiries dealt by necessity with government claims of national security confidentiality ("NSC"). These are claims by designated ministers of the federal government that certain testimony or documentary evidence be treated confidentially, due to the concern that its public release would be damaging to national security or to Canada's international relations. Under the *Canada Evidence Act*,[53] an assertion of NSC imposes an obligation on officials presiding over various proceedings (including inquiry commissioners) to treat the designated evidence as presumptively confidential; unless challenged, its review must take place in camera, and it may not be disclosed in a public decision or report.[54] The *Act* also stipulates a process by which NSC claims may be tested before the Federal Court.[55] Should a commissioner reject the assertion of NSC and find him- or herself incapable of reaching agreement with counsel for the federal government, the only recourse is via the judicial review procedure stipulated by the *Act*. This arose as a significant impediment in each of the *Arar*, *Iacobucci*, and *Air India* inquiries.

In the *Arar Inquiry*, the scope of government NSC claims resulted in the majority of the inquiry's formal hearings occurring in camera, with only the Commissioner, commission counsel, counsel for the Attorney General, and the applicable government witnesses present.[56] Nevertheless, the Commissioner intended that at the conclusion of these hearings he would issue "an *omnibus* ruling with respect to the Government's NSC claims, thereby providing a means for disclosing, in advance of the [public] hearings, the part of the evidence that I considered could be made

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[52] Canada, Commission of Inquiry into the Investigation of the Bombing of Air India Flight 182, *Air India Flight 182: A Canadian Tragedy* (Ottawa: Minister of Public Works and Government Services, 2010) (Commissioner: The Honourable John C Major).

[53] RSC 1985, c C-5.

[54] See generally s 38 of the *Act*, *ibid*, "International Relations and National Defence and National Security."

[55] *Ibid* at s 38.04.

[56] O'Connor, *Report*, *supra* note 48 at 295. Seventy-six hearing days took place in camera, compared with forty-five hearing days that occurred publicly. Notably, Maher Arar himself was excluded from the in camera hearings, as was his counsel.

public."[57] He appointed specialized amicus curiae counsel to aid him in this task by selectively challenging the NSC claims.[58] Moreover, the Commissioner intended to publish summaries of the in camera hearings, "indicating what evidence the Government claimed was subject to NSC" and divulging as much information as he considered possible.[59] In this manner, the Commissioner sought to honour the public character of his inquiry, affirming his belief that "Exposure to public scrutiny is unquestionably the most effective tool in achieving accountability for those whose actions are being examined and in building public confidence in the process … ."[60]

Commissioner O'Connor was ultimately forced to abandon this approach, however. The government's assertion of NSC claims were scrupulously defended, and it became clear from an early stage that any attempt by the Commissioner to release summaries of the in camera hearings, or to selectively reject NSC claims, would eventuate judicial review. Although the Commissioner considered the claims to be overbroad, opposing them threatened to burden the inquiry with continuous litigation, disruption, and delay.[61] After consulting inquiry participants, the Commissioner decided to withhold judgment on all NSC claims until the preparation of his final report.[62] This meant that the public hearings would proceed with no knowledge on the part of participants, including Mr Arar, of what transpired during the private hearings. The Commissioner would prepare a draft report based on his own evaluation of the NSC claims. The Attorney General could then review and challenge the Commissioner's determinations prior

[57] *Ibid* at 294.

[58] *Ibid* at 293-94.

[59] *Ibid* at 294.

[60] *Ibid* at 304.

[61] *Ibid* at 302: "… the Government issued a court challenge to my first ruling on information I considered should be disclosed publicly. The prospect of litigation at that point in the inquiry was very troubling. It seemed evident that litigating the government's NSC claims on a piecemeal basis, ruling by ruling, was a course that would at best lead to enormous delays and could actually bring the Inquiry to a complete and final halt."

[62] *Ibid* at 295-96.

to the report's public release. In the result, a court decision was necessary to resolve persistent disputes between the Commissioner and government concerning the scope of disclosure.[63]

Commissioner O'Connor concluded in his final report that the government had misused the claims as bargaining devices and to shield itself from embarrassment.[64] Although the Commissioner was satisfied of his ability to complete a thorough investigation, he implied that the public interest was damaged by the inquiry taking place largely behind closed doors.[65]

Commissioners Major and Iacobucci faced similar difficulties in the conduct of their inquiries. When the federal government made its initial evidentiary productions to the *Air India Inquiry*, a large volume of the materials were redacted due to NSC concerns. Commissioner Major responded that failure to publicly scrutinize much of the evidence would render his task "meaningless" and threatened to resign.[66] The government consequently negotiated a broader release of materials to the commission. The Commissioner had notable leverage in this case, as his inquiry had been an election promise of the Harper government.[67] He likely also drew from Commissioner O'Connor's experience to approach the government's NSC claims with reticence and skepticism.

The unique secrecy of the *Iacobucci Inquiry* was a deliberate response to the procedural difficulties and conflict that had beset Commissioner O'Connor's inquiry.[68] Commissioner Iacobucci's

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[63] *Canada (AG) v Canada (Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar)*, [2008] 3 FCR 248.

[64] O'Connor, *Report*, *supra* note 48 at 302-304.

[65] *Ibid* at 302: "… the public hearing part of the Inquiry could have been more comprehensive than it turned out to be, if the Government had not, for over a year, asserted NSC claims over a good deal of information that eventually was made public. … This 'overclaiming' occurred despite the Government's assurance at the outset of the Inquiry that its NSC claims would reflect its 'considered' position and would be directed at maximizing public disclosure. The Government's initial NSC claims were not supposed to be an opening bargaining position."

[66] See discussion in Ratushny, *supra* note 18 at 212.

[67] *Ibid.*

[68] Commissioner O'Connor signaled in his recommendation for a further inquiry that it should not be subject to the same scale of openness as a public inquiry: "My experience in conducting this Inquiry indicates that conducting a public inquiry in cases such as these can be a tortuous, time-consuming and expensive exercise. Quite properly, the public inquiry process brings with it many procedural requirements for openness and fairness. … [T]here are more

interpretation of his mandate, while drawing criticism from some inquiry participants,[69] resulted in all testimonial evidence being gathered via private interviews in which only commission counsel, counsel for the government of Canada, and the individual witnesses were present. The documentary evidence gathered by the Commission was treated as absolutely confidential and never disclosed to participants or their counsel. A conflict nevertheless arose when the government objected to certain information that the Commissioner intended to disclose in his public report. Although the Commissioner was obliged to respect the government's NSC claims by releasing a redacted report, he also gave notice of his intent to seek judicial review of the claims under the *Canada Evidence Act*. The threat of such litigation appears to have motivated a compromise, as the Commissioner was able to release a supplement to his report disclosing additional information that had previously been withheld.[70]

It is worth noting that the Supreme Court of Canada has recently corroborated the view that the federal government is prone to overclaiming national security confidentiality. While upholding Canada's revised security certificate regime in *Canada (Citizenship and Immigration) v Harkat*,[71] the Court nevertheless criticized the federal government for having requested that much of the case be heard in camera, a truly extraordinary measure for hearings at the Supreme Court. In comments preliminary to the majority decision, McLachlin CJ observed:

> At the request of the ministers, this Court conducted two distinct hearings on this appeal. One was open to the public, while the second was held behind closed doors. Having heard the confidential submissions, it is my view that it was unnecessary to conduct a portion of the appeal hearing behind closed doors.
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> …
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> The issues in this appeal do not turn on confidential information and could have been debated fully in public without any risk of disclosure, supplemented where necessary by brief closed written submissions and by the closed record. …

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appropriate ways than a full-scale public inquiry to investigate and report on cases where national security confidentiality must play such a prominent role" (O'Connor, *Report*, *supra* note 48 at 277-78).

[69] See e.g. Jasminka Kalajdzic, "Outsiders: the Sources and Impact of Secrecy at the Iacobucci Inquiry" (2010-2011) 36 Queen's LJ 161, and further discussion in Chapter 4.

[70] Canada, Internal Inquiry into the Actions of Canadian Officials in Relation to Abdullah Almalki, Ahmad Abou-Elmaati, and Muayyed Nurredin, *Supplement to Public Report* (Ottawa: Public Works and Government Services Canada, 2010) (Commissioner: the Honourable Frank Iacobucci).

[71] 2014 SCC 37.

> The content of the closed hearing overlapped significantly with the open hearing and did not assist this Court in deciding the issues before it. It served only to foster an appearance of opacity in these proceedings, which runs contrary to the fundamental principles of transparency and accountability.[72]

If Canada's highest court is threatened by overclaiming of NSC, then inquiry commissioners – whose appointment and removal are subject to the whim of an executive master – are especially so. The open court principle is among the most basic tenets of Canada's justice system, and of judicial ethics. It reflects not just a procedural feature of courtroom litigation, but a substantive commitment to justice – namely, the idea that a maximally fair decision is one that exposes the decision-maker to the utmost transparency and scrutiny. As Commissioner O'Connor observed: "Openness and transparency are hallmarks of legal proceedings in our system of justice. … 'In any constitutional climate, the administration of justice thrives on exposure to light – and withers under a cloud of secrecy.'"[73]

Occasionally, judges are obliged preside over court proceedings in which confidentiality concerns require in camera hearings, national security certificate reviews being one of them. But in court, judges have the ultimate authority to decide whether or not to accept a government claim for secrecy. Should such a claim be declined, the government is left with no alternative other than to proceed with a public hearing or to abandon the process. Judicial commissioners have no such final authority. They may be confronted with the dilemma of facing ongoing litigation precipitated by judicial review or capitulating to an inadequately transparent process; or they may be forced to contemplate resignation where confidentiality claims fundamentally undermine their capacity to effect a fair and open inquiry; or they may face acceptance of a commission that the government has deliberately mandated to take place in secret. Each scenario would require a conscientious judge to contemplate whether the denial of transparency undermines the judicial integrity that he or she is intended to contribute to the process.

(d) Polycentricity

The challenge of polycentricity is the most encompassing of those confronting judicial inquiry commissioners, and will receive detailed attention in Part 3 below. In summary terms,

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[72] *Ibid* at paras 23-26.

[73] O'Connor, *Report*, *supra* note 48 at 304, quoting Fish J in *Toronto Star Newspapers Ltd. v Ontario*, [2005] 2 SCR 188, 2005 SCC 41 at para 1.

polycentricity refers to a type of issue or problem that is multi-centered, engaging diffuse societal interests and effects such that its effective management cannot depend on a single axis of decision-making.[74] The policy decisions of governments are quintessentially polycentric: that those decisions are intended to be taken on the advice of a professional civil service, and subject to the democratic accountability of elected decision-makers, each reflect the understanding that sound public policy must account for diverse stakeholders, perspectives, and concerns.

The distinctions drawn in the case law between inquiries and courts are implicitly (and sometimes explicitly) concerned with polycentricity. Courts are intended to decide questions of law, not policy. Their decisions are shaped and bounded by legislation and precedent. They are also bounded by the questions of law presented to them in the disputes of litigating parties. Conceptually at least, the effects of their decisions are to be confined to those parties: they are to be specific and limited, not diffuse and polycentric.[75]

Inquiries, however, are centrally concerned with questions of policy: indeed, they mandate commissioners to formulate policy recommendations derived from their investigative reviews. Public inquiries thus demand that judicial commissioners grapple with a different type of decision-making, engaging different considerations and methods, than they would typically face in a court. Indeed, there is a risk that duplication of court-like processes may impede a judicial commissioner from reaching good polycentric recommendations and conclusions, the reason being that adjudicated decisions risk framing issues through the interests of disputing parties, rather than through the diverse vantage points present in broader society.

The danger posed by a possible disconnect between polycentricity and the judicial methods of a commissioner is a central focus of this thesis. I will argue at the conclusion to this chapter that adjudicative methods are not, in fact, incompatible with the work of some public inquiries, but that their capacity to accommodate polycentric issues is a matter of degree that must be assessed by judicial commissioners on a case-by-case basis. The point here is to acknowledge the

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[74] See generally Lon L Fuller, "The Forms and Limits of Adjudication" (1978-79) 92 Harv L Rev 353.

[75] I stress that this is a conceptual characterization of judicial decisions. Clearly, the reality is that many judicial decisions do have far reaching effects touching more than just the immediate parties to a dispute. This will be explored more fully in Part 3.

legitimacy of the concern, and stress that it is one which judicial commissioners must be mindful of. A practical example will help bear out its implications.

The *Cohen Inquiry* was commissioned by the federal government in 2009 to investigate the decline of Sockeye Salmon in British Columbia's Fraser River. For three years preceding the inquiry, the annual return of sockeye to the river had been dramatically below historical volumes, threatening the regional ecology and the livelihoods of local fishers and First Nations. The Honourable Bruce Cohen, a judge of the Supreme Court of British Columbia, was appointed Commissioner. Commissioner Cohen's terms of reference directed him (in part):

> …
>
> (B) to consider the policies and practices of the Department of Fisheries and Oceans (the "Department") with respect to the sockeye salmon fishery in the Fraser River – including the Department's scientific advice, its fisheries policies and programs, its risk management strategies, its management of Department resources and its fisheries management practices and procedures, including monitoring, counting of stocks, forecasting and enforcement,
>
> (C) to investigate and make independent findings of fact regarding
>
> (I) the causes for the decline of the Fraser River sockeye salmon including, but not limited to, the impact of environmental changes along the Fraser River, marine environmental conditions, aquaculture, predators, diseases, water temperature and other factors that may have affected the ability of sockeye salmon to reach traditional spawning grounds or reach the ocean, and
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> (II) the current state of Fraser River sockeye salmon stocks and the long term projections for those stocks, and
>
> (D) to develop recommendations for improving the future sustainability of the sockeye salmon fishery in the Fraser River including, as required, any changes to the policies, practices and procedures of the Department in relation to the management of the Fraser River sockeye salmon fishery[.]
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> …[76]

Two aspects of these terms are immediately striking. The first is their breadth: they asked the Commissioner not only to review the relevant policies and practices of an entire federal department, but also to consider any possible causes for the sockeye decline, including but not limited to the vague and encompassing possibilities listed in the terms. The second is that they directed the Commissioner to answer questions of science, both at a high level (what is causing

[76] Canada, Commission of Inquiry into the Decline of Sockeye Salmon in the Fraser River, *Final Report - Volume 1: The Sockeye Fishery* (Ottawa: Public Works and Government Services Canada, 2012) (Commissioner: The Honourable Bruce I Cohen), Appendix 1: Terms of Reference.

the sockeye decline?) and at a level of specificity (what is the likely volume for future sockeye returns?). There is at least a superficial oddness in posing these questions to a judge. If we accept the premise that appointment of a judicial commissioner confers valuable judicial symbolism on the process – for example, a special quality of independence and integrity, or a special skill in weighing evidence and assessing credibility – then we are left to ask why *those* qualities are specially demanded in respect of *these* questions? Is the implication that the department of fisheries and oceans may be so completely lacking in accountability, or its officials so lacking in credibility, that their integrity requires testing from the distinct vantage point of a judge? Or that the issues raised by participants in the inquiry are likely to be so contested that they demand the judge's special adjudicative and evidentiary skills? If either were the case, this would seem to be undermined by the further proviso in the Commissioner's terms of reference directing him:

> … to conduct the inquiry without seeking to find fault on the part of any individual, community or organization, and with the overall aim of respecting conservation of the sockeye salmon stock and encouraging broad cooperation among the stakeholders.[77]

The encouragement of broad cooperation amongst stakeholders is not an obvious component of the judicial repertoire. The terms of reference thus confronted the Commissioner with polycentricity at (at least) three different levels: in assessing the efficacy of policies and practices within a government bureaucracy; in pursuing answers to questions of science; and in fostering cooperation amongst diverse groups and interests impacted by the sockeye fishery.

For his part, Commissioner Cohen conducted his inquiry as a classic hybrid process, combining formal evidentiary hearings, in which witnesses were led and examined by lawyers, with more informal public forums in the affected communities, site visits, commissioned research studies, and consultation with a scientific advisory panel.[78] Notably, despite the restriction in his terms of reference that the Commissioner not reach findings of fault, he determined that he was empowered to report instances of misconduct. While public sector unions representing employees of the department of fisheries and oceans opposed this interpretation of the Commissioner's mandate, it was supported by the government of Canada, amongst other parties. The government reasoned that a "spectrum exists between public inquiries that might be

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[77] *Ibid.*

[78] See *ibid*, *Volume 3: Recommendations – Summary – Process*.

referred-to as 'study inquiries' and public inquiries that are focused on investigating potential misconduct."[79] This inquiry fell "somewhere in the middle of the spectrum";[80] accordingly, while the Commissioner should not "seek" to make findings of fault (that is, treat it as a core aspect of his mandate), he was entitled to opine on misconduct as a function of his fact-finding responsibility. The Commissioner effectively adopted this interpretation in his Ruling on Interpretation of Terms of Reference:

> … in my opinion, the background to my appointment, together with the language used in both the preamble to and the provisions of the Terms of Reference when considered as a whole, … reflect that to the extent the evidence leads me to a conclusion that any individual, community or organization has engaged in conduct which, directly or indirectly, is a factor causing or contributing to the decline of Fraser River sockeye salmon; or that the conduct of any individual, community or organization forms the basis for making recommendations to change policies, practices and procedures in relation to the management of the fishery, then I am authorized to make findings or recommendations based upon that conduct.[81]

The Commissioner went on to caution that his ruling should not be taken as an invitation for participants to pursue lines of examination intended to "point fingers" or single-out other parties for blame.[82]

Commissioner Cohen's construal of his terms of reference mirrors the vast majority of investigative commissions in which findings of misconduct are framed not as ends in their own right, or as focal points for an inquiry, but as means to the end of stating accurate and informative factual findings. The volume and severity of such findings will be a matter of degree flowing from individual context: one would certainly expect more findings of misconduct to flow from an inquiry investigating issues of malfeasance or corruption than from an inquiry investigating a broad environmental concern for which human action may be a contributing factor. Nevertheless, the potential for findings of misconduct engages, at minimum, reputational interests on the part of those affected by an inquiry, which in turn may lead to their participation in that inquiry being oriented to self-defence. It should also be noted that inquiries engage clear

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[79] See Canada, Commission of Inquiry into the Decline of Sockeye Salmon in the Fraser River, Ruling on Interpretation of Terms of Reference, 15 September 2010 at para 13, available online: <http://epe.lac-bac.gc.ca/100/206/301/pco-bcp/commissions/cohen/cohen_commission/LOCALHOS/EN/RULINGS.HTM.>

[80] *Ibid*.

[81] *Ibid* at para 25.

[82] *Ibid* at para 28.

legal and other material implications for stakeholders even absent findings of misconduct: the recommendations of the *Cohen Inquiry* (should they have been adopted in policy) were sure to impact fishers, fish farmers, First Nations, tourism-related business, and industries with downstream effects on the Fraser River estuary. Indeed, these interests were plainly evident in the submissions and witness examinations conducted by the various participants in the inquiry.

Liora Salter has observed that inquiries are prone to becoming staging grounds for the strategic interests of their participants, expressed in particular through the assertion of legal rights and defence against possible liability.[83] Although a commissioner may offset this effect through alternate hearings processes, commissioned research studies, and diverse means of community consultation, the staging of strategic and legal interests through an inquiry is almost certain to affect both the content and framing of issues before a commissioner and accordingly the commissioner's final conclusions. Moreover, it may influence the *type* of participant heard most amply by a commission. Recall that the innovativeness of Commissioner Berger's inquiry into the proposed Mackenzie Valley Pipeline lay in the equal evidentiary weight it afforded to the relatively informal testimony and lived experiences of community participants. By contrast, the *Missing Women Commission of Inquiry* illustrates the negative potential for resource inequality to foster unequal participation at an inquiry, with consequent effects on the quality and legitimacy of investigative outcomes.

The point here is a simple one: an inquiry that touches on reputational, legal, material, or other important interests, and that provides a forum for the protection of those interests through legal advocacy, is almost certain to have its substantive outcomes impacted as a result. We can expect that an inquiry conducted "judicially", in the sense of drawing some of the procedural features of a courtroom, may reach different findings than one that denies participants legal representation altogether and facilitates a different manner of participation. This is not necessarily a bad thing. It may be that an inquiry combining opportunities for legal advocacy with alternate research and investigative practices is a highly effective means of answering questions of the type posed to Commissioner Cohen. But that assumption should not be taken for granted. It would be damaging for a commissioner to instigate a heavily "legalized" process

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[83] Liora Salter, "The Two Contradictions in Public Inquiries" in A Paul Pross et al., eds, *supra* note 19, 173 at 174-75.

where the central aims of an inquiry were inimical to the expression of different interests and perspectives through legal advocacy. That is the challenge of polycentricity which confronts judges in deciding whether or not to accept a commission: they must assess whether a task demands fundamentally different values, and consequently different procedures, than they are equipped to bear. I consider this challenge again in Chapter 5.

(e) Summary

The challenges considered in the preceding examples have a special dimension for judges because of the conflicts they raise with traditional judicial methods and values. The challenge of instilling fairness demands that the judge assess an appropriate degree of departure from adjudicative methods in order to accommodate the investigative focus of the inquiry. The challenge of politicization exposes the judge to an unfamiliar risk of interference with his or her independence. Judicial commissioners facing NSC or other secrecy claims face a conflict with the fundamental principle that justice be open and transparent, as embodied in the open-court principle. Finally, judges making polycentric decisions face the challenge of accounting for diffuse societal interests and effects, engaging methodological demands very different from traditional adjudication.

That judicial commissioners face these challenges does not, in itself, suggest that their service in public inquiries is necessarily improper. It does, however, suggest that guidance of some form – in law, judicial ethics, or both – would be valuable in helping judges to avoid pitfalls and lending a measure of coherency and consistency to judicial service in public inquiries. In the next Part, I consider Canada's existing regulatory framework in this respect. A review of Canada's doctrine of separation of powers, and of the regulatory landscape governing judicial appointments to inquiries, will reveal gaps and ambiguity in confronting the challenges outlined above. Thus the need is established for stronger analytic guidance, which I begin to develop in Part 3.

2. The Regulation of Judicial Service on Commissions of Inquiry

This Part introduces Canada's existing regulatory framework for the service of judges as inquiry commissioners. The term "regulatory" is used to denote the fact that the relevant standards in this area arise not just from law, but from ethical guidelines that have been adopted by Canada's judiciary. I begin with an overview of Canada's doctrine of separation of powers, which while protecting a purposive core of judicial independence also allows for relative

flexibility in the extra-judicial service of judges. The statutory landscape governing Canada's judiciary is then explored. Finally, I consider relevant portions of the Canadian Judicial Council's handbook on *Ethical Principles for Judges*[84] and its 2010 *Protocol on the Appointment of Judges to Commissions of Inquiry*.[85] I conclude that despite the merit of these regulatory principles, a more robust analytic approach is needed to assess the propriety of judicial service on public inquiries, and to inform the conduct of commissions once judges have accepted such appointments.

(a) Canada's Separation of Powers

Any discussion of judicial service within an executive institution must start with the separation of powers: the doctrine of constitutional law specifying that the legislative, executive, and judicial branches are to be jurisdictionally distinct. Neither the *Constitution Act, 1867*[86] nor the *Constitution Act, 1982*[87] provide a detailed statement of the jurisdiction and powers of Canada's judiciary. As such, Canada's practices concerning the separation of powers have emerged as a fusion of traditions inherited from the United Kingdom with Canada's own domestic jurisprudence. Peter Hogg has observed:

> There is no general 'separation of powers' in the [Constitution]. The [Constitution] does not separate the legislative, executive and judicial functions and insist that each branch only exercise 'its own' function. … Either Parliament or the [provincial] Legislatures may by appropriate legislation confer non-judicial functions on the courts and … may confer judicial functions on bodies that are not courts.[88]

Despite this lack of formal recognition in constitutional text, Canada does observe boundaries between the judiciary and the political branches of government. The courts have derived these boundaries inferentially from several sources, including both written and unwritten aspects of the Constitution.

Three sources in particular have proved significant. The first is the judicature provisions contained in ss 96-101 of the *Constitution Act, 1867*. While expressly concerned with the credentials, tenure, and remuneration of judges appointed by the federal government, these

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[84] Canadian Judicial Council, *Ethical Principles for Judges* (Ottawa: Canadian Judicial Council, 1998).

[85] Canadian Judicial Council, *Protocol on the Appointment of Judges to Commissions of Inquiry* (Ottawa: Canadian Judicial Council, 2010).

[86] 30 & 31 Victoria, c 3 (UK).

[87] Being Schedule B to the *Canada Act 1982*, (UK) 1982, c 11.

[88] Peter Hogg, *Constitutional Law of Canada* (Toronto: Carswell, 1996) at 180.

provisions have been interpreted to protect a zone of inviolable jurisdiction for certain courts – what Peter Hogg has termed a "little separation of powers".[89] The second is the *Charter*, which reinforces judicial independence by cementing the institutional role of courts as a check on powers emanating from the legislative and executive branches. Finally, Canada's courts have interpreted the Constitution to include a broad, unwritten principle of judicial independence. Despite the lack of firm textual foundation for this principle in the Constitution, it has been used to provide robust and highly specific institutional safeguards for the courts. Taken together, the judicature provisions, the *Charter*, and the unwritten principle of judicial independence establish a substantial, purposive doctrine of separation of powers. The operation of each of these sources is considered below.

(i) The Judicature Provisions

Canada's justice system is a field of shared jurisdictional responsibility between the federal and provincial governments. Under s 92(14) of the *Constitution Act, 1867*, the provinces have broad jurisdiction to legislate concerning the "administration of justice" within their respective territories. Accordingly, the vast majority of disputes that arise in Canada's justice system are decided in provincial courts whose jurisdiction and powers are prescribed by provincial statute. These courts do not possess inherent jurisdiction: they are creatures of statute with no powers to decide legal claims outside of those specified in their constitutive legislation. For this reason they are often referred to by the somewhat misleading nomenclature of "inferior" courts.

Section 96 of the *Constitution Act, 1867* reserves the power to appoint courts of inherent jurisdiction – or superior courts – to the federal government alone. Sections 98-100 secure federal jurisdiction over the remuneration and tenure of judges appointed to these courts. The inherent jurisdiction of superior courts – that is, their authority to hear any legal claim not specifically barred by statute – provides an important source of uniformity in Canada's justice system, ensuring standing for all Canadians to bring disputes before a common judicial body. To this end, they benefit from a separation of powers doctrine that has been judicially derived from principles of federalism inherent in the judicature provisions themselves.

[89] *Ibid* at 181.

First, provincial governments may not circumvent federal jurisdiction for the appointment of superior courts by creating new administrative tribunals to usurp superior court functions. Pursuant to the Supreme Court of Canada's decision in *Re Residential Tenancies Act*,[90] a provincial tribunal that exercises powers historically vested in s 96 courts,[91] and that does so 'judicially',[92] will be invalidated for lack of conformity with the judicature provisions: that is, for not having been appointed by the federal government and subject to federal regulation of tenure and salary. This effectively protects a 'core' jurisdiction for the superior courts, defined by analogy to their traditional functions and by the judicial quality of their decision-making.

On its face, the protection arising from *Residential Tenancies* is exceedingly broad. However, *Residential Tenancies* also requires that courts account for the modern "institutional setting" in which a given instance of provincial legislative power has been exercised. This means that the superior courts are not to enforce a frozen, historical conception of their jurisdiction. For this reason, the principle from *Residential Tenancies* has not been applied dogmatically, and has allowed for the formation of diverse administrative tribunals by the various provincial governments. Nevertheless, a second level of institutional protection for the superior courts is ensured by their retention of inherent powers of judicial review.

The inherent jurisdiction of s 96 courts embraces the power to exercise judicial review of administrative decisions, including those of provincial tribunals that satisfy the validity requirements of *Residential Tenancies*. Efforts by provincial governments to preclude that ability through strict privative clauses have been only partly successful. In *Crevier v Quebec*,[93] the Supreme Court held that while provincial legislation may bar judicial review of the substantive decisions of tribunals, it cannot prevent a superior court from reviewing questions of jurisdiction. Superior courts thus retain the power to invalidate administrative decisions that exceed their delegated authority. This power has particular significance in that issues of

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[90] [1981] 1 SCR 714 [*Residential Tenancies*].

[91] That is, a power vested in a s 96 court at the time of Confederation (see *Residential Tenancies*, *ibid*).

[92] The Court considered a procedure to be "judicial" where it involved "a private dispute between parties", adjudicated "through the application of a recognized body of rules", and "in a manner consistent with fairness and impartiality": *ibid* at 735.

[93] [1981] 2 SCR 220 [*Crevier*].

procedural fairness are considered matters of jurisdiction in Canadian administrative law. The protection thus derived for courts from the judicature provisions also secures a right of review for individuals who allege unfair or unlawful treatment by the state.

While originating as a principle of federalism precluding provincial encroachment on the judicature provisions, subsequent jurisprudence has confirmed that the federal government, too, cannot limit the ability of s 96 courts to review administrative tribunals on jurisdictional grounds. The Supreme Court held in *MacMillan Bloedel Ltd v Simpson*:[94]

> The superior courts have a core or inherent jurisdiction which is integral to their operations. The jurisdiction which forms this core cannot be removed from the superior courts by either level of government, without amending the Constitution. Without this core jurisdiction, s. 96 courts could not be said to either ensure uniformity in the judicial system throughout the country or to protect the independence of the judiciary.[95]

In securing a core jurisdiction for Canada's superior courts, the judicature provisions thus secure a zone of judicial independence and reinforce the institutional role of courts in safeguarding individuals and the integrity of the Constitution itself. These features are further consolidated by the *Charter* and by the unwritten principle of judicial independence, considered below.

(ii) The Charter

Prior to the adoption of the *Charter*, the legislative powers of Canada's federal and provincial governments were limited only by jurisdiction and by constitutional requirements as to manner and form. The *Charter* fundamentally changed the enterprise of governance in Canada, requiring all legislative and executive acts to accord with fundamental rights and freedoms guaranteed for all people. It also had a significant impact on the status and function of Canada's judiciary. While superior courts have always had inherent jurisdiction to invalidate laws for non-conformity with the Constitution, the *Charter* created a vast new basis for the exercise of this power. Moreover, it created a basis instigated through the individual claims of citizens, rather than through jurisdictional disputes instigated by governments. At a systemic level, the *Charter* thus reinforces a role for the courts as guardians of individual rights – a role that necessarily implies both judicial independence and a separation of powers doctrine that protects it.

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[94] [1995] 4 SCR 725.

[95] *Ibid* at para 15.

The *Charter* also contains several provisions that engage the separation of powers more explicitly. Section 11(d) guarantees that any person charged with an offence has the right "to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal." The requirements of independence and impartiality safeguard any court, be it federally or provincially appointed, against interference from the executive or legislative branches in the conduct of criminal trials. More generally, the "legal rights" enumerated in ss 7-14 of the *Charter* place several demands on the criminal justice system that can only be fulfilled if the presiding courts are independent – including the right not to be deprived of one's liberty except in accordance with the principles of fundamental justice, and the right to *habeas corpus* upon detention. The Supreme Court has referred to judicial independence as a "residual right" derived from these protections, which serve as "specific examples of broader principles of fundamental justice."[96]

(iii) The Unwritten Principle of Judicial Independence

The judicature provisions and the *Charter* have each provided the courts with constitutional footholds from which to develop general statements of judicial independence. Indeed, most Supreme Court of Canada decisions concerning judicial independence anchor their reasoning in one of these two textual sources, although the constitutional imperatives derived from them are sometimes striking in their scope and detail. For example, in *Valente v the Queen*,[97] the Court held that protection of an individual's right to a fair trial necessitated that judges have security of tenure[98] and remuneration,[99] as well as administrative independence, meaning independence in the exercise of judicial functions "including the idea that only judges can supervise judges."[100]

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[96] R*e Application under s 83.28 of the Criminal Code*, [2004] 2 SCR 248 at para 81.

[97] [1985] 2 SCR 673 [*Valente*].

[98] *Valente*, *ibid*, as summarized in Peter J McCormick, *Judicial Independence and Judicial Governance in the Provincial Courts: A Report Prepared for the Canadian Association of Provincial Court Judges* (Lethbridge: Canadian Association of Provincial Court Judges, 2004) at 19 [McCormick, *Judicial Independence*]. Notably, this principle departs from the plain language of s 99(1) of the *Constitution Act, 1867*, which states that judges may be removed by joint motion of the House of Commons and Senate. Not only does the independence principle require that such dismissal be for cause, it requires that an independent body, free from the political influence of government, be responsible for making cause determinations.

[99] *Ibid.*

[100] *Ibid.*

Just as *Valente* infers detailed independence requirements from textual sources in the Constitution, it also signifies a purposive treatment of independence that centres on the courts' role in protecting the Constitution. This theme is strongly reinforced by other Supreme Court jurisprudence. The Court in *R v Lippé*,[101] for example, referred to judicial independence as "the lifeblood of constitutionalism in democratic societies,"[102] something essential to "ensure that the power of the state is exercised in accordance with the rule of law and the provisions of our Constitution."[103] Independent courts "act as a shield against unwarranted deprivations by the state of the rights and freedoms of individuals."[104]

In *Reference re Remuneration of Provincial Judges*[105] the Supreme Court articulated an independence principle that stands free of almost any mooring in constitutional text. The *Reference* grew out of challenges brought by criminally accused individuals to the decisions of several provincial governments to reduce the salaries of inferior court judges. At issue was not the reduction of judicial salaries per se, but the means by which judicial salaries were altered. It was alleged that the ability of governments to unilaterally effect changes to judicial salary threatened the independence of courts, thus undermining individual rights to a fair trial. Ultimately these challenges, combined with reference questions posed by the Prince Edward Island government to its appellate court, were consolidated in an appeal to the Supreme Court of Canada.

Chief Justice Lamer, writing for the majority of the Court, began his analysis of judicial independence with a review of protections already established through the judicature provisions and the *Charter*. He concluded that these provisions left "gaps" in the landscape of judicial independence, since the judicature provisions only apply to superior courts, and the most relevant *Charter* protections only apply when individuals face criminal prosecution.[106] He also noted that the judicial interpretation of the judicature provisions "has come a long way from

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[101] [1991] 2 SCR 114.

[102] *Beauregard v Canada*, [1986] 2 SCR 56 at 70.

[103] *Ell v Alberta*, [2003] 1 SCR 857.

[104] *Ibid.*

[105] [1997] 3 SCR 3 [*Provincial Judges Reference*].

[106] *Ibid* at paras 85-86.

what those provisions actually say", concluding that "[t]he only way to explain the interpretation of ss 96 and 100, in fact, is by reference to a deeper set of unwritten understandings which are not found on the face of the document itself."[107] These unwritten principles underlie the structure of the written constitution, enabling courts to "fill out gaps in the express terms of the constitutional scheme."[108] The courts must nevertheless locate some foundation in the written Constitution from which the principles can be inferred. In the case of judicial independence, that foundation arises not just from the judicature provisions and the *Charter*, but from the Preamble to the *Constitution Act, 1867*, which states that Canada shall have "a Constitution similar in Principle to that in the United Kingdom." On this basis, Lamer CJ inferred the existence of a broad principle of judicial independence, applicable not just to s 96 courts but to the entire judiciary, and protecting all judicial proceedings, not just those that concern criminal offences. Moreover, he found that the principle commanded each of the institutional safeguards articulated in *Valente*, plus additional protections for the financial security of judges.[109] The Chief Justice reasoned:

> [T]he institutional independence of courts is inextricably bound up with the separation of powers, because in order to guarantee that the courts can protect the Constitution, they must be protected by a set of objective guarantees against intrusions by the executive and legislative branches of government.[110]

The Court's decision in the *Reference* has been described as an "audacious tour de force" that "shifted the constitutional foundations of judicial independence".[111] It has also been heavily criticized, both in academic commentary and in the powerful dissenting reasons of Justice La Forest.[112] The key point for present purposes is that the *Reference* marks a shift, commenced by the *Charter* cases but completed through recourse to unwritten principle, to enforce judicial independence as a fundamental norm governing the entire Canadian judiciary. A broad, clear

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107 *Ibid* at para 89 [emphasis in original].

108 *Ibid* at para 95.

109 *Ibid* at para 133-135.

110 *Ibid* at para 138.

111 McCormick, *Judicial Independence*, *supra* note 98 at 23.

112 See e.g. Jeffrey Goldsworthy, "The Preamble, Judicial Independence and Judicial Integrity" (2000) 11 Constitutional Forum 60, and J Leclair, "Canada's Unfathomable Unwritten Constitutional Principles" (2002) 27 Queen's LJ 389. La Forest J observed in his dissent: "The express provisions of the Constitution are not, as the Chief Justice contends, 'elaborations of the underlying, unwritten, organizing commitments found in the preamble to the *Constitution Act, 1867*.' On the contrary, they are the Constitution. To assert otherwise is to subvert the democratic foundation of judicial review" (*Provincial Judges Reference*, *supra* note 105 at para 319; emphasis in original).

statement of judicial independence – combined with a host of specific institutional protections – supplants the highly technical exercise of assessing the historical jurisdiction of s 96 courts, or the presence of "judicial" procedures in a new tribunal, as commanded by the s 96 jurisprudence. Moreover, that statement purposively treats judges as guardians of the Constitution and, by necessary extension, of individuals against the abuse of official authority by the state.

(b) Canadian Law Governing the Extra-Judicial Work of Judges

A notable feature of Canada's jurisprudence on separation of powers is that it focuses largely on protecting the independence of judges *qua* judges: that is, safeguarding the judiciary against political interference in the performance of judicial duties, and safeguarding judicial duties themselves against encroachment by tribunals lacking the constitutional protections of courts. Less attention is devoted to the expansion of judicial duties by the conferral of new statutory responsibilities on courts, or to the assumption of extra-judicial duties by judges. In *Minister of Indian Affairs v Ranville*,[113] Dickson J (as he then was) straightforwardly declared for the Supreme Court that "whenever statutory power is conferred on a s 96 judge or officer of a court, the power should be deemed exercisable in an official capacity as representing the court, unless there is express provision to the contrary."[114] The same principle has been found to apply to Canada's provincially-appointed judiciary.[115] The effect of these authorities is to considerably limit the scope of any Canadian "persona designata" doctrine: that is, the notion that new powers conferred on judges vest in them as individuals, and not as representatives of their respective courts. In Canada, the opposite assumption is true, enabling legislators to liberally expand the powers and jurisdiction of courts by simple legislative enactment. There nevertheless remains the residual possibility for persona designata appointments were the intention of a lawful appointing authority is clear.

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[113] [1982] 2 SCR 518.

[114] *Ibid* at 527.

[115] See e.g. the Court of Appeal for Manitoba's decision in *Hudson Bay Mining and Smelting Co Ltd v the Honourable Judge RG Cummings*, 2004 MBCA 182 per Freedman JA at para 18: "... the principle that persona designata applies in a case only if the statute expressly so states has, in my opinion, equal application to provincially appointed judges."

These principles are reflected in the federal *Judges Act*.[116] Section 55 of the *Act* stipulates that a federally-appointment judge may not "engage in any occupation or business other than his or her judicial duties."[117] An exception nevertheless lies in section 56:

> 56(1) No judge shall act as commissioner, arbitrator, adjudicator, referee, conciliator or mediator on any commission or on any inquiry or other proceeding unless
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> (a) in the case of any matter within the legislative authority of Parliament, the judge is by an Act of Parliament expressly so authorized or the judge is thereunto appointed or so authorized by the Governor in Council;
> (b) in the case of any matter within the legislative authority of the legislature of a province, the judge is by an Act of the legislature of the province expressly authorized to so act or the judge is thereunto appointed or authorized by the lieutenant governor in council of the province.[118]

Although s 56(1) does not, in the language of *Ranville*, "expressly provide" that the roles it enumerates vest in judges as individuals and not as officers of courts, this interpretation has been adopted in case law.[119] As such, the provision effectively ensures open-ended authority for Parliament, provincial legislatures, and the executive branches of the federal and provincial governments to appoint judges to individual, non-judicial assignments, provided the appointments are within jurisdiction and effected by Order in Council or express legislation. Commissions of inquiry are almost certainly the most visible and familiar examples of such appointments. Other examples lie in the service of judges on electoral boundary commissions, advisory councils for the Order of Canada, and several administrative tribunals.[120] Ontario's *Municipal Act, 2001*[121] even confers standing authority on the province's municipal councils to appoint "judicial investigations",[122] vested with equivalent power as a public inquiry, to inquire

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[116] RSC 1985, c J-1.

[117] *Ibid.*

[118] *Ibid* (emphasis added).

[119] The persona designata status of judicial service in a public inquiry was confirmed by the Federal Court of Appeal in *Canada (AG) v Canada (Commission of Inquiry on the Blood System)*, [1997] 2 FCR 36 per Décary JA: "Mr. Krever is not named commissioner in his capacity as a judge; the words 'a judge' in the Order in Council are intended to identify, and not to characterize. … This question was decided by the Supreme Court of Canada in *Minister of Indian and Northern Affairs v Ranville et al.*, in which Mr. Justice Dickson, as he then was, concluded that a judge is not sitting as a judge when he is exercising an 'exceptional jurisdiction unrelated to his ordinary capacity'. Certainly Mr. Krever's capacity as a commissioner bears no relation to his capacity as a judge."

[120] See Monahan and Shaw, *supra* note 1 at 436-38.

[121] SO 2001, c 25.

[122] *Ibid* at s 274.

broadly into "any matter connected with the good government of the municipality."[123] Notably, upon majority resolution by the municipal council requesting such an appointment, acceptance by the superior court judiciary would appear to be mandatory.[124]

Whether Canada's doctrine of separation of powers imposes limits against the assumption of lawfully-conferred extra-judicial duties on judges is unclear. Given the mandatory language of the *Municipal Act, 2001*, for example, and the fact that it is a jurisdictionally valid law whose authority is augmented by s 56(1)(b) of the *Judges Act*, it is conceivable that an Ontario municipal council could require that a superior court judge be appointed to an inquiry constituted for politicized and punitive reasons. Perhaps such an obvious abuse of the appointment power would be invalidated by the courts pursuant to the general principle of judicial independence, although credible arguments could be made both ways (these would mirror the arguments outlined previously as to whether the separation of powers is best honoured by judges scrutinizing or ignoring the political motives behind formally valid inquiry appointments). At the very least, this would seem to be an area that calls out for greater clarity in the law. In the absence of legal clarity, the judiciary has itself created important administrative and ethical guidelines speaking to extra-judicial conduct, and to service on public inquiries in particular.

(c) Administrative and Ethical Guidelines for Judges

The Canadian Judicial Council (CJC) has adopted two sets of guidelines relevant to the service of judges as inquiry commissioners: its handbook on *Ethical Principles for Judges*,[125] and the more specific *Protocol on the Appointment of Judges to Commissions of Inquiry.*[126] The CJC is empowered under the federal *Judges Act* to "promote efficiency and uniformity, and to improve the quality of service, in superior courts."[127] While its guidelines are not applicable to provincial court judges, nor are they binding on former members of the bench, they nevertheless provide a

[123] *Ibid* at 274(b).

[124] *Ibid* at 274(1): "If a municipality so requests by resolution, a judge of the Superior Court of Justice shall [conduct an investigation…]" (emphasis added).

[125] *Supra* note 84.

[126] *Supra* note 85.

[127] *Supra* note 116 at s 60.

valuable precedent for judicial conduct generally. They are also valuable for connecting the professional responsibility of judges to preservation of public confidence in the judiciary at large. As most judicial inquiry appointments are drawn from the ranks of Canada's s 96 judges, the discussion here will be confined to these sources.

Ethical Principles for Judges addresses the work of judges as inquiry commissioners in reference to three broad responsibilities: those of independence, diligence, and impartiality. Concerning a judge's duty to safeguard his or her independence, the *Principles* observe:

> There are examples of Judicial Commissioners becoming embroiled in public controversy and being criticized and embarrassed by the very governments which appointed them. The terms of reference and other conditions such as time and resources should be examined carefully so as to assess their compatibility with the judicial function.[128]

They also state that, pursuant to the principle of diligence, judges should discuss prospective inquiry appointments with their presiding Chief Justice in order to assess whether the appointment will adversely impact the court's current workload.[129] Finally, the *Principles*' commentary on impartiality cautions against judicial involvement in political or partisan matters, observing that

> Where the terms of reference require, judges serving on Commissions of Inquiry may exercise greater latitude in commenting on issues relevant to the inquiry. Judges serving in this way, however, must continue to bear in mind that they are judges even while serving for the time being as commissioners.[130]

The *Principles* do not specify what it means for a judge to remain mindful of his or her judicial status in this context.

The CJC *Protocol* provides more detailed guidance for judges contemplating an inquiry appointment. It begins with an important threshold requirement that government requests for judicial commissioners be made in the first instance to the Chief Justice of the applicable jurisdiction, with draft terms of reference provided for the Chief Justice's review. The *Protocol* states:

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[128] *Supra* note 84 at 11, para 8.

[129] *Ibid* at 18, para 4.

[130] *Ibid* at 39, para D.6.

> The constitutional principle of judicial independence requires the approval of both the Chief Justice and the judge before the judge is appointed as commissioner. Therefore, the government should not approach an individual judge either directly or indirectly until the Chief Justice has had a chance to consider the request and discuss it with the judge. A judge who is approached directly must not accept an appointment and must advise the Chief Justice that he has been approached.[131]

The *Protocol* then lists a number of considerations to be weighed by the Chief Justice and the prospective appointee in determining whether to accept an inquiry. Some of these considerations are practical in nature. For example, like the *Ethical Principles*, the *Protocol* stresses that inquiry appointments should be avoided where they engage the risk of seriously exacerbating existing problems with case load at the relevant court. The Chief Justice is also to consider whether the appointee possesses the "robust health", "abundant energy", "management skills" and sensitivity to public scrutiny that will be necessary for the task.[132] Other considerations are more substantive, and concern safeguarding the institutional integrity of the court. The Chief Justice and judge are to ask whether "the subject matter of the proposed public inquiry is of sufficient importance and of such a nature as to warrant the involvement of a judge."[133] Inquiries of "such a politically partisan nature" that they endanger the independence of the judiciary should be avoided.[134] So too should inquiries that are effectively investigations into whether "certain individuals have committed a crime or civil wrong."[135]

The Chief Justice and judge are to review the applicable inquiries legislation, and a draft Order in Council for the proposed appointment, with special wariness concerning:

- the imposition of a reporting deadline without consultation with the judicial commissioner;

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[131] *Supra* note 85 at 2, para 1(D).

[132] *Ibid* at 3, paras 2(A),(B).

[133] *Ibid*, para 2(C).
[134] *Ibid*.

[135] *Ibid*. That the *Protocol* warns against acceptance of such an inquiry is my own interpretation. The actual language of the provision is somewhat ambiguous: "In particular, the Chief Justice and the judge should consider whether the inquiry essentially involves investigating the conduct of government agencies or establishing if certain individuals have committed a crime or a civil wrong, and whether – if the inquiry requires a legally-trained commissioner – the court should feel obliged to appoint a judge or if a senior lawyer could perform the function equally well."

- the imposition of "broad and undefined" governing principles, raising a high risk of executive interference or applications for judicial review;
- the imposition of limits on a commissioner's authority to hold public hearings;
- the imposition of limits on a commissioner's ability to set an appropriate inquiry budget;
- the ability of government to publish a commissioner's unfinished work against his or her wishes; and
- the ability of government to assign "roles and responsibilities" to members of an inquiry.[136]

Finally, the *Protocol* encourages the Chief Justice and prospective commissioner to "suggest changes" to the draft terms of reference.[137] The aim of such suggestions should be to ensure:

- that the terms do not "exclude issues that the public will expect to be investigated";
- that the timeframe for completing the inquiry is reasonable;
- that if "all or most of the inquiry [is to] be conducted in private", this does not compromise public confidence in the process;
- that should the inquiry involve investigating an organ of government, the terms reflect "a clear and explicit commitment by the government to fully cooperate with the work of the commission";
- that the judge "have complete independence in selecting his or her staff", including commission counsel;
- that the Order in Council not be changed after commencement of the inquiry;
- that no ongoing civil or criminal processes will be adversely affected by the inquiry; and
- that the government will be responsible for providing the judge with legal representation should the inquiry eventuate in any claims against the judge.[138]

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[136] *Ibid* at 4-5.

[137] Although the *Protocol* does not specifically call for negotiation between the judiciary and the appointing government, it does suggest that "The judge – perhaps through the office of his or her Chief Justice – should feel free to suggest appropriate changes to the draft Order in Council before it is adopted" (*ibid*).

[138] *Ibid* at 5-6, paras 3(A)-(K).

The *Protocol* is clearly the most robust aspect of Canada's regulatory framework concerning the assumption of inquiry commissions by judges. Indeed, while the doctrine of separation of powers and the federal *Judges Act* provide considerable latitude for judges to assume inquiry assignments, and the CJC's *Ethical Principles* speak only to general concerns, the *Protocol* touches specifically on some of the challenges considered earlier in this chapter. The *Protocol* gives particular attention to institutional assurances protecting judicial independence, such as adequate funding, timing, and independence in the selection of inquiry staff. It speaks to some of the secrecy concerns raised in the NSC cases by directing the judge to ensure that public confidence not be undermined when the government seeks to appoint a "private" inquiry. It acknowledges the political character of inquiries by cautioning judges against acceptance of partisan assignments, and speaks obliquely to concerns of polycentricity in stating that an inquiry must be "suitable" for judicial leadership.

Nevertheless, the *Protocol* is mostly prophylactic in nature: it signals dangers that a judicial commissioner should guard against, not prescriptions that he or she should follow. The *Protocol* signals the importance of questioning whether an inquiry is suitable for judicial leadership, but does not offer substantive guidance as to how this determination should be made. It obliges the judge to consider public confidence in the integrity of the inquiry process – and indeed, public opinion in assessing the adequacy of an inquiry's proposed mandate – but doesn't speak to how a judge should assess public opinion while respecting the separation of powers. It obliges the judge to satisfy him- or herself of adequate time and resources to complete an inquiry, and independence in selecting staff, but leaves the judge to assess *how* the inquiry should be conducted, a necessary prerequisite to making these other determinations.

The latter observation is significant. To reiterate a persistent theme of this dissertation, whether a judge should conduct an inquiry (and indeed, whether judges should be involved in inquiries at all) necessarily demands that we account for *how* judges should behave as inquiry commissioners. The *Protocol* tells us that they should avoid a politicized role, protect judicial independence, honour public confidence, and satisfy themselves of certain basic protections necessary to fulfill these values. But it does not require that judicial leadership of an inquiry involve specific ethical boundaries in the relationship between a commissioner and counsel. It does not tell us whether the denial of legal financing for core participants in an inquiry assaults a commissioner's

independence to such an extent that he or she is obliged to resign. It does not specify whether public confidence in the judiciary is satisfied by the types of confidentiality measures adopted in the *Arar Inquiry* or in the more extreme case of the *Iacobucci Inquiry*.

In fairness, the *Protocol* is intended as a guideline document and not a doctrinal script. It affirms that the relative flexibility of inquiries is among their desirable attributes in commenting that "Historically, public inquiries legislation, whether federal or provincial, has imposed few constraints on the conduct of these inquiries. This approach has served Canada well."[139] Accepting, however, that the challenges outlined earlier in this chapter pose legitimate risks – to the integrity of judicial commissioners, to fair treatment of inquiry participants, and to the effective conduct of inquiries – then the need is established for a more rigorous analytic approach than the *Protocol* offers. Judicial integrity, procedural fairness, and the efficacy of inquiries are closely entwined concerns. Mutually addressing them ultimately involves confronting issues of substance and procedure; it requires not an inflexible doctrine for judicial inquiries, but principles that provide stable and substantial guidance, both for the discretion of commissioners and the expectations of witnesses and other participants. It requires anchoring the work of judge-led inquiries in a richer statement of the judicial role, and specifying the demands of that role applied in the unique context of an inquiry.

3. Judges, Public Inquiries, and the Rule of Law

In this Part I develop an analytic approach to discerning the potential and limits of judicial service on commissions of inquiry. By implication, I also consider how inquiries should be conducted when led by a judge. The essence of my argument is that judges are suited for those inquiries that demand them to behave as judges – or more specifically, to behave adjudicatively. I do not claim that adjudication is the exclusive procedural feature of such inquiries, but I do claim that it is an essential one, and that recognizing this provides a coherent and principled explanation for judicial involvement. Honouring adjudication in a public inquiry accomplishes three interrelated objectives: it provides intrinsic protection for the separation of powers; it aligns with the legitimate fairness demands of participants; and it helps to address the challenges outlined earlier by establishing a more rigorous means of guiding judicial conduct.

[139] *Ibid* at 4.

This Part focuses on the first two of these claims. The third will be substantiated in the remaining chapters as the practical utility of this approach is demonstrated.

I begin with a brief comparative review of the practices of a different jurisdiction. Like Canada, Australia makes frequent use of public inquiries. However, the leadership of those inquiries by judges, while not uncommon, is more restrained.[140] The reason is that Australia's federal, Commonwealth Constitution has been interpreted to require a strict separation of powers between the judiciary and the other branches of government. The result is that extra-judicial service by judges is governed by a rich, and relatively strict, doctrine of incompatibility. While Canada's approach to the separation of powers is more relaxed than Australia's, the Australian jurisprudence nevertheless sheds light on two concepts that resonate with Canada's constitutional structure and that provide the starting points for the analytic approach advocated here. The first is that the separation of powers is purposively oriented not just to protecting judicial independence, but also the principles of representative and responsible government. Indeed, judicial independence and the latter principles are closely related, each honouring fundamental values of human dignity and agency in distinct ways. Attention must be paid to the democratic accountability of the political branches as well as the independence of the judiciary in discerning appropriate roles for judges under the Constitution. The second is that the protection of these principles in the setting of an extra-judicial assignment is closely linked with the judge's choice of procedure.

[140] The state bench of Victoria prohibits the service of its members as inquiry commissioners, a practice stemming from a 1931 letter from then Chief Justice Irvine of the state Supreme Court to the Attorney General. The so-called "Irvine Memorandum", which treats service on public inquiries as fundamentally non-judicial, and thus improper, is considered in detail in Sir Murray McInerney et al, *Judges as Royal Commissioners and Chairmen of Non-Judicial Tribunals* (Victoria: Australian Institute of Judicial Administration, 1986) at 11 and 17-18. Enid Campbell and HP Lee suggest that a similar position has long been taken by judges of the High Court, and that most state benches view service on commissions of inquiry as warranted only in "exceptional" circumstances: see Enid Campbell and HP Lee, *The Australian Judiciary* (Cambridge: Cambridge University Press, 2001) at 171. Nevertheless, the Australian Law Reform Commission has observed that most modern public inquiries appointed under the federal *Royal Commissions Act 1902* have been chaired either by a judge, a retired judge or prominent lawyer (Australia Law Reform Commission, *Making Inquiries: A New Statutory Framework* (Sydney: Australia Law Reform Commission, 2009) at 68), and that the New South Wales and Australian Capital Territory statutes governing public inquiries provide that certain powers may only be exercised when a commissioner is a judge or lawyer (*ibid* at 80). Debate about the propriety of Australian judges serving as inquiry commissioner abounds: see e.g. the Hon DG McGregor, QC, "The Case For", in McInerney et al, *ibid*; Sir Murray McInerney, "The Appointment of Judges to Commissions of Inquiry and Other Extra-Judicial Activities" (1978) 52 Australian Law Journal 540; Tom Sherman, "Should judges conduct royal commissions?" (1997) 8 Public Law Review 3; and Winterton, *supra* note 1.

I deepen these insights by considering the traditional adjudicative procedures of judges. Drawing on the classic work of Lon Fuller,[141] I explain the core value instilled by adjudicative procedure, and how clarification of that value helps discern the limits of adjudicative institutions. I then apply Fuller's theory to the work of judges in public inquiries. I suggest that some inquiries do require the enforcement of adjudication, both in order to honour the legitimate demands of participants for a high standard of justice, and to intrinsically safeguard judicial commissioners from political interference. In this manner, adjudicative procedure reinforces the twin principles of judicial independence and responsible government; it helps safeguard compliance with the separation of powers, and thus coherence between inquiries and Canada's commitment to the rule of law.

(a) Australia's Doctrine of Incompatibility

I noted above that Canada's separation of powers admits relative flexibility both in the expansion of judicial powers and in the assumption of extra-judicial, persona designata functions by judges. I also speculated, however, that the separation of powers must impose some outward limits on this flexibility: that is, additional powers or extra-judicial assignments that clearly endanger judicial independence are likely to be voided in order to safeguard the latter principle, which Canada's courts have interpreted robustly in other contexts. Australia provides a valuable comparison to Canada because of the strictness with which the separation of powers is observed under its Constitution. That strictness has produced doctrinal standards that closely regulate the expansion of judicial power and, more importantly for our purposes, the assumption of extra-judicial duties by judges, including commissions of inquiry.

The Australian judiciary is composed of both federal and state courts, each appointed by their respective levels of government and responsible for the resolution of legal disputes within their respective areas of jurisdiction. A formal separation of powers between the executive, legislative, and judicial branches of government exists only under Australia's Commonwealth Constitution,[142] and consequently the case law delimiting restrictions on the extra-judicial functions of judges pertains mainly to judges of federally appointed courts. There is scope for the application of these restrictions to state courts, however, to the extent that such courts may

[141] *Supra* note 74.
[142] *Australian Constitution* (Cth).

be delegated authority to enforce federal laws and thus form part of an integrated, federal system of justice.

Formally, the powers and limits of Australia's federal judiciary are drawn from Chapter III of the Constitution. Section 71 provides that "The judicial power of the Commonwealth shall be vested in a federal Supreme Court, to be called the High Court of Australia, and in such other federal courts as the Parliament creates, and in such other courts as it invests with federal jurisdiction. …"[143] As Cheryl Saunders explains, s 71 has been interpreted by the courts to be both exclusive and exhaustive; that is, "only the courts listed in section 71 may exercise federal judicial power"[144] and "federal courts may not exercise any other types of power."[145] These principles have been applied strictly. The High Court held in the landmark 1956 *Boilermaker's Case*: "A federal constitution must be rigid. The government it establishes must be one of defined powers; within those powers it must be paramount, but it must be incompetent to go beyond them."[146] Accordingly, many functions that are routinely exercised by the Canadian judiciary would be considered constitutionally impermissible in Australia. For example, the provision of judicial reference opinions has been found in Australia to violate the separation of powers, as it engages the judiciary in providing "advice" rather than the adjudication of legal disputes.[147]

A longstanding exception to Australia's strict separation of powers is that judges acting in a personal capacity – as personae designata – may assume extra-judicial functions that vest in them as individuals rather than as judges. Here a contrast with the Canadian approach is evident: the principle barring Australian courts from assuming 'non-judicial' functions means that new powers conferred on judges will be routinely interpreted to vest in them as individuals, rather than as officers of their respective courts. For example, the issuance of search warrants or authorizations for police wiretaps are construed in Australian law to be exercised by judges as

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[143] *Ibid* at s 71.

[144] Cheryl Saunders, *The Australian Constitution* (Carlton: Constitutional Centenary Foundation, 1997) at 76.

[145] *Ibid*. See also *Victorian Stevedoring & General Contracting Co Pty Ltd & Meakes v Dignam* (1931) 46 CLR 73.

[146] *R v Kirby; Ex Parte Boilermakers' Society of Australia (Boilermakers Case)* (1956) 94 CLR 254.

[147] *In Re Judiciary and Navigation Acts* (1921) 29 CLR 257 (HC).

individual administrative officials, and not as judges.[148] While persona designata appointments have historically been made quite liberally,[149] more recently the courts have recognized limits necessary to enforce the separation of powers. These limits are expressed in a caveat to the persona designata principle: the doctrine of incompatibility.

The incompatibility doctrine is intended to ensure that when judges do assume extra-judicial duties, their conduct will not impugn the integrity and proper operation of the judiciary as a whole.[150] In *Grollo v Palmer*,[151] Australia's High Court found that incompatibility arises under the following three circumstances: 1) where a judge assumes "so permanent and complete" a commitment to a non-judicial function that his or her judicial duties are disrupted; 2) where the nature of the non-judicial function is such that the judge's ability to perform his or her judicial duties with the requisite integrity is impaired; and 3) where the non-judicial function is "of such a nature that public confidence in the integrity of the judiciary as an institution or in the capacity of the individual judge to perform his or her judicial functions with integrity is diminished."[152] The Court also added that the assumption of extra-judicial duties must be voluntary, meaning a judge cannot be required to assume them under statute or by administrative direction.[153]

The incompatibility doctrine was further refined in *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs*,[154] in which Chief Justice Brennan set-out an analytic test to determine the

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148 See e.g. *Grollo v Palmer*, (1995) 184 CLR 348 (HC).

149 Examples include Sir Owen Dixon, who served as Australia's Commonwealth Minister to the United States during the 1940s, at the same time as he retained his position as Justice of the High Court pursuant to special legislation enacted by the Commonwealth parliament. Sir Edward Woodward served as Director of the Australian Security Intelligence Organization from 1976 to 1981, at the same time as he held a judicial appointment in the Federal Court. Given the emergence of the incompatibility doctrine, these assignments would be unlikely to pass constitutional muster today: see Enid Campbell and HP Lee, *The Australian Judiciary* (Cambridge: Cambridge University Press, 2001) at 168-69.

150 See *Hilton v Wells*, (1985) 157 CLR 57 at 73 (HC).

151 *Supra* note 148.

152 *Ibid* at 365.

153 *Ibid*.

154 (1996) 189 CLR 1 (HC).

conformity of an extra-judicial appointment with the third branch of *Grollo* – that is, with preserving public confidence in the judiciary. The courts will ask:

1) Is the function "an integral part of, or closely connected to, the functions of the Legislature or Executive government?"[155] If the answer is "no", then no prima facie incompatibility arises.

2) Is the function "required to be performed independently of any instruction, advice or wish of the Legislature or the Executive Government, other than a law or instrument made under a law?"[156] If the answer to this question is "yes", then the inquiry proceeds to the third step. If the answer is "no", then an immediate finding of incompatibility results.

3) Finally, "Is any discretion purportedly possessed by the Ch III judge to be exercised on political grounds – that is, on grounds that are not confined by factors expressly or impliedly prescribed by law?"[157] An affirmative answer to this question will result in a finding of incompatibility. A function that clears this final hurdle, however, may constitutionally be exercised by a Ch III judge.

Wilson concerned the appointment of a Federal Court judge under the *Aboriginal and Torres Strait Islander Heritage Protection Act 1994* (Cth) to investigate the potential impact of a bridge development on Aboriginal heritage interests in Hindmarsh Island, a region of South Australia, and to provide an advisory report to the responsible Minister. The High Court held that this appointment failed to accord with the incompatibility doctrine and thus violated Ch III of the Constitution. The Court characterized the appointee's extra-judicial function as a "condition precedent" to the exercise of political discretion by the Minister. It was not an institutionally independent appointment because the Minister could intervene at any time to direct or interfere with the appointee's discretion. Importantly, the High Court in *Wilson* also drew a strong connection between procedural fairness and the separation of powers – and in particular, preserving the independence of the judiciary. The Court held that although the presence of

[155] *Ibid* at 17.

[156] *Ibid.*

[157] *Ibid.*

procedural fairness alone was not conclusive of compatibility with Ch III, its absence is fatal: "if a judicial manner of performance is not required, it is unlikely that the performance … will be performed free of political interference or without the prospect of exercising political discretion."[158]

It will be recalled that Chapter III of the Australian Constitution concerns only the federal judiciary. A 2011 decision of the High Court appears nevertheless to extend the incompatibility doctrine to the extra-judicial activities of state court judges.[159] The Court's reasoning is based on the authority of the Commonwealth government to vest federal judicial power in the state judiciary. The mere possibility of this vesting requires an integrated approach to the separation of powers in order to maintain constitutional integrity and coherence. As Rebecca Welsh has observed, this may cement a "uniform notion of incompatibility rising, capable of providing a standard of constitutional protection for the independence and integrity of the nation's entire judicial structure."[160]

The merit of these developments has been debated by Australian jurists. Critics suggest that the incompatibility doctrine biases courts in favour of validating extra-judicial tasks: since it demands the case-by-case assessment of appointments, strong policy arguments justifying the extra-judicial service of judges in individual cases are likely to trump concern for the gradual erosion of the separation of powers, which may only be observable over time.[161] Proponents argue that the doctrine better reflects and enforces the underlying values of the separation of powers, obviating the need for inflexible formalism.[162] Sir Anthony Mason has taken such a view

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[158] *Ibid*.

[159] *Wainohu v New South Wales*, (2011) 85 ALJR 746 (HC).

[160] Rebecca Welsh, "Incompatibility Rising? Some Potential Consequences of *Wainohu v New South Wales*" (2011) 22 PLR 251 at 263.

[161] See e.g. Kristen Walker, "Persona Designata, Incompatibility and the Separation of Powers" (1997) 8 PLR 153 at 167; Denise Meyerson, "Judicial Independence", *supra* note 1 at 10; and *ibid*, "Extra-Judicial Service on the Part of Judges: Constitutional Impediments in Australia and South Africa" (2003) 3 OUCLJ 181.

[162] See especially Fiona Wheeler, "The Use of Judges to Discharge Executive Functions: The *Justice Matthews* Case" (1996) 82 Canberra Bulletin of Public Administration 10; *ibid*, "The Rise and Rise of Judicial Power under Chapter III of the Constitution: A Decade in Overview" (2001) 20 Australian Bar Review 283 at 288-89; and *ibid*, "The Separation of Federal Judicial Power: A Purposive Analysis" (PhD thesis, 1999) at 157.

in arguing that "The concept [of persona designata] has little to commend it. Rationality would be advanced if the concept were jettisoned and replaced by the incompatibility test. … It is a matter of identifying the purpose or purposes intended to be served by the separation of judicial power, particularly for executive power. Once this is done 'incompatibility' has a natural place in the scheme of things."[163]

For present purposes, it is not necessary to resolve this debate. The value of considering Australia's incompatibility doctrine lies in the light it sheds on issues of constitutional principle that arise when judges face appointment to an unorthodox task. Regardless of formal differences in their Constitutions, these principles are relevant in both Australia and Canada. Specifically, the analytic steps enforced by the incompatibility doctrine bring the following principles into relief:

- The separation of powers is purposive. The third branch of *Grollo* draws a connection between respect for the separation of powers and public confidence in the judiciary. The test from *Wilson* elaborates this concept, indicating that confidence in the judiciary involves preservation of independence, even where the judge assumes a non-judicial duty. The independence principle embraces freedom from outside interference or political direction in the exercise of such a judge's discretion. The Australian jurisprudence thus speaks more directly to issues of constitutional principle that arise when judges assume extra-judicial duties, an issue on which Canadian jurisprudence is largely silent.

- Judicial independence is not the only value protected by the separation of powers. *Wilson* stipulates that a persona designata judge cannot exercise discretion on "political grounds", or on grounds not "expressly or impliedly prescribed by law." While the exclusion of judges from political decisions intrinsically reinforces independence, it also honours the correlative principles of representative and responsible government:[164] that political decision-making be confined to officials accountable to an elected legislature

[163] Sir Anthony Mason, "A New Perspective on Separation of Powers" (1996) 82 Canberra Bulletin of Public Administration 1 at 5.

[164] See e.g. James Stellios, "Reconceiving the Separation of Judicial Power" (2011) 22 PLR 113 at 134.

and to the citizenry. As noted elsewhere in the *Wilson* decision, the appointment of a persona designata judge should not be used to "cloak" controversial political deliberations with the symbolic independence of the judiciary.[165]

- Finally, preservation of the separation of powers is intimately linked to procedure. At minimum, the persona designata judge must honour the requirements of procedural fairness (or, in *Wilson*'s words, behave "judicially"). Procedural fairness is intended to protect individuals against the arbitrary exercise of power. By making it a necessary feature of compatibility with the separation of powers, however, *Wilson* underscores the role played by due process in intrinsically reinforcing judicial independence and the insulation of judges from political decision-making. To reiterate one of the most important principles from *Wilson*: a judge who is not obliged to act fairly is very unlikely to execute an extra-judicial task with the requisite independence needed to sustain the separation of powers.

The incompatibility doctrine does not provide a complete answer to the question of when it is appropriate for a judge to serve on a public inquiry. We might invert the doctrine and argue that those circumstances most demanding of the values it promotes – judicial independence, avoidance of political decision-making, and procedural fairness – are those suited for judicial leadership. This would take us further than the existing standards in Canadian law, but still would not provide an entirely satisfying justification, because judges are not the only individuals who can be trusted to act independently, to avoid decisions that are politically-based, and to act fairly. The doctrine is also ambiguous in two important areas: first, in determining how and when a connection between a persona designata judge and the executive becomes "too close", and thus violates the separation of powers; and second, in determining whether a duly enacted law – such as an Order in Council – violates the separation of powers if it proscribes the discretion of a persona designata judge in subtle ways.[166] By bringing the three principles above into relief, however, the doctrine establishes the basis of a robust analytic approach.

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[165] See *Wilson*, *supra* note 154 at para 7, citing the United States Supreme Court's decision in *Mistretta v United States*, [1989] USSC 9, (1989) 488 US 361.

[166] An alternate way of framing this question is to ask whether such an Order in Council would satisfy the doctrine of incompatibility because it assures that the persona designata judge will exercise discretion "governed by law."

Justifying the use of judges as inquiry commissioners requires us to take a step further: to consider what is distinctly *judicial* about the manner in which judges observe independence, respect the political prerogatives of elected government, and ensure fairness to individuals.

(b) Fuller's Forms and Limits of Adjudication

The discussion earlier of challenges facing judicial commissioners concluded with an account of polycentricity. Polycentricity is intrinsic to the work of a public inquiry, both in the sense that commissioners are tasked with conducting thorough investigations and in the sense that their conclusions and recommendations must account for diffuse societal effects. As such, polycentricity serves as the most obvious and stark reason to question the utility of judges, and traditional legal methods generally, in conducting public inquiries. In his paradigmatic essay, "The Forms and Limits of Adjudication",[167] Lon Fuller evoked the term "polycentric issue" as a means of identifying those matters ill-suited for adjudicative decision-making, and this theory has been employed in at least one compelling critique of the use of judicial commissions of inquiry. Michael Trebilcock and Lisa Austin have queried whether the epistemologies of lawyers and judges lead inevitably to the reproduction of adjudicative procedures in new institutional settings – what they call a "full court press" – without regard for actual efficacy and substantive justice.[168] The implication is that the work of some heavily 'legalized' public inquiries might be completed with greater efficiency, and possibly even greater fairness to those involved, by a more considered selection of governing instrument from the outset.

A re-reading of Fuller's "Forms and Limits" is thus a worthy starting-point in considering what, if any, role adjudicative procedures should play in a commission of inquiry. If judges are to be treated as custodians of those procedures, then clarifying their core value is likely to narrow the instances in which judges will be considered good candidates to lead a public inquiry, as Trebilcock and Austin suggest. However, clarifying the core value of adjudication may also serve as a means of challenging some of the categorical distinctions often made between inquiries and courts. More specifically, it may reveal instances in which the value of adjudication and the expectations vested in public inquiries align. This section reconsiders Fuller's theory of adjudication with a view to drawing-out that affinity.

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[167] *Supra* note 74.

[168] Michael J Trebilcock and Lisa Austin, "The Limits of the Full Court Press: Of Blood and Mergers" (1998) 48 UTLJ 1 at 49.

Fuller considered that the core, indispensable feature of each type of "social ordering" is the manner in which it engages the participation of affected individuals.[169] In the case of elections, individuals participate by voting; in contracts, by negotiation.[170] The distinct mode of participation fostered by adjudication, he argued, is "that of presenting *proofs* and *reasoned arguments* for a decision in [one's] favour."[171] Adjudication consists in parties advocating for a particular decision based on factual assertions that corroborate some form of "reasoned" argument, or argument based on principle (as opposed to naked self-interest). This form of participation presupposes a decision-maker charged with hearing and deciding the parties' claims. For that matter, it presupposes the existence of a *dispute*, and in this sense is adversarial, requiring the translation of parties' competing interests into a language of rational claims to be adjudged on some basis of principle. This type of adversarialism is to be lauded, because an adversarial contest – in which each affected party has an equal and thorough opportunity to be heard – establishes a sound basis for impartial decision-making. Fuller observed: "The institution of advocacy is not a concession to the frailties of human nature, but an expression of human insight in the design of a social framework within which man's capacity for impartial judgment can attain its fullest realization."[172]

Fuller did not intend that this account of the essential qualities of adjudication be merely descriptive. In describing what is necessary for a process to truly be "adjudicative", he intended also to define what is essential for that process to generate a particular social value. Adjudication gives the parties affected by a decision special influence over the evidentiary and principled bases on which the decision will be reached. By requiring their claims to be stated in the form of proofs and reasoned arguments, it also converts those claims into a rational discourse. The decisions produced by adjudication are thus characteristically different from those produced by other institutional forms:

> Adjudication is … a device which gives formal and institutional expression to the influence of reasoned argument in human affairs. As such it assumes a burden of

[169] S*upra* note 74 at 363.

[170] *Ibid* at 363-64.

[171] *Ibid* at 364.

[172] *Ibid* at 384.

> rationality not borne by any other form of social ordering. A decision which is the product of reasoned argument must be prepared itself to meet the test of reason. We demand of an adjudicative decision a kind of rationality we do not expect of the results of contract or of voting. This higher responsibility toward rationality is at once the strength *and the weakness* of adjudication as a form of social ordering.[173]

The latter caveat is important. Fuller did not contend that adjudicated decisions were intrinsically superior to those reached through alternate means. He claimed, rather, that they possess a particular form of rationality instilled by the adjudicative process: a decision premised on the reasoned claims of participants must itself speak in the language of reason. That is, the parties to adjudication are entitled to a decision that genuinely addresses the proofs and reasoned arguments placed before the adjudicator. This, in turn, is the source of an adjudicative decision's authority: a decision that truly addresses proofs and reasoned arguments from a position of impartiality should assure the parties of its justice. Herein lies the special value of adjudication: it is a form of decision-making that offers an especially high assurance of justice to affected parties, by affording them a strong influence over the basis of decision-making and by demanding a decision that rationally addresses their own reasoned claims.[174]

The particular rationality of adjudicative decision-making is also a weakness. This is its inefficacy in managing decisions that are not reducible to competing proofs and reasoned arguments – Fuller's polycentric issues. Fuller described polycentric issues through the metaphor of a spider-web, in which a pull on any single thread will redistribute tensions and affect the entire structure.[175] Questions of public policy are quintessentially polycentric. In traditional litigation, the judge's role is largely passive, with the parties themselves directing the issues that the judge is ultimately charged with deciding. This accords with an assumption that it is the litigating parties who will bear the received effects of the decision. As such, where decisions necessarily affect diverse stakeholders and interests, relying on the claims of bilateral disputants will prove inadequate. Some issues may demand managerial resolution by an official possessing special knowledge, expertise, and resources to reconcile diverse societal demands. Others may demand

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[173] *Ibid* at 367.

[174] The point is not so much that parties will always agree with an adjudicated outcome, but that the strong participatory rights of the decision-making process, combined with the neutrality of the arbiter and his or her duty to address the parties' reasoned claims, should secure the assent of reasonable persons to the outcome.

[175] *Ibid* at 395.

the creativity and democratic accountability of elected officials. By advocating different forms of "social ordering" to address a range of issues, Fuller would seem to have envisioned a heterogeneous state – one in which a range "social orderings" coincide to address issues for which they are individually suited.

Where do public inquiries fit within such a state? To answer this we must consider the issues that public inquiries are intended to address, and the degree to which polycentricity manifests in those issues. The answer from case law considered in the previous chapter is that inquiries are functionally distinct from adjudication. Recall that in *Episcopal*, the Court of Appeal for Ontario observed of the *Cornwall Public Inquiry*:

> The commission is not asked to resolve a bi-polar dispute over a specific legal or factual issue. The Commissioner is not entitled to make findings of civil or criminal responsibility. He is faced, rather, with a broad issue of policy affecting the public at large. His mandate concerns … a 'polycentric issue' involving 'a large number of interlocking and interacting interests and considerations.[176]

Trebilcock and Austin take a similar view, albeit in less conclusive terms. The example they consider – that of the *Krever Inquiry* into the 'tainted blood' scandal of the 1980s[177] – appears at first blush to be highly polycentric. Commissioner Krever was tasked to "review and report on the mandate, organization, management, operations, financing, and regulation of all activities of the blood system in Canada, including the events surrounding the contamination of the blood system in Canada in the early 1980s."[178] This clearly was a sweeping investigative mandate, demanding that the Commissioner scrutinize the interrelationship of numerous state and non-state organizations and formulate conclusions of policy rather than law. The authors compare the *Krever Inquiry* with an American counterpart – an independent, government-commissioned research study of the same subject-matter, but which did not employ a legally-driven process – to suggest that the latter was equally effective in formulating policy recommendations while consuming only a fraction of the time and cost.[179]

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[176] *Episcopal Corporation of the Diocese of Alexandria-Cornwall v Cornwall Public Inquiry Commissioner* (2007), 149 DLR (4th) 550 at para 26.

[177] Canada, Commission of Inquiry on the Blood System in Canada, *Final Report* (Ottawa: Minister of Supply and Services, 1997) (Commissioner: the Honourable Horace Krever).

[178] Trebilcock and Austin, *supra* note 168 at 20.

[179] *Ibid* at 34: "… the Krever Commission of Inquiry spent 17.5 million dollars, directly conducted 247 days of hearings which … involved 53 lawyers, 474 witnesses, 175,000 documents, and took over four years to complete.

It should be recalled, however, that public inquiries are kaleidoscopic institutions, and policy formulation is but one of the dimensions by which their worth can be measured. Another is the expectations and experiences of their participants. Commissioner Krever was directed by his terms of reference to make a factual inquiry concerning a specific sequence of events precipitating the blood-contamination crisis. Indeed, these terms focused much more closely on a forensic review of errors in Canada's blood system, with the aim of restoring confidence, than did the terms directing the American study referenced by Trebilcock and Austin.[180] This would no doubt involve hearing from those implicated directly in the events, including victims. It would also involve confronting the possibility of fault on the part of organizations and individuals.

These twin considerations – affording affected individuals the opportunity to be heard, and confronting the possibility of wrongdoing – may begin to introduce adjudicative qualities into the inquiry process. For the individual participant – whether an involuntary witness or a party who has sought standing – the opportunity to be heard serves more than the utilitarian, investigative mandate of the inquiry. It is an opportunity to be heard in respect of how that mandate specifically bears on *them*. For the victim, this may involve seeking vindication in the form of official recognition of mistreatment that has erstwhile been denied, and assurance that appropriate ameliorative steps will be taken. For individuals and organizations implicated in possible wrongdoing, it may involve seeking a different sort of vindication, or at least ensuring that any blame attributed to them does not exceed that for which they are actually responsible. It is easy to discern in this dynamic the propensity for competing – and even adversarial – viewpoints.

Perhaps more importantly, it is possible to discern an interest in justice that approximates that of a formally adjudicative proceeding. Recall that those authorities establishing a categorical

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The Institute of Medicine's study spent $685,000, held 2 days of hearings which involved no lawyers, heard from 72 witnesses, reviewed over 700 documents, and spanned 17 months from its inception until the publication of its final report." In fairness, the authors resist the temptation of categorically dismissing the *Krever Inquiry* on this basis. They acknowledge that a public inquiry, due to its public deliberative nature, may instill benefits other than the formulation of new policy.

[180] This difference is acknowledged by the authors: see *ibid.*

distinction between inquiries and trials place great emphasis on the non-final, non-binding character of an inquiry's conclusions and recommendations. Indeed, inquiries are said to reach "findings" but not to make "decisions." This distinction tracks that between investigation and adjudication, and implies that individuals place a higher premium on the avoidance of tangible legal consequences (a civil or criminal finding) than they do on mere "reputational" concerns. It is not clear, however, that the participants to an inquiry are concerned only with matters of reputation, or that the personal interests engaged by an inquiry's findings, even if unenforceable, are vested with any less importance than the decisions of a court.

Consider the significance of those factual findings sought by some of the inquiries that have been discussed. The *Somalia Inquiry* opined on the responsibility of Canadian soldiers and officials for the commission of atrocities during a peacekeeping mission; the *Arar Inquiry* opined on the responsibility of Canadian officials for the detention and torture of an innocent citizen; the *Braidwood Commission* opined on the responsibility of individual RCMP officers for the death of Robert Dziekanski; the *Westray Inquiry* opined on the responsibility of corporate officials for a fatal mining disaster that devastated a community. It seems disingenuous to suggest that the people subjected to such findings, and to the exceptional public scrutiny facilitated by an inquiry, have a lesser interest in the justice of the proceeding than defendants in a civil, litigated dispute. While the case is stronger in distinguishing inquiries from criminal trials, which pose the danger of incarceration and the stigma of conviction, it should be borne in mind that inquiries are sometimes predicates to criminal prosecutions, despite *Charter* and other limitations on the use of evidence between the two types of proceeding. For example, both the *Gomery* and *Walkerton* inquiries preceded criminal prosecutions against individuals who fell under their investigative scrutiny. The combination of inquiry and criminal proceedings exposes accused individuals to even greater stigma and prejudice than a criminal trial alone. This is not to suggest that individuals should never be subjected to both forms of proceeding, but rather to question whether those individuals themselves perceive a categorical distinction in the standards of justice they are owed by an inquiry as opposed to a court. The same is true of individuals who are heavily stigmatized by the inquiry process even if subsequent criminal or civil proceedings do not arise.

Conversely, it is questionable whether the victims of an injustice approach an inquiry with lesser expectations of procedural justice than in a court. For them, formal acknowledgment of wrong, allocation of responsibility, and recommendations for future prevention and redress may be just as valuable as an award of civil damages or the criminal conviction of individual perpetrators. Liora Salter has stressed the degree to which inquiries are popularly viewed as a means to "put the state on trial".[181] If the importance of an inquiry's findings are no less important to individuals than the decisions of a court, it should follow that the participants demand a similar level of justice from an inquiry process. The idea that inquiries should follow non-adjudicative procedures based on the unenforceable quality of their findings is thus considerably eroded.

This point is underscored by considering the example of one inquiry in more detail. The *Missing Women Commission of Inquiry* confronted difficult issues surrounding the opportunity for affected parties to be heard. Although not constituted to decide between two, diametrically-opposed versions of events, the inquiry bore directly on the experiences of individuals, communities, and groups that had previously felt excluded and ostracized by official institutions. Indeed, one of the inquiry's central investigative tasks was to determine why the police had not paid greater heed to the concerns of friends, family members, and groups working with vulnerable women in Vancouver's downtown eastside, at a time when police intervention might have prevented many avoidable deaths. For these community participants, the opportunity to be heard signaled the opportunity to redress previous experiences of exclusion. It was an opportunity to have those experiences publicly recognized, to demand a response on behalf of the individuals and agencies responsible for their exclusion, and to counter any denial of responsibility.[182] For the individuals and agencies themselves – notably the Vancouver Police Department, RCMP, and individual police officers involved in the missing women investigations – the inquiry represented a setting in which adverse findings could be made against them.[183] This in itself engaged an interest in

[181] *Supra* note 83 at 174-75.

[182] See BCCLA et al., *supra* note 31.

[183] The Commissioner himself spoke to the adversarial quality of the hearings phase of his inquiry, particularly with respect to allegations of discrimination made against the police: "That critical police failures in the missing women investigations resulted from discriminatory policing or systemic institutional bias is highly contested. It is an issue with an absolute division between the non-police participants and the police in this inquiry. Counsel for the VPD, the RCMP, and the Vancouver Police Union, as well as most of the individual police officers with independent counsel, utterly rejected these arguments, emphasizing the lack of evidence necessary to substantiate these serious crimes." See Oppal, *Final Report*, *Executive Summary*, *supra* note 29 at 93. Counsel for the families represented at the

being fully and fairly heard, even if in some instances this involved acknowledging wrongdoing. The *MWCI* thus illustrates that for inquiry participants, the opportunity to be heard on procedurally equal terms, to be permitted meaningful advocacy even where this means casting blame or confronting suspicions and allegations, and to be treated with impartiality and fairness by the commissioner, were paramount considerations. Each of these are values strongly reinforced by traditional adjudicative decision-making.

The kaleidoscopic nature of inquiries obliges us to acknowledge that not all participants will view a public inquiry with the same expectations and values. Just as the *MWCI* was criticized for not ensuring procedural equality for community participants, it was also criticized for not enabling the testimony of vulnerable witnesses through alternatives to adversarial cross-examination.[184] It states the obvious that inquiries do more than conduct adversarial hearings, and to claim that adjudicative values are their sole or overriding function would clearly overreach.

But my claim is more modest: it is that in some public inquiries, values legitimately sought from the process by participants parallel the values sought from adjudication. That is, those participants demand an equal assurance of justice as they would from a court; the subject-matter of the inquiry affects them so closely – either as subjects of investigation or victims seeking acknowledgment and redress – that their interest is at least equivalent to that recognized in litigated legal disputes. Accordingly, there is a strong basis upon which to argue that such participants should be afforded an adjudicative manner of participation, even where such participation must be balanced with other inquiry activities intended to meet different values.

Thinking of public inquiries as "hybrid" institutions is neither novel nor profound, but it serves as an important reminder that adjudicative procedure should not be dismissed summarily as complicating the process of investigation. For one thing, the accuracy of that assumption is dubious: in the *MWCI*, hearing more fully from affected parties may have strengthened the basis of investigative conclusions. For another, it places undue emphasis on the utilitarian goals of an

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inquiry went so far as to allege a deliberate "cover-up" on the part of the police. The Commissioner considered and flatly rejected this allegation (*ibid* at 105).

[184] See BCCLA et al., *supra* note 32 at 21, 49 and Stanton, *supra* note 35.

inquiry – the pursuit of an investigate mandate – at the expense of its deliberative value as perceived by individuals and groups directly affected. It invites categorical distinctions – "adjudicative" versus "investigate" – to dictate the procedural rights of participants rather than a fair appraisal of how a proceeding concerns and affects them.

Recognizing the adjudicative quality of some inquiry proceedings also aligns with common sense. The position that inquiries are "inquisitorial, not adversarial" simply belies the experiences of witnesses who are subjected to harsh scrutiny, and whose interests are clearly at odds with various interlocutors – including the commission itself – seeking to verify their implication in wrongdoing. To be clear, recognizing that inquiries are adversarial need not imply that a commissioner and counsel assume the roles of prosecutors: in some cases probing and adverse cross-examination is necessary to test the veracity of credible witnesses and testimony. Moreover, there is nothing inherently improper about commissioners, counsel and other participants in an inquiry developing factual theories which they seek to test through cross-examination, provided commissioners retain an open-mind about what they hear. If we recognize that these types of cross-examination are adverse, however, and that commissioners owe an opportunity for witnesses and participants to present their own proofs and reasoned arguments to the extent of their interest in an inquiry, then we should recognize that in this sense inquiries are adjudicative.

Whatever the distinctions offered by case law, these realities have been recognized (if somewhat obliquely) in the commentary of several prominent inquiry commissioners. In complementing the service of various legal counsel to his *Inquiry into Pediatric Forensic Pathology in Ontario*, Commissioner Goudge remarked: "They all contributed, some significantly, to the inquiry being able to proceed as efficiently as possible and to attempt to fully discharge its mandate while preserving the fairness necessary for any adjudicative process."[185] Commissioner Braidwood has described his hearings commission into the tasering death of Robert Dziekanski in the following terms: "The hearings were entirely adversarial. Here, it was obvious that the role of various

[185] Justice Stephen T Goudge, "Reflections on the Public Inquiry into Pediatric Forensic Pathology in Ontario" in Laverne Jacobs and Sasha Bagley, eds, *Nature of Inquisitorial Processes in Administrative Regimes: Comparative Perspectives* (Surrey: Ashgate, 2012) 199 at 202 (emphasis added).

persons as they encountered Mr. Dziekanski at the airport would be under close scrutiny, particularly the four RCMP officers, along with various airport and other staff members."[186]

If a strong preliminary basis thus exists to recognize the role of adjudication in some public inquiries, we are nevertheless left with the fact that inquiries are obliged to confront polycentricity. Moreover, we are obliged to acknowledge that judges are not the only individuals skilled in adjudication: many administrative tribunals, for example, use adjudicative procedures in carrying out their respective functions. Completing the argument for judicial service on some inquiries requires explaining the extent to which judges are equipped to address polycentric issues, and how their particular observance of adjudication reinforces distinct values that resonate with the purpose of public inquiries. To do so, we must consider Fuller's theory in the light of a judge's contemporary role in enforcing the rule of law.

(c) Judges and the Rule of Law

Fuller's "Forms and Limits" evinces a clear focus on private law, and has been criticized for failing to anticipate the rise of public law litigation that would accompany the civil rights reforms of the 1960s and 70s and the consequent role of judges in identifying, defining, and enforcing constitutional values. Writing in 1979, Owen Fiss' archetypal counterpoint to Fuller's thesis was America's tortured experience with the desegregation of public schools – a process that required detailed judicial oversight of the administration of certain school districts in order to enforce compliance with the constitutional guarantee of equality.[187] Had judges limited themselves simply to declaring the "winner" of bilaterally litigated disputes, and not grappled with the polycentric exercise of enforcing structural remedies, their rulings would have had no meaningful effect. These remedies demanded that judges take account of societal interests and effects beyond those raised by the parties; that is, the judges were required to look beyond simply the "proofs and reasoned arguments" placed before them.

The duty for judges to look beyond the proofs and arguments of disputing parties, and to account for broader societal interests and effects, would seem to apply generally in the modern context of constitutional adjudication. This is evident in the Canadian approach to determining

[186] The Honourable Thomas R Braidwood, QC, "Reflections on the Braidwood Inquiry" in Jacobs and Bagley, *ibid*, 209 at 215 (emphasis added).

[187] Owen Fiss, "The Forms of Justice" (1979) 93 Harv L Rev 1.

the legitimacy of limitations on constitutional rights. Proportionality analysis, flowing from section 1 of the *Charter*, asks that judges consider whether a rights-infringing law has a "pressing and substantial objective"; whether the measures it employs are reasonably connected to that objective; whether it impairs a constitutional right to only the minimum extent necessary; and whether the benefits secured by the law are proportionate to the constitutional injury they entail.[188] This form of inquiry – particularly the last step, which asks that a court assess the societal effect of a law – seems starkly polycentric. Indeed, it is a familiar practice in Canadian constitutional litigation for intervener parties to be granted standing in order to provide the courts with a broader societal perspective on which to base their decisions. It is also typical for parties to include social science data, academic commentary, and a host of other "non-legal" materials in their court briefings.

Aharon Barak, who served as President of Israel's Supreme Court from 1995 to 2006 and is among the most influential commentators on the role of judges in constitutional democracies, offers a theory of judging that clearly engages polycentric concerns.[189] Barak posits that modern democracy has both a formal and a substantive quality – the former concerning the process of representative government, the latter concerning the enforcement of fundamental values necessary to sustain democracy itself:

> Everyone agrees that a democracy requires the rule of the people, which is often effectuated through representatives in a legislative body. … However, real or substantive democracy, as opposed to formal democracy, is not satisfied merely by these conditions. Democracy has its own internal morality, based on the equality and dignity of all human beings. Thus, in addition to formal requirements, there are also substantive requirements. These are reflected in the supremacy of such underlying democratic values and principles as human dignity, equality, and tolerance. There is no (real) democracy without recognition of basic values and principles such as morality and justice. Above all, democracy cannot exist without the protection of individual human rights – rights so essential that they must be insulated from the power of the majority.[190]

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[188] These criteria were stated for the first time in Canadian jurisprudence by the Supreme Court in *R v Oakes*, [1986] 1 SCR 103, but their origins lie in converging constitutional practices shared by many countries. See Aharon Barak, *Proportionality: Constitutional Rights and their Limitation*, translated by Doron Kalir (Cambridge: Cambridge University Press, 2012).

[189] Aharon Barak, "A Judge on Judging: The Role of a Supreme Court in a Democracy" (2002-2003) 116 Harv L Rev 19 [Barak, "Judging"]. Barak's specific focus is on the role of a Supreme Court judge; that is, a judge at the apex of a country's legal system. There is no obvious reason, however, not to consider his observations relevant to the work of all judges empowered to hear and decide constitutional disputes – especially where that jurisdiction is accompanied by the power of statutory invalidation, as in the case of Canadian superior court judges.

[190] *Ibid* at 38-39.

In this setting, judges play two crucial roles: to protect the constitution, which includes protecting those substantive values essential to a democracy, and to "bridge the gap between law and society."[191] By the latter, Barak means to acknowledge that society exists in a state of evolution, and the law too must evolve to accommodate changing social values and collective goals. These roles do not belong to the judiciary exclusively, but are shared with the other branches of government.[192] Accordingly, Barak observes that elected governments assume the "senior" role in legislating – that is, in enacting new laws responsive to the democratic imperatives of citizens.[193] Judges, by contrast, assume a "junior" role in interpreting legislation: in giving it meaning and application in the context of cases that arise before them.[194]

Barak also argues that judges take the "senior" role in developing the common law.[195] Their discretion is bounded in important ways, however. For one thing, judges must assure coherence between the development of common law and the existing system of legal principles and rules. Quoting Fuller, he notes: "The rules applied to the decision of individual controversies cannot simply be isolated exercises of judicial wisdom. They must be brought into, and maintained in, some systematic interrelationship; they must display some coherent internal structure."[196] For another, judges must be mindful of protecting the substantive values at the heart of the legal system. Normally, this will involve incremental development of the common law in line with principles that have wide legitimacy, such as those formally recognized in entrenched rights.[197]

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[191] *Ibid* at 25-26 and 28.

[192] *Ibid* at 28.

[193] *Ibid* at 29.

[194] *Ibid.*

[195] *Ibid.*

[196] *Ibid* at 30, quoting Lon L Fuller, *Anatomy of the Law* (New York: Praeger, 1968) at 94. Barak also comments favourably on Ronald Dworkin's theory of judges as collective authors of a chain novel, each responsible for ensuring coherency of the storyline with the preceding chapters: *ibid*, citing Ronald Dworkin, *Law's Empire* (Cambridge, Mass: Belknap Press, 1986) at 229. It would be inaccurate, however, to cast Barak's judicial philosophy solely in Dworkinian terms. Barak characterizes his philosophy as an "eclectic reexamination of the judicial role", drawing selectively from legal realism, positivism, natural law, the legal process movement, critical legal studies, and interdisciplinary legal studies: *ibid* at 21.

[197] Barak writes: "Judges should not reflect their own principles, but rather the fundamental principles that are implied by the legal system and the ethos that it characterizes. The nature of the fundamental principles and the

However, occasionally judges must also utilize the independence and security of their positions to be the "flag bearers" of change – as in the case of landmark decisions expanding the reach of constitutional rights, such as *Brown v Board of Education*.[198] Barak observes:

> The consensus within which judges usually ought to operate should be a consensus grounded in the fundamental values of the legal system. Judges should not act according to a consensus formed by transient trends that are inconsistent with the society's fundamental values. Judges' social framework must be central and basic, not temporary and fleeting. When society is not being true to itself, judges are not required to give expression to its passing trends. They must stand firm against these trends, while giving expression to the social consensus that reflects their society's fundamental principles and tenets[.][199]

The task of protecting fundamental values necessarily involves judges in a kind of balancing, since different values may bear on common issues, demanding the assessment of their relative weight in order to reach a proper legal disposition. Barak writes: "The concept of balancing recognizes that fundamental principles may conflict with one another, and that the proper resolution of this conflict lies not in the elimination of the inferior value but in determining the proper boundary between conflicting values."[200]

This observation brings us full-circle to the Canadian jurisprudence on s 1 of the *Charter*, since proportionality analysis is exactly the type of balancing that Barak envisages as characteristic of the judicial role in rights-based democracies. Proportionality is a means of assuring that the values promoted in limiting constitutional rights have "weight", or importance, exceeding that attached to full enforcement of the rights in a given context. Rather than being an open-ended balancing exercise, s 1 commands that limits on rights be justified in reference to morally

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balance among them are determined by the fundamental positions and fundamental beliefs of the society, such as those written into its constitution or its declaration of independence" (*ibid* at 86). Such principles will embrace both public and private law matters; Barak hypothesizes that in a democracy they are likely to include "ethical values (such as justice, morality, and human rights)", "social purposes (such as the existence of the state and public safety within it, certainty and stability in interpersonal arrangements)", and "proper ways of behavior (such as reasonableness, fairness, and good faith)" (*ibid* at 85-86).

[198] 347 US 483 (1954).

[199] "Judging", *supra* note 189 at 88-89.

[200] *Ibid* at 94. Indeed, he recognizes that fundamental principles associated with the formal and substantive character of democracy (legislative supremacy and individual rights, respectively) will themselves often have to be balanced by judges.

substantive values – namely, the values of a "free and democratic society."[201] The judicial task is thus necessarily concerned with elucidating those values and assessing their relative and contextual weight. As Dickson CJ remarked in *R v Oakes*:[202]

> Inclusion of these words as the final standard for justification for limits on rights and freedoms refers the Court to the very purpose for which the *Charter* was originally entrenched in the Constitution: Canadian society is to be free and democratic. The Court must be guided by the values and principles essential to a free and democratic society which I believe embody, to name but a few, respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide range of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society. *The underlying values of a free and democratic society are the genesis of the rights and freedoms guaranteed by the* Charter *and the ultimate standard against which a limit on a right or a freedom must be shown, despite its effect, to be reasonable and demonstrably justified.*[203]

The implication is that Canada's constitutional structure has a coherent, self-referential character: since the limits on rights must flow from the same source as the rights themselves, that source (what Barak would term the "substantive" character of a democracy) remains inviolable.[204]

It should be clear that the judicial methodology commanded by this model requires judges to confront polycentric issues. If judges do more than simply interpret and pronounce the requirements of formal law, but "protect the constitution" and "bridge the gap between law and

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[201] Section 1 of the *Charter* states: "The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

[202] [1986] 1 SCR 103.

[203] *Ibid* at para 64 (emphasis added).

[204] Lorraine Weinrib has termed this the postwar model of rights protection, referring to its proliferation among liberal democracies following the Second World War. She writes: "Constitutional rights embody the bedrock principles of post-Second World War liberal democracies. Experience in the operation of rights-protecting instruments has demonstrated that it is these principles, not their crystallization as rights, which must be regarded as absolute. … Limitation provisions in rights-protecting instruments thus give legal expression to a common body of principles underlying the guarantees and the permitted basis for their limitation. They do not mark a boundary beyond which the exercise of plenary legislative authority reasserts itself, excluding the normative force of these principles. In operation, limitation provisions require demonstration by the state that any measure diminishing enjoyment of the right conforms to the principles, encapsulated in the formula for permitted limitation, that underlie the rights themselves": Lorraine Weinrib, "Canada's *Charter of Rights*: Paradigm Lost?" (2002) 6:2 Rev Const Stud 119 at 121. See also Lorraine Weinrib, "The Supreme Court of Canada in the Age of Rights: Constitutional Democracy, the Rule of Law and Fundamental Rights Under Canada's Constitution" (2001) 80:1 Can Bar Review 699. Barak situates his understanding of "substantive" democracy as a postwar phenomenon, in which individual rights, enforced by courts, are seen as a bulwark against the recurrence of fascism: *supra* note 189 at 20-21.

society", they would appear to go far beyond the passive hearing and resolution of bilateral disputes as framed by the parties. Accepting for the moment the veracity of Barak's claims and their relevance to Canada's constitutional landscape, is Fuller's account of adjudication thus an antiquated ideal?

That conclusion would be premature. Recall that Barak envisages the courts as having *shared* responsibility, together with the other branches of government, for protecting the constitution and bridging the gap between law and society. In elaborating how this responsibility is shared – and more specifically, how the judicial portion of it is distinct – Barak highlights not just interpretive methods but institutional procedure, and in terms that explicitly recognize the value of Fuller's theory. His perspective in this regard warrants quotation at length:

> Without a dispute there is no judicial lawmaking. By nature, then, judges create law sporadically, not systematically. The changes they make to law are partial, limited, and reactive. The issues brought before a court are, to some extent, selected randomly. Many years pass before a problem that troubles the public enters a judicial forum. A court's control over the matters it hears is negative in nature, permitting only dismissal of what the court does not wish to consider. Consequently, a judge cannot plan a strategy of bridging the gap between law and society. The changes he or she makes to the law are partial or limited. When a comprehensive and immediate change is needed in an entire branch of law, the legislature ought to make it. Moreover, one cannot bridge the gap between law and society without having reliable information about society. The court does not always have the information about social facts that would justify a change in law. Our laws of evidence usually look backward (adjudicative facts), providing a (partial) answer to the question of "what happened." They usually do not look forward (legislative facts), and do not provide an answer to the question "what should happen." …
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> … [A] a judge should beware evaluating complex polycentric questions of economic or social policy that require specialized expertise or knowledge and that may rely on assumptions concerning issues with which he or she is unfamiliar. I am aware of the difficulties in making this distinction. I mean only to say that a judge should be sensitive to this type of consideration. I feel much more comfortable holding that one type of economic plan is discriminatory compared to another than I do holding that one economic plan falls within a range of reasonableness while another does not.[205]

The importance of this observation lies in the link it draws between the limits of a judge's role and the manner in which a judge receives and hears disputes. That manner sets limits on the degree to which judges engage with polycentricity. That judges hear disputes at the instance of parties (and thus receive issues in a "partial, limited, reactive" form), and must base their decisions in large part on the forensic scrutiny of litigants' claims ("adjudicative facts"), means

[205] *Supra* note 189 at 32-33.

that they cannot "plan a strategy" of comprehensive policy reform in same the manner as a legislature. They can and do confront polycentricity, however, in all of the ways discussed above. These forms of polycentric decision-making, it would appear, can be accommodated by judicial methodology, and indeed are distinct from the type of polycentric decision-making we might expect from policy officials or from the legislature. Judicial *procedure* serves as an important umpire of the judicial *role*, from a separation of powers perspective.

Fuller himself conceded that adjudicators confront polycentric issues, observing: "It is not, then, a question of distinguishing black from white. It is a question of knowing when the polycentric elements have become so significant and predominant that the proper limits of adjudication have been reached."[206] These limits are determined by asking whether the essential value of adjudication is preserved: "Whatever destroys the *meaning* of … participation [by proofs and reasoned arguments] destroys the integrity of adjudication itself."[207] The value produced by an adjudicative process is the high assurance of justice it affords to participants, by virtue of their structural equality in presenting proofs and reasoned arguments to a neutral arbiter, and by reason of the arbiter's obligation to reasonably address their claims in his or her decision. Polycentricity undermines the adjudicative character of a process when it demands procedural modification to a degree that this value is no longer produced.

Accepting Barak's account of judges as constitutional guardians responsible for bridging the gap between law and society, we see that certain types of polycentricity impinge on the work of judges without undermining the adjudicative nature of courts. Public inquiries are different. To borrow Barak's language, inquiries are expressly concerned with developing new law or policy "systematically"; with the assertion of positive control over issues to be addressed; with the development of strategies; with proposing "comprehensive and immediate change"; with the search for complete, not partial, social facts; and with looking forward to prescribe "what should be." Thus, in the case of public inquiries, the situation is inverted, and we must ask: can adjudication impose itself on the work of a polycentric process, and still play a valuable and principled role? More specifically, can the fulfillment of adjudicative values (with their

[206] *Supra* note 74 at 398.

[207] *Ibid* at 364.

consequent procedural commitments) form a part of a public inquiry without diminishing the efficacy of the institution?

The answer to this question is yes, but only in the case of some, not all, public inquiries. These will be the types of inquiry suited to judicial leadership. We have already distilled the core value of adjudication by reference to Fuller's theory, and recognized that the participants in some public inquiries may legitimately demand the enforcement of this value. We may now complete the picture by recognizing how the instantiation of adjudication within a public inquiry reinforces the constitutional role of the judge in fostering the rule of law, and in reinforcing the boundaries that constrict that role.

TRS Allan has pointed out that the value of adjudication is especially strong in the litigation of public law issues, where the individual is frequently placed in a position of adversity with the state.[208] The fact that adjudication structures disputants as equals – by requiring them to speak in terms of proofs and reasoned arguments (and not, for example, through the power of their relative social influence), and by imposing a duty on the arbiter to hear those claims impartially and to rationally address them – provides an individual with a special assurance that official demands placed upon him are just. This is the case because a reasonable person, having been afforded the benefit of an adjudicated challenge to an official demand, should be prepared to accept the non-arbitrary character of the demand when it is affirmed by an impartial arbiter.[209] Stated differently, adjudication constitutes an institutional means by which individuals can be satisfied of the non-arbitrariness of official authority. It obliges an official interlocutor to justify its expression of authority in rational terms, answering fully the claims of an individual disputant. Allan considers this justificatory role to be essential in maintaining the equality of individuals – that is, the notion that all individuals have equal dignity and are equal bearers of fundamental rights. Legislative and executive actions will impact different individuals in different

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[208] TRS Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law* (Oxford: Oxford University Press, 2001) at 8-9.

[209] *Ibid* at 8-9: "In extolling the virtues of adversarial adjudication at common law, Fuller was not (as is often alleged) guilty of a short-sighted Anglo-American cultural bias; he was rightly drawing attention to the intrinsic value of fair procedures when the participants have substantial control over their operation and conduct. The litigants must be free to direct the relevant legal and moral dialogue to the questions of justice that they regard as critical to the law's claim to their assent."

ways. These distinctions, in order to be non-arbitrary, must be justified by some rational purpose consistent with the fundamental values of a society:

> Accepting the propriety of laws and government policies that discriminate between persons for legitimate public purposes, the principle of equality imposes a fundamental requirement of justification: legislative and administrative distinctions … must be reasonably related to genuine public purposes, reflecting an intelligible and defensible view of the common good, consistent with accepted principles of the legal and constitutional order. … Equality, in this abstract, but crucial, understanding, is therefore the opposite of arbitrariness: it means treatment in accordance with an overall scheme of justice, consistently defended and applied to all and which is subject to unfettered public debate and criticism.[210]

Adjudication provides the institutional means of assuring this justification is in place.

In demanding that official authority be justified with reference to "a defensible view of the common good, consistent with accepted principles of the legal and constitutional order", Allan echoes Barak's claim that judicial decisions must cohere with fundamental principles underlying the Constitution. He also echoes the Canadian jurisprudential approach under section 1 of the *Charter*, which is centrally concerned with the justification of official authority in reference to morally substantive, fundamental values. This ethic of justification is characteristic not just of Canadian constitutional adjudication, but of the modern development of public law in Canada generally.

In a 1999 address to the Canadian Bar Association, Chief Justice Beverley McLachlin described Canada's observance of the rule of law in terms of a "culture of justification":

> Perhaps [the Rule of Law] can best be expressed, not as a monolithic prescriptive rule … but rather as a collection of broadly accepted ideals. Those ideals, I suggest, include but are not limited to the notions that the state must be bound by the laws it prescribes; that substantive law should be characterized by certainty, generality, and equality; that the enforcement of the law must be impartial; that the judiciary must be independent; and that the law must be respected as an organizing and civilizing force for virtue in society.
>
> To these I would add the overarching principle that societies governed by the Rule of Law are marked by a certain *ethos of justification*. In a democratic society, this may well be the general characteristic of the Rule of Law within which the more specific ideals I described are subsumed. Where a society is marked by a culture of justification, an exercise of public power is only appropriate where it can be justified to citizens in terms of rationality and fairness. Arbitrary decisions and rules are seen as illegitimate. … [M]ost importantly, the ability to call for such justification as a precondition to the legitimate exercise of public power is regarded by citizens as their right, a right which

[210] *Ibid* at 122-23.

> only illegitimate institutions and laws venture to infringe. The prevalence of such a cultural expectation is, in my view, the definitive marker of a mature Rule of Law.[211]

That Chief Justice McLachlin refers to such a society as possessing a "mature" rule of law would seem to imply that she is not advocating a universal, semantic definition of the latter term. Rather, she is aiming to articulate what the rule of law means as a substantive ideal in Canadian legal and political practice. I intend the same meaning when I use the term in this dissertation.

The Chief Justice highlights two important trends contributing to Canada's mature rule of law. The first is the pragmatic and functional approach to judicial review of Canadian administrative tribunals (now simply the standard of review analysis), which developed in a series of Supreme Court of Canada decisions during the 1980s and 1990s.[212] Previously, through the exercise of strong, non-curial judicial review, Canada's courts had exhibited hostility to the growth of administrative tribunals, which were perceived both to incur on the roles of courts (recall the s 96 jurisprudence considered previously) and as hallmarks of growing executive power that potentially threatened individual rights. Both of these concerns, McLachlin suggests, were rooted in what she terms a traditional, Diceyan conception of the rule of law, according to which official authority should flow from a legislature via laws of general application to be interpreted and applied by courts (as opposed to from the executive, to be interpreted and applied by executive agents shielded from judicial review by strict privative clauses).[213] The pragmatic and functional approach, by recognizing that contextual factors such as the expertise of a tribunal could warrant more deferential standards of review, signified recognition by the courts that there were areas in which tribunals may produce better outcomes than judges. This,

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[211] Chief Justice Beverley McLachlin, "The Role of Administrative Tribunals and Courts in Maintaining the Rule of Law" (1999) Can J Admin L & Prac 171 at 174. McLachlin acknowledges the influence on her thinking of David Dyzenhaus, "The Politics of Deference: Judicial Review and Democracy" in Michael Taggart, ed, *The Province of Administrative Law* (Oxford: Hart Publishing, 1997) at 278-207, although she does not endorse Dyzenhaus' views in their entirety.

[212] The shift to a more deferential approach to judicial review was first marked by *CUPE Local 963 v New Brunswick Liquor Corp*, [1979] 2 SCR 227, in which Justice Dickson (as he then was) "admonished" courts not to broadly construe questions of jurisdiction warranting a strict, correctness standard of review. Rather, certain tribunal decisions should be overturned only in the face of "patent unreasonableness" (McLachlin, *supra* note 211 at 179). The pragmatic and functional test itself was first employed in *Syndicat national des employés de la commission scolaire régional de l'Outaouais v Union des employés de service, local 298*, [1988] 2 SCR 1048, and clarified, most notably, in *Canada (Director of Investigation and Research) v Southam Inc*, [1997] 1 SCR 748 and *Pushpanathan v Canada (Minister of Citizenship and Immigration)*, [1998] 1 SCR 982.

[213] McLachlin, *supra* note 211 at 175-76.

in effect, involved recognizing that courts were not alone in overseeing the interpretation and application of laws – indeed, that they were not exclusively responsible for enforcing the rule of law. As McLachlin writes:

> Courts have begun to redefine their relationships with tribunals. They have had to adjust fundamentally both their philosophical orientation and their very position in the structure supporting the Rule of Law. Increasingly, it is recognized that that structure must include social institutions other than courts, including administrative boards and tribunals. Respect must be shown to this new reality. Courts have strived to acknowledge that the Rule of Law is more pluralist than ever at the close of the twentieth century.[214]

This characterization of rule of law as "pluralist" alludes to the second trend considered by the Chief Justice. McLachlin observes that just as Canada's courts have moved toward greater deference in their oversight of administrative tribunals, those tribunals have been vested with greater responsibility to enforce fundamental values, such accountability, rationality, fairness, and justification. These values connote a positive rule of law: one that requires proactive effort to sustain, not just the negative restraint of official power.[215] The most significant harbinger of this change is the recognition of a broad duty of fairness in administrative law, beginning with *Nicholson v Haldimand-Norfolk (Regional Municipality) Commissioners of Police*.[216] It also lies in the treatment of fairness as an issue that will typically attract strict judicial review.[217] Although the strict review of procedural fairness may be thought to conflict with the deference commanded by the pragmatic and functional approach, McLachlin suggests:

> [I]f the Rule of Law can be conceptualized as embodying a culture of justification, any apparent conflict disappears. This Rule of Law, particularly as it has modified Dicey's approach, promotes administrative action. But it does so only on the condition that the procedures which are utilized are *fair* and facilitate participation and justification.

[214] *Ibid* at 185.

[215] McLachlin writes: "The Rule of Law today means much more than that the government and its agents are not above the law and that it is solely the role of the courts to enforce this negative proscription. The new Rule of Law has an element of positivity. It requires proactive efforts to maintain it. Fair procedures, equitable treatment, and responsiveness to the public are the cornerstones of a system of administrative tribunals built according to the Rule of Law" (*ibid* at 186).

[216] [1979] 1 SCR 311.

[217] McLachlin writes, "In keeping with my earlier proposition that societies characterized by a mature Rule of Law enjoy a certain culture of justification, courts must be especially ready to intervene in those unfortunate circumstances where a board or tribunal fails to abide by these principles. In such a case, regardless of whether it is said to be caused by crushing caseloads, a difficult legislative mandate, inexperience or funding difficulties, the board may have failed to justify its exercise of public power. It is not just a matter of 'fairness.' It has failed to abide by the fundamental values underlying the Rule of Law. A citizen to whom the administrative agency has denied due process … has a right to have the court intervene to ensure the preservation of the Rule of Law and the court has a duty to respond" (*supra* note 211 at 187).

> *CUPE* instructs courts to be deferential, of course, but *Nicholson* cautions that deference is only owed if the board has fulfilled its obligations under the Rule of Law. Those obligations require that the board make a conscientious effort to justify its decision to the public. Procedural fairness is an important way to achieve this goal.[218]

The Chief Justice's comments thus demonstrate that the justification of official authority, measured against the morally substantive benchmarks of a society's fundamental values, is not just an idiosyncratic feature of constitutional jurisprudence flowing from s 1 of the *Charter*, but a basic tenet of Canadian public law.

More recent jurisprudential developments have underscored this approach. The Court's decision in *Dunsmuir*,[219] replacing the pragmatic and functional test with a more straightforward "standard of review analysis", collapsing the standards of review to two and expanding the ambit of deferential, "reasonableness" review, continued the trend of recognizing the valid role of administrative tribunals in sustaining fundamental values. The Court's observation that a "reasonable" decision is one exhibiting "justification, transparency and intelligibility" resonates with the ethos of justification described by the Chief Justice.[220] So too does the imposition in *Baker* of a broad, common law duty of administrative officials to give reasons for their decisions.[221] As David Dyzenhaus has observed:

> L'Heureux-Dubé J.'s finding in *Baker* of a general duty on administrative decision-makers to give reasons when the decisions affect important interests of the individual is … intimately related to her understanding of both the relationship between courts and the administrative state and of the kinds of values that must inform the officials of that state. The measure of performance is not the decision, taken by itself, but whether the reasons given by the delegate adequately justify that decision.[222]

Those reasons must cohere with fundamental values of the legal system that find crystalized (although non-exhaustive) expression in the *Charter* and other formal sources of constitutional

[218] *Ibid*.

[219] *Dunsmuir v New Brunswick*, [2008] 1 SCR 190, 2008 SCC 9.

[220] *Ibid* at para 47.

[221] *Baker v Canada (Minister of Citizenship and Immigration)*, *supra* note 3.

[222] David Dyzenhaus, "Constituting the Rule of Law: Fundamental Values in Administrative Law" (2001-2002) 27 Queen's LJ 445 at 492-93.

law.[223] Finally, the Supreme Court's recognition that the authority of administrative tribunals to interpret and apply the law embraces the authority to apply the *Charter*,[224] including to the scrutiny of their own constituting statutes, confirms the shared jurisdiction of the various institutions of state to proactively affirm and protect the basic values of Canada's legal order.

Accordingly, if *all* expressions of official power – both as it is exercised by administrative bodies, and in the case of some tribunals, as it is tested by them – must meet an ethic of justification, then that duty alone cannot be used to distinguish the constitutional role of judges. We must look elsewhere to account for what makes the type of *judging* exercised by judges distinct from the roles of administrative tribunals and other institutions of state. One factor will certainly be the constitutional guarantee of judicial independence secured by the separation of powers. Administrative boards and other officials may be responsible for observing fundamental values and, pursuant to those values, recognizing the rights of individuals, but only courts have constitutionally protected independence in doing so. Conversely, another factor will be the injunction against courts engaging in political activity, the second purposive goal of the separation of powers, which reserves political decision-making and engagement in partisan activities to those branches of government ultimately beholden to the electorate. Administrative boards may be functionally independent, but as creatures of the executive branch and instruments of policy, they clearly do not have the same constitutionalized impediment as courts when it comes to grappling with policy questions. Indeed, administrative boards are often comprised of policy experts for the specific purpose of grappling with such questions. Finally, even allowing for deference to the expertise of administrative tribunals, through retention of a residual power of judicial review (especially as it concerns procedural fairness) the courts retain an oversight role that continues to focus distinctly on the protection of individuals. Recall the Canadian separation of powers jurisprudence considered earlier, which framed the purpose of judicial independence in reference to protecting the Constitution, and by implication, protecting individuals.

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[223] *Ibid* at 488-89 and 490.

[224] See especially *Nova Scotia (Workers' Compensation Board) v Martin; Nova Scotia (Workers' Compensation Board) v Laseur*, [2003] 2 SCR 504, affirming that where administrative tribunals have authority to decide questions of law, barring statutory prohibition, they may apply the *Charter* and even decline to apply aspects of their constituting statutes seen to violate the *Charter*; and *R v Conway*, 2010 SCC 22, [2010] 1 SCR 765, finding that tribunals may issue remedies under s 24(1) of the *Charter* where doing so is consistent with the powers conferred by their constituting statutes.

The Australian jurisprudence on incompatibility brought these distinguishing traits to the fore by highlighting the interrelationship between judicial independence and representative and responsible government. That jurisprudence takes a step further than Canada's case law on the separation of powers, with the latter's focus on the institutional characteristics needed to safeguard the independence of judges qua judges: it suggests that preservation of the separation of powers is intimately connected to proper observance of judicial *procedure*, even where judges assume non-judicial tasks. Barak also highlights the importance of procedure in describing the institutional boundaries of courts in terms that evoke Fuller's classic account of adjudication.

Adjudication intrinsically reinforces the principles of judicial independence and responsible government. By allowing participants full and equal opportunity to state the bases on which an arbiter is to render a decision, and by requiring the arbiter to issue a decision that rationally addresses those positions, adjudication removes arbitrary considerations – such as the relative social power or influence of the parties – from the equation. The removal of these considerations safeguards independence by insulating the decision-maker against illegitimate influence from without. It also safeguards against the arbiter engaging in a form of political decision-making, and thus buttresses the functional distinctness of the democratically accountable, political branches of government. The Supreme Court in *Beauregard* held:

> The rationale for … [the] modern understanding of judicial independence is recognition that the courts are not charged solely with the adjudication of individual cases. That is, of course, one role. It is also the context for a second, different and equally important role, namely as protector of the Constitution and the fundamental values embodied in it – rule of law, fundamental justice, equality, preservation of the democratic process, to name perhaps the most important. In other words, judicial independence is essential for fair and just dispute-resolution in individual cases. It is also the lifeblood of constitutionalism in a democracy.[225]

It is now possible to understand why the "context" in which judges protect and enforce fundamental values is so important: through the observation of adjudicative procedure, judges reinforce their principled distinctness from the other branches under the separation of powers.

[225] *Supra* note 102 at 70 (emphasis added).

Mary Liston suggests that the features of Canadian constitutionalism reviewed above demonstrate the centrality of dialogue to Canada's observance of the rule of law.[226] The rule of law has been given a range of treatments by Canada's courts. In some cases, it has been identified as part of a package of substantive, interrelated principles with robust normative force,[227] while in others, it has been treated as a doctrinally specific principle requiring the creation of a positive legal order and the supremacy of law over government officials, but denying courts the ability to invalidate laws absent conflict with written constitutional prescriptions.[228] Debate abounds as to whether the rule of law has a justiciable quality, and in particular whether courts should be empowered to evoke the rule of law as a free-standing principle limiting or invalidating legislative acts.[229] This dissertation takes no position on that debate, as the view of rule of law taken here is capable of supporting either interpretation: both strong and weak forms of judicial review admit of judges weighing and determining the appropriate balance between fundamental principles.[230]

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[226] Mary Liston, "Governments in Miniature: The Rule of Law in the Administrative State" in Colleen M Flood and Lorne Sossin, eds, *Administrative Law in Context* (Toronto: Emond Montgomery, 2008) 78-114.

[227] The paradigmatic example of a robust, morally substantive and judicially enforceable conception of rule of law was provided by Justice Rand in *Roncarelli v Duplessis*, [1959] SCR 121 [*Roncarelli*]. Rand J found that Premier Duplessis' ordered rescission of Roncarelli's liquor license not only exceeded the authority of the relevant provincial statute, but compromised the rule of law itself by constituting a capricious and arbitrary exercise of discretion. Even if the rescission had been effected by the properly authorized official, it still would have been invalid, as the exercise of such discretion demanded good faith absent express statutory authorization to the contrary. See discussion in Liston, *ibid* at 88-89 and David Dyzenhaus, "The Deep Structure of *Roncarelli v Duplessis*" (2004) 53 UNBLJ 111. A more recent example of robust, substantive treatment of the rule of law was provided by the Supreme Court in *Reference Re Secession of Quebec*, [1998] 2 SCR 217, in which the Court identified four, interrelated principles that underlie and animate Canada's legal order: federalism, democracy, respect for minorities, and constitutionalism and the rule of law. These principles "may give rise to substantive legal obligations (have 'full legal force', as we described in the *Patriation Reference* …), which constitute substantive limitations on government action. … The principles are not merely descriptive, but are also invested with a powerful normative force, and are binding upon both courts and governments" (*ibid* at para 54; citations omitted).

[228] See the Supreme Court's decision in *British Columbia v Imperial Tobacco Ltd*, [2005] 2 SCR 473, in which the Court rejected the applicants' attempt to have legislation declared invalid for conflict with an unwritten principle of rule of law. The Court found that, were it to do so, this would be tantamount to endorsing a particular theoretical account of the rule of law, and at the expense of the express statutory text of the Constitution. In the Court's words, "protection from legislation that some might view as unjust or unfair lies not in the amorphous underlying principles of our Constitution, but in its text and the ballot box" (*ibid* at para 66).

[229] An excellent illustration of this debate is provided in the competing arguments of Allan, *supra* note 208, who is a proponent of the justiciable and enforceable qualities of unwritten principles, and Jeffrey Goldsworthy, his most strident critic. See especially Jeffrey Goldsworthy, "Homogenizing Constitutions" (2003) Oxford J Leg Studies 483.

[230] This balancing is evident in the Supreme Court's decision in *Imperial Tobacco*, *supra* note 228, for example, which most commentators would acknowledge presents one of the most restrained treatments of the rule of law by the Court. The Court's interpretation of the rule of law, and its normative force in the face of an allegedly unfair law, itself exhibits a balancing of fundamental principles – including the separation of powers, democracy, and the

The very process of engaging in such balancing, however, and the manner in which it manifests in Canadian judicial practice, evinces a dynamic and joint relationship amongst the institutions of state, emblemized by the metaphor of dialogue: legislatures may limit the fundamental rights listed in the *Charter*, but must justify their actions to courts in the language of proportionality, and in a manner that coheres with a free and democratic society; administrative boards are owed deference in the deployment of their expertise to address matters prescribed by their legislative mandates, but must honour the *Charter* and procedural fairness in doing so; and courts must enforce compliance between legislative and executive acts and the Constitution, subject to the possibility of legislative reply, and crucially, through the procedural medium of adjudication.

(d) Public Inquiries and Adjudication

It is now possible to express, in more substantial terms, the thesis that will be applied in the remainder of this dissertation. Judges are suited to the leadership of inquiries likely to affect the interests of certain individuals or groups to such an extent that those individuals and groups may legitimately demand the high assurance of justice instilled by an adjudicative process. In dealing with such participants – both those whose participation in the inquiry is voluntary, and those whose participation is compelled – judges should strive to preserve the core value of adjudication: that is, to facilitate a manner of participation by means of proofs and reasoned arguments to the extent of the participants' interests, and to rationally address the claims of those participants in formulating relevant interlocutory and final conclusions. As with judges confronting a constitutional dispute in court, judicial commissioners will be tasked with integrating the adjudicative hearing of such participants with the wider polycentric issues engaged by their inquiries. Moreover, they will be required to confront polycentric issues to a far greater degree, necessitating a hybrid inquiry structure in which adjudication is employed in

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observance of constitutional text. Specifically, it preferences fidelity to legislative intent and deference to the democratic authority of lawmakers over enforcement of a substantive concept of fairness. It is intriguing to speculate whether the Court might have decided the case differently had the applicant not been a relatively unsympathetic corporation. For example, were the British Columbia legislature to have enacted legislation retroactively imposing liability on adult smokers for the healthcare costs of children exposed to secondhand smoke, might the courts have invalidated the legislation for failing to accord with the rule of law principle that laws be knowable to their subjects? The notion that the rule of law may require different standards of official authorities in dealing with individuals as opposed to organizations or other incorporeal interests will surface at several points in this dissertation. The critical distinction is that individuals have dignity, while incorporeal interests do not, and thus the former suffer the indignity and humiliation of arbitrary laws in a manner not experienced by the latter. See generally David Luban, *Legal Ethics and Human Dignity* (Cambridge: Cambridge University Press, 2007), especially Chapter 2, "Lawyers as upholders of human dignity (when they aren't busy assaulting it)".

respect of some issues and non-adjudicative procedure is employed in respect of others. This is not to suggest a bifurcation of the inquiry, but a synergy between different procedural methods calibrated to different (although not incompatible) values and goals. The key is that by honouring the core value of adjudication for participants most significantly impacted by an inquiry, the same laudable characteristics of adjudication that arise in a court setting – the intrinsic reinforcement of a judge's role in the separation of powers, with associated values of independence and removal from politicized decision-making – are instantiated in the setting of the inquiry. A constitutionally principled and coherent justification for the use of judges as commissioners is thus established: their service is warranted by the need to instill procedural justice approximating that of a court, and their judicial integrity is preserved by observing procedures that reinforce a judge's place in the separation of powers.

Just as polycentricity may encroach on adjudicative decision-making in a court setting without subverting its adjudicative character, the question of whether a judicial commissioner honours the core value of adjudication in a given context will be one of degree. The question for the judge will be: can I allow affected individuals and groups to participate to the extent of their interest via the presentation of proofs and reasoned arguments, and maintain a position of impartiality from which to hear and address those claims? The caveat "to the extent of their interest" reflects the fact that adjudicative procedures are warranted in response to legitimate justice demands of participants; it reflects the fact that these demands may be confined to aspects of an inquiry rather than its totality. Consequently, adjudicative procedure may be appropriate to the formal evidentiary hearings stage of an inquiry, or it may be appropriate to hearings in which a judicial commissioner solicits submissions on his rules of procedure or other interlocutory matters, or both. The precise manner in which adjudication arises in an inquiry will be context-driven, accounting for the manner in which an inquiry's mandate and factual matrix interacts with the interests and concerns of parties.

Linking the instantiation of adjudicative procedure to the legitimate demands of participants preserves flexibility for a judicial commissioner to observe alternate procedures for other aspects of an inquiry. However, the fact that adjudication is not appropriate for those aspects will signal different expectations on the part of participants. More specifically, it will signal that alternate values – for example, the opportunity to be heard on more flexible, non-adversarial terms –

should take precedence over the specific assurances of rationality and justice instilled by adjudication in respect of other portions of the inquiry. Judicial commissioners bear the burden of distinguishing when adjudicative procedure is appropriate from when it is not. By treating fidelity to adjudication as the threshold issue in accepting an inquiry, however, judges will be forced to assure themselves that an inquiry requires, to a significant extent, the high assurance of justice appropriate to judicial service. Moreover, by observing adjudicative procedure where that assurance is demanded, judges will ensure their independence and remove from political decision-making in respect of those matters that most severely engage prejudice to participants or high demands of justice.

The remainder of this dissertation is devoted to verifying these claims by applying the approach advocated here to the practical conduct of inquiries. In Chapter 3, I consider how honouring the value of adjudication would help address the challenges outlined earlier concerning procedural fairness. In Chapter 4, I consider how it would address the challenges of politicization and government claims to secrecy. I outline a number of procedural reforms that would lend principled consistency to the conduct of judge-led inquiries. Importantly, these reforms do not necessitate changes to existing statutory frameworks governing the conduct of inquiries, but rather speak directly to the ethics of judicial commissioners (and to some extent, their counsel) acting within that framework.

The examples considered in Chapters 3 and 4 also concern, by implication, the argument that fidelity to adjudication may help a prospective commissioner determine whether or not an inquiry is suited to judicial leadership. In Chapter 5, I confront this issue directly. Having given an account of what judge-led inquiries should look like in the preceding chapters, it is possible to more clearly articulate the limits of their potential. I do so by returning to the challenge of polycentricity. I demonstrate how a commitment to the substantive justice values embodied in adjudicative procedure helps demarcate limits to judicial service when those values are not legitimately sought in an inquiry – indeed, where their pursuit by participants may subvert alternate values that should take precedence. Particular attention will be devoted to commissions pursuing matters of scientific truth, and those seeking healing, reconciliation, and other goals of restorative justice.

Conclusion

Judicial commissioners face distinct challenges in the conduct of public inquiries, which subsist in tensions between the demands of an inquiry and the judicial methods and epistemologies that have been instilled by service in courts. In addition to posing obstacles to effective inquiry conduct, these challenges may threaten public confidence in the integrity of the judiciary itself. Canada's existing regulations governing the service of judges on commissions of inquiry are skeletal. The doctrine of separation of powers, focused strongly on safeguarding the independence of judges *qua* judges, does not deal directly with how public confidence in the judiciary may be threatened by extra-judicial work. The federal *Judges Act* allows for the broad conferral of extra-judicial duties on judges, provided such a conferral is express and within the jurisdiction of the appointing government. The Canadian judiciary itself has developed ethical guidelines to fill the gap, but the guidelines are largely prudential in nature, alerting judges to problems that may arise in inquiries and suggesting safeguards that might be sought in proposed terms of reference. While valuable in their own right, these guidelines leave vast discretion to judges in determining the suitability of an inquiry to judicial leadership and in crafting procedural features. A judicial commissioner confronting several of the challenges outlined earlier in this chapter would not be significantly aided by the guidelines.

Consequently, a more robust analytic approach is needed to justify the service of judges in public inquiries, rendering it constitutionally principled and coherent. The Australian jurisprudence on incompatibility helps to outline the basis of such an approach by illuminating the interconnection of judicial independence with the principles of representative and responsible government, and how the observance of judicial procedure helps sustain both principles. Fuller's account of the core value of adjudication – that is, the high assurance of justice it affords to participants by virtue of the distinct manner of participation it involves – helps us to understand that that value may indeed be at play in some public inquiries. Recognizing that these will be the types of inquiry suited to judicial leadership, and that judges serving in such inquiries should observe adjudicative procedures to the extent legitimately required to instill a sense of justice among participants, aligns judicial service with a Canadian conception of rule of law. In that conception, judges share responsibility with the other branches of government to affirm and protect fundamental values, including the dignity and equality of individuals. Their distinct role in doing so, however, is intimately linked with

procedure: adjudicative procedure intrinsically reinforces the independence and impartiality of judges, and safeguards their place in the separation of powers. Judges are thus suited to service in inquiries demanding the core value of adjudication, and should work to fulfill that value in inquiry conduct. Doing so will be a matter of context and degree, as the following chapters will demonstrate.

Fairness

Introduction

The next three chapters consider the practical implications of judges observing fidelity to adjudication, both in instantiating principles of fairness, independence, and transparency in inquiry conduct, and in making the initial decision of whether or not to accept a proposed commission. These issues are closely related: in order to accept fidelity to adjudication as a means of addressing the basic propriety of a judge serving on an inquiry, it is first necessary to give a substantive and procedural account of what a properly "judicial" inquiry should look like. I begin that task in this chapter by focusing specifically on the content of procedural fairness at judge-led inquiries. My aim is not to set-out a comprehensive code of conduct, but to demonstrate how fidelity to adjudication helps clarify and resolve some existing legal ambiguities and practical challenges confronting commissioners. The broader merit of this approach will nevertheless be evident from its utility in addressing especially complex and important aspects of inquiry conduct.

The rule of law, understood as a Canadian legal and political ideal, involves both a negative injunction against the abuse of official power and a positive duty for the various branches of government to honour and affirm fundamental values. Public inquiries neatly illustrate the duality of this role. Because inquiries are constituted to address some of the most pressing matters of public concern – a suspected miscarriage of justice, official corruption, an avoidable tragedy, the abuse of power – they are inherently concerned with safeguarding values central to our legal and political order. These include, among others, the equality and dignity of persons; the accountability of officials and of public institutions; the integrity of justice; and the efficacy and observance of law. Yet public inquiries are also instruments of official power: they exercise that power in compelling the production of evidence and the testimony of witnesses, and in issuing findings that have serious personal consequences for their subjects. Inquiries are thus bound by the same general, negative injunction against abuse of power as are all official institutions. In a culture of justification, procedural fairness is about achieving the proper balance between the pursuit of legitimate public ends and the protection of individuals who are distinctly impacted by the means employed. The rational and proportionate pursuit of just ends

will involve means worthy of the assent of those they affect. Ends that are irrational or disproportionate to their goals, and which inflict harm on individuals, cannot be justified in Canada's rule of law.

Apropos these principles, the traditional judicial task is centrally concerned with balancing, and adjudicative procedure embodies the unique and constitutionally legitimate manner in which judges undertake a balancing exercise. Here, the significance of that method is considered with respect to instantiating procedural fairness in a public inquiry. I begin by considering the feature of inquiries that most clearly activates the need for procedural fairness in the first place: the fact that inquiries exercise coercive authority against individuals.

1. The Use of Coercive Authority

In 1994 the Faculty of Law at the University of New Brunswick hosted a conference on public inquiries, the proceedings of which were published in the *University of New Brunswick Law Journal*.[1] The overwhelming focus of the papers presented at the conference was the impact that *Phillips v. Nova Scotia (Westray Mine Inquiry)*,[2] then a decision of the Court of Appeal for Nova Scotia,[3] would have on the future of public inquiries. The Court of Appeal had ordered a stay of the *Westray Mine Inquiry*,[4] a provincial public inquiry appointed to investigate a fatal underground explosion at the Westray Coal Mine, after accepting the claims of two inquiry witnesses that proceeding with the inquiry would endanger the fairness of their criminal trials.[5] A consensus appears to have emerged at the conference that the Court of Appeal's decision, together with other case law,[6] threatened to emasculate public inquiries in the name of protecting witness rights. While some authors expressed moderate reservations about this development, noting that governments might now be forced to choose between public inquiries and the criminal

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[1] (1994) 43 UNBLJ 379-434.

[2] (1993), 117 NSR (2d) 218 (NS CA).

[3] Later decided as *Phillips v Nova Scotia (Westray Mine Inquiry)*, [1995] 2 SCR 97 [*Phillips*].

[4] Nova Scotia, Westray Mine Public Inquiry, *The Westray Story: A Predictable Path to Disaster – Report of the Westray Mine Public Inquiry* (Nova Scotia: The Inquiry, 1997) (Commissioner: the Honourable K Peter Richard).

[5] *Supra* note 2.

[6] Notably *Starr v Houlden*, [1990] 1 SCR 1366 [*Starr*] and *Nelles v Grange* (1984), 46 OR (2d) 210 (CA) [*Nelles*], each considered in greater detail below.

prosecution of potential felons,[7] others were more severe, lamenting "the suppression of public inquiries by the successful invocation of the presumption of innocence,"[8] or offering "a requiem for the royal commission."[9]

Ultimately the Supreme Court of Canada would reverse the Court of Appeal's decision in *Phillips*.[10] The concerns expressed at the 1994 conference nevertheless provide a useful introduction to basic questions that surround the manner in which inquiries exercise their authority. Controversy surrounding the concurrence of inquiries with criminal proceedings is inextricably linked to the fact that inquiries have coercive power: they can compel the production of evidence and testimony which would not otherwise enter the public realm, with consequent implications for the integrity of criminal justice, among other concerns. Debate as to the propriety of inquiries operating concurrently with criminal prosecution is thus a contextual variety of a more fundamental concern – namely, when is it just that public inquiries exercise coercive authority?

It bears emphasizing that public inquiries represent a rare instance in which the executive instigates proceedings that compel the participation of individuals, forcing them to give an account of their actions in a setting of intense scrutiny. The Law Reform Commission of Canada (LRCC) observed in 1979:

> A commission of inquiry should be regarded as an unusual institution which may seriously affect individual rights. The power to compel people to give evidence under oath to a body appointed by the executive but responsible to no one is not to be given lightly. The inquiry system must provide a means of conducting an inquiry with the least possible danger to individuals or organizations that may be caught up in the process.[11]

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[7] See e.g. Kent Roach, "Public Inquiries, Prosecutions or Both?" (1994) 43 UNBLJ 415.

[8] H Archibald Kaiser, "The Public Inquiry and the Presumption of Innocence: The Prospects for Mutual Survival" (1994) 43 UNBLJ 391.

[9] SGM Grange, "A Requiem for the Royal Commission" (1994) 43 UNBLJ 381.

[10] See *supra* note 3.

[11] Law Reform Commission of Canada (LRCC), *Report 13: Advisory and Investigatory Commissions* (Ottawa: Minister of Supply and Services Canada, 1979) at 6. Lord Justice Salmon's *Royal Commission on Tribunals of Inquiry* (London: Her Majesty's Stationary Office, 1966) reached a similar conclusion at 16: "Normally persons cannot be brought before a tribunal and questioned save in civil and criminal proceedings. Such proceedings are hedged around by long standing and effective safeguards to protect the individual. The inquisitorial procedure is alien to the concept of justice generally accepted in the United Kingdom. There are, however, exceptional cases in which such procedures must be used to preserve the purity and integrity of our public life without which a successful democracy is

The exceptional nature of inquiries warranted, in the LRCC's view, the amendment of Canada's federal *Inquiries Act* to provide for two distinct processes – one investigative, and the other advisory – with a stricter, statutory code of procedure binding the conduct of the former.[12] This would include a right of hearing for those who may be subject to adverse comment at an inquiry,[13] and the extension to witnesses of the same evidentiary privileges as they would enjoy in court.[14]

In 1992, the public inquiry studies completed by the Ontario Law Reform Commission (OLRC) and the Alberta Law Reform Institute (ALRI) would each recommend statutorily codifying an absolute prohibition against criminally accused individuals being summoned as witnesses at inquiries.[15] The OLRC went further and recommended that witnesses (whether criminally accused or not) benefit from a statutory right to refuse testimony on the basis of self-incrimination, except where their testimony pertains to the execution of official duties or where immunity against prosecution has been granted.[16] Moreover, it argued that individuals should be allowed to refuse evidentiary productions where "the person's right of privacy outweighs the commission's interest in their production."[17]

Each of these studies evinces a common concern for strengthening witness rights, through the vehicle of statutory codification, in response to the recognized harsh effects that inquiries may

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impossible." The Royal Commission accordingly recommended that public inquiries "should never be used for matters of local or minor public importance but always be confined to matters of vital public importance concerning which there is something in the nature of a nation-wide crisis of confidence" (*ibid*). I do not entirely agree with the LRCC's characterization of public inquiries as entities that are "accountable to no one." They are accountable to the executive branch of government that commissioned them, to participants to whom they owe fairness, and to the public to whom they owe informed conclusions and recommendations.

[12] *Ibid.*

[13] See the proposed *Advisory and Investigative Commissions Act*, s 11, in *ibid* at 13-48.

[14] *Ibid* at s 24.

[15] See Ontario Law Reform Commission, *Report on Public Inquiries* (Toronto: Ontario Law Reform Commission, 1992) at 214, recommendation 4, and Alberta Law Reform Institute, *Proposals for the Reform of the Public Inquiries Act* (Edmonton: Alberta Law Reform Institute, 1992) at 130, recommendation 31.

[16] OLRC, *ibid* at 214, recommendation 5.

[17] OLRC, *ibid* at 215, recommendation 6.

have on individuals. As noted previously, none of their recommendations were adopted: the federal and Alberta inquiries statutes remain unchanged since the time of the reports' publication, and the new Ontario *Public Inquiries Act, 2009*,[18] while affording witnesses equivalent evidentiary privileges as in a court, otherwise does little to supplement their rights. It is likely that the reluctance of legislators to adopt the respective law commission studies – if not explicable by the fact that inquiry reform has simply never been a pressing political concern – is attributable to the present attractiveness of inquiries as flexible executive instruments. The skeletal legislative landscape governing inquiries affords the executive considerable advantage in being able to "fill-in" substantive and procedural limitations on an inquiry via the appointing Order in Council. Codification of witness rights necessarily cedes flexibility in favour of greater predictability (and possible rigidity) of inquiry proceedings.

It will be recalled that Chief Justice McLachlin characterized a mature rule of law as enabling citizens to demand justification for the received effects of official power. Thinking of public inquiries in these terms, we might consider the law commission recommendations above as partial answers to the question, "when is it just that an inquiry exercise coercive power?" The reply may be, depending on the circumstances, "it is just to compel a witness when they are afforded the right to refuse testimony on the basis of self-incrimination." Or, "it is just to compel a witness when they are afforded immunity against the subsequent use of their testimony in another forum." In some cases, the prejudice faced by a witness may warrant the reply that his or her compulsion to give evidence cannot be just – as the OLRC and ALRI argue is the case concerning criminally-accused witnesses. By reframing these issues as matters of justification, we not only bring them within a framework of analysis commanded by the Chief Justice's account of the rule of law, we see how closely questions of justification are entwined with questions of procedure. In other words, the question of whether coercive power is justified is both one of just ends (why should the person be compelled as a witness?), and one of just means (how will he or she be treated?).

TRS Allan observes:

> The reasonableness of administrative action (and hence its legality under a just constitution) depends not only on whether it makes an effective contribution to some legitimate end, but also on whether the means adopted take proper account of those

[18] SO 2009, c 33, Sch 66.

> persons who may be adversely affected. It is right to impose special burdens on specific individuals only when the nature and gravity of the sacrifices demanded fairly reflect the importance or urgency of the ends in view. The test – inevitable hypothetical – is whether a majority of other citizens, well disposed toward the good of the community, could be expected to acknowledge the justice of their treatment if placed in the shoes of those required to comply with official orders (judging them from the perspective of those actually affected).[19]

Allan's hypothetical reasonable citizen (or reasonable majority of citizens) can be thought of as a shorthand for the values of rationality and fairness that Chief Justice McLachlin characterizes as the hallmarks of a mature rule of law. They are values citizens are justified in expecting when they are affected by official power, and which once present in such an expression should secure a reasonable person's assent. Judges are expert balancers of the fundamental values that undergird a mature rule of law, but as we have seen, they are not the exclusive custodians of this task. Judicial enforcement of those values is marked by the entrenched independence of the judiciary, by judicial remove from political decision-making, and by adjudicative procedure, which reinforces the latter principles. By retaining review powers over issues that impact most fundamentally on individuals – compliance with the *Charter*, the lawful exercise of authority, observance of procedural fairness – judges serve as guardians for individual dignity in the most grave circumstances. As the preceding chapter argued, they are thus suited to service on inquiries that engage the most serious individualized effects, in turn warranting the observance of adjudicative procedure. In answer to the demand that just *means* be employed to facilitate the legitimate ends of an inquiry, we can say that those means should be linked to honouring the core value of adjudication.

The remainder of chapter is devoted to an account of how judicial commissioners can realize this ideal in practical terms. Fidelity to adjudication requires an analytic starting point – a question that commissioners can keep in mind, apply to new situations, and adopt as a talisman for navigating the specific demands of fairness applied in context. I suggest that this analytic can be articulated as follows: judicial commissioners should adopt standards and procedures at their inquiries that would reasonably address the claims of participants, were the commissioners to conduct a preliminary, fully adjudicative hearing on the interpretation of the inquiry's terms of reference, and on standards and procedures appropriate to those terms. Better yet, judicial

[19] TRS Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law* (Oxford: Oxford University Press, 2001) at 126-27.

commissioners should actually conduct such preliminary adjudicative hearings. This argument demands clarification.

It is not uncommon for inquiry commissioners to solicit comments from participants concerning the interpretation of terms of reference, or concerning proposed rules of procedure. It is also virtually inevitable that commissioners confront interlocutory motions, which may challenge how a commissioner has construed his or her terms of reference (for example, concerning the vires of a particular avenue of investigation) or which advocate participants' own procedural and substantive claims. Often, these motions consume considerable amounts of a commissioner's time and occupy lengthy appendices to his or her final report. Consequently, commissioners are already obliged to deal extensively with the claims of participants concerning the just ends of inquiries (the proper interpretation of their terms of reference), and just means (appropriate standards and procedures), framed through the participants' particular interests, motivations, and concerns. The argument here is that commissioners account for this proactively, to the extent possible, and do so in a manner that would provide an assurance of justice equivalent to that of an adjudicative hearing. In other words, commissioners should adopt procedures and standards that would rationally and impartially address the competing claims of participants were a comprehensive, preliminary adjudicative hearing on such matters to be held. Moreover, given the time and resources already consumed by interlocutory motions, I advocate that commissioners actually convene such hearings: that they commence their inquiries by inviting participants to make formal, public submissions on the proper investigative scope of the commissioner's terms of reference, and on the appropriate procedures and standards she should adopt in fulfillment of those terms. The commissioner should hear these claims impartially, consider them on equal terms, and issue a public ruling rationally addressing them. This ruling will serve as the procedural template for the inquiry.

The observance of a preliminary, adjudicative hearing on procedure and the interpretation of terms of reference would be a significant reform to the standard conduct of public inquiries. It would reinforce their public character by reflecting that their participants are owed input on the issues they should address (and those that are irrelevant or disproportionately prejudicial) and on the manner in which those issues are explored. It would obviate the need for inflexible, codified rules by affording an appropriately high standard of justice for participants, enabling them to be

heard fully and impartially, on structurally equal terms, by a judge. It would go a significant distance to addressing basic concerns that surround the coercive powers of public inquiries, not just as they relate to the interaction of inquiries with criminal proceedings, but across a range of contextual problems. In response to the rule of law's need for justification of coercive authority, such an approach would answer: "The use of coercive authority by a judicial inquiry is just when those affected by it are afforded equal opportunity to direct the commissioner to the proper interpretation of his or her terms of reference, and to appropriate evidentiary and procedural standards in the treatment of witnesses, and where the commissioner is obliged to rationally address those claims from an impartial perspective."

An important concept embedded in this approach must be acknowledged. The high assurance of justice instilled by an adjudicative hearing, while beneficial to all participants and inquiry observers, is only *owed* to participants whose interests in the inquiry warrant it. In other words, recognizing that adjudication is intended to assure justification at the highest level, a preliminary adjudicative hearing should be structured primarily by the claims of those most seriously affected by an inquiry. The ordinary threshold for receiving standing at an inquiry is that an applicant demonstrate a "direct and substantial interest" in its subject-matter. Once standing is granted, however, commissioners often afford different participatory rights based on the nature of different participants' interests. These issues will be considered in detail in Chapter 4. For present purposes, the point is that the preliminary adjudicative hearing should be intended principally for those in the highest category of standing: those whose rights or interests are centrally implicated in the investigative mandate of the inquiry, and who stand to be impacted the most by its process and outcomes. While the identification of such participants will be a matter of context, and must flow from a commissioner's initial decisions on standing, at minimum they should include two groups. If the inquiry involves investigation of allegations of misconduct, the subjects of those allegations must be included. Additionally, the individuals or groups whose concerns form the basis of those allegations must be included. These are the groups who, either facing the greatest prejudice at an inquiry or seeking legitimately to use the inquiry as a means of addressing personal injustice, rightly demand the highest assurance of justice in the inquiry process.

It will likely be desirable for the commissioner to allow all participants granted standing, whatever the form, to make submissions during the preliminary adjudicative hearing, with the scope of those submissions tailored to their respective levels of standing. Participants less centrally implicated in the inquiry might serve a role akin to interveners in a court case. But it will be those most centrally implicated whose reasoned claims *must* be addressed by the commissioner in order to instill an assurance of justice worthy of their assent to the commission's authority.

The approach advocated here is intended to allow commissioners flexibility to adjust evidentiary and procedural standards to context, provided that in doing so they account for the legitimate interests and perspectives of affected witnesses and other participants. As such, it is intended to enhance the fairness of inquiries, and their consistency with Canada's rule of law, without necessitating statutory amendment. It must nevertheless be acknowledged that observance of this approach in circumstances of similar gravity is likely to lead to some measure of consistency in the conduct of inquiries. In other words, participants similarly affected by inquiries are likely to assert similar procedural, evidentiary, and jurisdictional claims, and commissioners observing a duty to impartially and rationally address those claims are likely to reach similar conclusions. Indeed, just as fairness is enhanced across all fields of law through the stabilizing value of precedent, inquiry commissioners can and should consult the decisions by their predecessors as a means of lending principled consistency to inquiry conduct.

The remainder of this chapter is devoted to exploring three areas of inquiry conduct in which fidelity to adjudication, via the observance of a preliminary adjudicative hearing, is likely to lend such consistency. These are: (1) the relationship of commissioners with commission counsel; (2) observance of the law of privilege; and (3) the issuance of findings of misconduct.

2. The Relationship of Commissioners with Commission Counsel

In Chapter 2, the relationship of a commissioner with his or her counsel was introduced as a variant on the tension between standards of fairness commanded by traditional, judicial proceedings and the distinct investigative context of an inquiry. To recapitulate, commission counsel serves as the agent of the commissioner – that is, as his or her lawyer. The commissioner is thus empowered to direct counsel in interviewing, calling, and examining

witnesses; in arguing interlocutory motions; in corresponding with counsel representing other inquiry participants; and in helping to draft portions of the commissioner's report. In so doing, the commissioner effectively uses counsel as a personal representative, and may be justly regarded as accountable for the actions of counsel. A witness subjected to harsh cross-examination by commission counsel might thus question whether the commissioner him- or herself is an adversary, and not a neutral arbiter concerned with providing a fair hearing and ascertaining objective truth. Conversely, a commissioner who cedes discretion to counsel – that is, who allows counsel to conduct key aspects of the inquiry, such as calling and examining witnesses with a high degree of independence – necessarily cedes a measure of control over the completion of his or her investigative mandate. While such an approach might enhance actual and perceived fairness by enabling the commissioner to retain maximum impartiality, and to assume a role most closely resembling that of a judge in court, the commissioner might also be discomfited to think that a delegate has assumed responsibility for investigative questions assigned lawfully to the commissioner under an Order in Council.

Different commissioners no doubt resolve this tension in different ways, reflecting the distinct contexts of their inquiries and their own individual judgment. There is nevertheless a general lack of clarity surrounding the basic principles or boundaries that a commissioner should observe in structuring a relationship with counsel, regardless of context. This problem is most pronounced in jurisprudence that defers significant discretion to the commissioner, but offers little principled guidance as to how that discretion should be exercised.

(a) Current Problems in the Law and in Practice

In *Canada (AG) v Canada (Commission of Inquiry on the Blood System)* ("*Krever*"),[20] the Supreme Court heard an appeal by witnesses who challenged the jurisdiction of a commissioner to issue notices of possible findings of misconduct against them. One appellant, the Canadian Red Cross Society, raised the fact that commission counsel had invited all parties with standing at the inquiry to make submissions on findings of misconduct that might be made against particular witnesses. These submissions were reviewed in confidence by commission counsel and not shared with the Commissioner. It was perceived by the appellant that commission counsel would nevertheless assist the Commissioner in drafting those findings of misconduct that would be included in his report. This, they alleged, constituted a breach of procedural

[20] [1997] 3 SCR 440.

fairness, since commission counsel might be swayed by private submissions that were never vetted publicly before the Commissioner.[21]

Justice Cory, writing for a unanimous Court, found that although such an approach could raise legitimate concerns of fairness, the objection was premature, since there was no clear indication that the Commissioner intend to enlist commission counsel's assistance in drafting the report.[22] The applicants were required to await actual publication of any adverse findings against them before challenging their propriety. Discretion as to the appropriate role for commission counsel in developing findings of misconduct was thus deferred to the Commissioner.

This outcome raises two obvious concerns. The first is that if parties are required to await delivery of a commissioner's report before challenging the fairness of its findings, the damage to their reputations may already have been done. The second is that it is unclear how parties are to prove the improper influence of commission counsel absent incontrovertible evidence that certain findings were reached as a result of that influence. In other words, how are parties to know if adverse findings made against them are based solely on the commissioner's impartial deliberations, or were influenced by commission counsel behind the scenes?

This issue arose on judicial review of the *Stevens Inquiry*,[23] which was constituted to investigate the alleged conflict of interest of a former federal cabinet minister. Sinclair Stevens, whose conduct was the focus of the inquiry, applied to have the inquiry's findings overturned for unfairness, basing his claim in part on the involvement of commission counsel – who had conducted a highly adversarial cross-examination – in preparing the final report.[24] Ed Ratushny aptly summarizes the 'Catch-22' situation in which Stevens found himself:

> … Stevens had difficulty in establishing the factual basis for [his] challenge. He was not able to determine exactly what role commission counsel actually played in writing the report. There was strong circumstantial evidence that this role was substantial. … [D]uring the deliberative phase of the inquiry, commission counsel docketed

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[21] *Ibid* at para 10.

[22] *Ibid* at paras 59-60, 72.

[23] Canada, Commission of Inquiry into the Facts of Allegations of Conflict of Interest concerning the Honourable Sinclair M Stevens, *Report* (Ottawa: Minister of Supply and Services Canada, 1987) (Commissioner: the Honourable William Parker).

[24] *Stevens v Canada (AG)*, [2005] 2 FCR 629 (FC).

> approximately 1,700 hours. However, the legal accounts, provided under access-to-information legislation, expurgated the narrative portions that identified the work performed. This was based on solicitor-client privilege, which was upheld by the Federal Court of Appeal. …
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> An effort to examine the commissioner as a third party also failed on the ground of deliberative secrecy. Although this privilege was not absolute, the prothonotary ruled that there was insufficient evidence of a breach of the rules of natural justice to override the privilege.[25]

In other words, Stevens was required to demonstrate unfairness in order to lift the veil protecting the commissioner's deliberations with counsel. Yet it was the very secrecy of those deliberations that precipitated his complaint of unfairness to begin with!

Disquieting though the vagueness of the Commissioner's post-hearing deliberations with his counsel may have been in *Stevens*, it is not uncommon. Most inquiry reports contain sections describing the role of commission counsel, but rarely do they speak with specificity to aspects of that role that have obvious significance for procedural fairness – for example, whether counsel advised the commissioner on misconduct findings; whether the commissioner directed counsel in the selection of witnesses to be examined; whether commissioner and counsel convened privately on interlocutory motions in which counsel advocated a particular outcome; and whether the commissioner had any involvement in directing counsel's examination of witnesses.

In a 1990 essay, the Honourable John Sopinka, who had served as counsel to Mr Stevens, offered one of the best commentaries on the ethical responsibilities of commission counsel. He stressed that the independence of the commission must flow through its lawyer. Analogizing to the role of a crown prosecutor, he observed that commission counsel is similarly charged not with vigorous pursuit of a "conviction", but with leading full and fair evidence. Even greater impartiality is demanded, however, due to an agency relationship with the commissioner: "A prosecutor is not the agent of the judge. He does not confer with the judge to determine what evidence to call nor does he participate in the preparation of the report. These and other factors demand more impartiality of commission counsel than is required of a prosecutor."[26]

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[25] Ed Ratushny, *The Conduct of Public Inquiries: Law, Policy, and Practice* (Toronto: Irwin Law, 2009) at 228-29.

[26] John Sopinka, QC (as he then was), "The Role of Commission Counsel" in A Paul Pross et al., eds, *Commissions of Inquiry* (Toronto: Carswell, 1990) at 77-78. Notably, Justice Sopinka supported Cory J's disposition for the Supreme Court in *Krever*, with the attendant defect criticized above.

Sopinka felt that, in the ordinary course, witnesses should be examined in chief by commission counsel, recognizing that they are the commission's *own* witnesses, summoned to assist the commission in its investigative task. He acknowledged, however, that pursuant to the Court of Appeal for Ontario's decision in *Re Shulman*,[27] witnesses subject to serious allegations of misconduct should be allowed the benefit of examination in chief by their own counsel.[28] Sopinka also recognized the importance of establishing boundaries between commission counsel's role in testing controversial evidence, including by cross-examination, and in advising the commissioner. To this end, he recommended against commission counsel making closing submissions when he or she has also provided advice to the commissioner on matters that arise in the hearings, and he cautioned against counsel contributing to the final report where adverse cross-examinations have taken place. In his words: "A commissioner who intends to enlist the aid of his counsel in preparing the report must, therefore, bear in mind that if he allows his gladiator to thrash about in the arena, the latter's transition to the dais may evoke a public clamour."[29]

The *Stevens* and *Krever* decisions are unsatisfying because they deal with fairness concerns that, as the respective Courts acknowledge, are legitimate, but which the Courts suggest are adequately addressed through standards presumptively observed in the interrelationship of commissioners and their counsel – standards which it is impossible for inquiry witnesses and participants to verify firsthand. It is well established that fairness, and in particular the impartiality of a tribunal, must be perceived in order for it to be effective; indeed, the appearance of bias is sufficient to disqualify a judge or other impartial decision-maker, regardless of whether bias actually lies in their mental state. In ascertaining whether an inquiry is perceived to be fair and impartial, the relevant perspectives are those of individuals whose personal rights, privileges and interests are significantly impacted, not those of a commissioner and commission counsel themselves, however inscrutable their reputations for integrity and fairness may be. Once a legitimate

[27] [1967] 2 OR 375, 63 DLR (2d) 578.

[28] Sopinka, *supra* note 26 at 80-81.

[29] *Ibid* at 85.

fairness concern is recognized as a matter of perception, it warrants a better answer than "just trust me" on the part of those officials whose actions have given rise to the concern.

Ed Ratushny correctly draws a distinction between unfairness and adversarialism: while it is true, for example, that a criminal prosecutor is not behaving unfairly in cross-examining an accused, it does not follow the that prosecutor is not adverse to the accused in interest. The same is true of a witness subject to severe cross-examination by commission counsel in an inquiry:

> … the reality is that rigorous cross-examination can be a rough business, as a matter of necessity, "for some witnesses are so penurious of the truth that they will only part with it when torn from them by violence." It is not a role that a commissioner should perform and, when performed by commission counsel, it should be done at arm's length from her. The reality is also that rigorous cross-examination cannot be impartial. It is adverse in interest to the witness. It is adversarial.[30]

In other words, the adversarial testing of an evidentiary theory, or of the credibility of controverted testimony, while not unfair in itself, may inherently (and reasonably) cast the examining party as partial in the eyes of the examined witness. Unfairness *would* then be occasioned were the examiner to don the mantle of judge, and assist in formulating conclusions regarding the very subject-matter of the cross-examination.[31] Ratushny also notes that those issues demanding vigorous cross-examination are likely to be among the most factually significant and heavily contested at an inquiry, making them issues for which the commissioner may be most in need of assistance and advice.[32] He thus characterizes the dual advisory and investigatory roles of commission counsel as a "fundamental problem",[33] concluding: "… the bottom line is that the laudable goals of both neutrality and truth seeking may come into direct conflict with each other through the conduct of commission counsel. Commission counsel should not be put in such a conflicting role."[34]

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[30] *Supra* note 25 at 222, quoting from *Murray v Haylow* (1927), 60 OLR 629 (CA).

[31] *Ibid* at 227: "In my view, participation of commission counsel as both a partisan advocate against a party and then assisting the commissioner in making adverse findings against the party at the deliberation stage could well constitute a reasonable apprehension of bias sufficient to strike down such findings."

[32] *Ibid* at 226.

[33] *Ibid* at 219.

[34] *Ibid* at 225.

(b) The Bifurcation Model

Ratushny's solution to this problem is bifurcation – that is, the separate allocation of advisory and hearings roles to different counsel. In his words:

> Commission counsel (hearings) would be responsible for marshalling and presenting the evidence at hearings and would be free to cross-examine witnesses and make full submissions. She would still act under the broad direction of the commissioner in relation to the evidence to be adduced. But she would not discuss the weight or quality of that evidence with the commissioner in private. Any such opinions would be expressed publicly in the hearing room so that counsel for any of the parties could respond if they disagreed.
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> In contrast, commission counsel (advisory) would attend the hearings but would not participate in them. He would be free to act as a sounding board for the commissioner and to provide advice and opinions privately on any matters the commissioner might choose. Advisory counsel would assist in drafting both rulings and the final report.[35]

This approach – which was successfully adopted by the Honourable Antonio Lamer in his 2003-2006 inquiry into the wrongful conviction of three Newfoundland men[36] – would seem clearly to address the fairness concerns identified above. It affords a commission the benefit of vigorous cross-examination where necessary; the commissioner the benefit of sound private advice and assistance with his report; and witnesses the assurance that an adverse interlocutor will not subsequently be afforded the privileged opportunity to stand in judgment over them. The visible impartiality of the commissioner is also enhanced, as Ratushny notes:

> Hearings counsel is free to cross-examine without her approach being interpreted as reflecting some pre-conceived views of the commissioner. It is easier to explain such a role to the parties and the public when this counsel will not participate in making findings or writing the report. Similarly, hearings counsel is completely free to make whatever submissions she deems appropriate without the concern that she will be interpreted as speaking on behalf of the commissioner. … What is doubly valuable to the commissioner is that all of the parties hear those submissions and may respond to them.[37]

It will be evident that this approach resonates strongly with the proposition that judicial commissioners recognize and instantiate the value of adjudicative procedures in conducting their inquiries. A hearing structure in which the commissioner stands at arm's length from commission counsel, dispassionately hearing his or her cross-examinations and submissions on

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[35] *Ibid* at 230.

[36] Newfoundland and Labrador, Lamer Commission of Inquiry into Proceedings Pertaining to Ronald Dalton, Gregory Parsons, and Randy Druken, *Report and Annexes* (St. John's: Government of Newfoundland and Labrador, 2006) (Commissioner: the Honourable Antonio Lamer).

[37] *Supra* note 25 at 235.

equal terms as other participants, is clearly more faithful to an adjudicative format than one in which counsel is the commissioner's direct agent or "alter ego." There are nevertheless important limitations to the model Ratushny proposes.

For one, Ratushny acknowledges that his model is derived from the procedure observed by Canadian Judicial Council (CJC) inquiry panels in reviewing allegations against federally-appointed judges. The CJC panels, which consist of senior lawyers and active judges drawn from various provincial and territorial benches, are aided by two lawyers when reviewing a case – one "legal counsel" to assist the panel on advisory matters, and another "independent" counsel to lead public hearings.[38] Independent counsel is expressly not an agent of the judicial panel. As the CJC's *Policy re Counsel Retained in Judicial Conduct Matters* states: "… Independent Counsel does not act pursuant to the instructions of any client but acts in accordance with the law and counsel's best judgment of what is required in the public interest."[39]

Even under Ratunshy's model of bifurcation, hearings counsel for an inquiry could not act with an equivalent level of independence without dramatically changing the nature of the inquiry process, and possibly subverting the intention of the appointing government. This is because it is the commissioner, not counsel, who is responsible for completing the inquiry. Despite recent controversy concerning the appropriate conduct of CJC inquiry panels,[40] they clearly consider much more factually narrow complaints than public inquiries, and function in a manner more reminiscent of a conventional tribunal. The appointment of an individual commissioner under Order in Council signifies that the appointing government vests special responsibility (and that the public may vest special confidence) in that person specifically to answer the investigative questions set-out in the terms of reference. Were commission counsel to assume primary control over evidentiary hearings, and do so simply "in accordance with the law and counsel's

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[38] See the *Canadian Judicial Council Inquiries and Investigations By-laws*, online, Canadian Judicial Council: www.cjc-ccm.gc.ca/cmslib/general/CJC-Bylaws-2010.pdf, at ss 3-4.

[39] Cited in Ratushny, *supra* note 25 at 232-33.

[40] See the numerous interlocutory disputes that beset the CJC's erstwhile inquiry into the conduct of the Honourable Lori Douglas, formerly Associate Chief Justice of Manitoba. Among the issues disputed before the Inquiry Committee was whether the Committee acted properly in directing its legal counsel to intervene in certain hearings in order to cross-examine a witness. The latter action prompted the resignation of the Committee's original Independent Counsel, who considered his role in the process to have been undermined: see "CJC correspondence re Independent Counsel", together with other motion materials, online, Canadian Judicial Council: www.cjc-ccm.gc.ca/english/conduct_en.asp?selMenu=conduct_inq_douglas_en.asp.

best judgment of what is required in the public interest", then to a considerable extent the inquiry would belong to counsel and not to the commissioner. To reiterate the dilemma introduced in Chapter 2, when a commissioner cedes control over part of the inquiry to counsel with the aim of enhancing fairness, he or she must inevitably accept the delegation of part of the investigative mandate. Where the portion of the inquiry over which control is ceded is substantial, so too is the delegation.

Ratushny addresses this concern only indirectly, acknowledging that evidentiary hearings should remain subject to the commissioner's "broad direction", and that

> Hearings counsel must still deal directly with the commissioner outside the hearing room on other matters. Such counsel must establish, with the approval of the commissioner, the manner in which the investigation and presentation of the evidence will be carried out. The commissioner must be briefed on an ongoing basis as to the nature of the evidence and the witnesses to be called and other aspects of the management of the hearings.[41]

How the commissioner's broad direction is exercised, however, will be key to determining the balance between fairness and investigative control adopted in a given inquiry. Ratushny's further elaboration of the role of hearings counsel suggests a considerable delegation of investigative authority to that official.

For example, while suggesting that commissioners have legal authority to review documents in order to ascertain the veracity of privilege claims,[42] Ratushny supports an emerging Ontario practice in which commission counsel assumes this function "informally".[43] Where agreement cannot be reached between commission counsel and the party claiming privilege, the document is referred to a designated judge for determination, not to the commissioner.[44] Ratushny also commends the practices of inquiries in which commission counsel prepares factual overview reports, based on pre-hearing interviews with potential witnesses and on the preliminary review

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[41] *Supra* note 25 at 235-36.

[42] *Ibid* at 247, relying on the authority of *Lyons v Toronto (Computer Leasing Inquiry – Bellamy Commission)* (2004), 70 OR (3d) 39 (SCJ). The *Lyons* case and the authority of commissioners to screen materials for privilege will be discussed in further detail later in this chapter.

[43] *Ibid.* Ratushny does not speak to whether the commissioner's authority to review allegedly privileged documents may be delegated to his or her counsel.

[44] *Ibid.*

of documents, which can be shared with other inquiry participants and used to inform and focus witness examinations during the hearings.[45] He recommends that commission counsel assume "hands-on" management of the evidentiary hearings, which will include determining the sequence of witness examinations, the order of examination by other participants, and other procedural matters.[46] He also advocates forcefully that commission counsel make closing submissions to the commissioner:

> No other person has the same comprehensive and intimate knowledge of all of the evidence and witnesses and their interrelationships. [Hearings counsel's] written submissions can provide a blueprint for the commissioner's final report, subject of course to contrary or modifying submissions made by parties with more specific interests. The latter provide a useful counterbalance to the commissioner in weighing the former. Hearings counsel has considerable freedom and latitude to suggest specific findings and conclusions. However, as one of the commission counsel, the objectivity of the commission will be enhanced if such submissions are not 'urged' upon the commissioner. Instead, potential conclusions should be identified together with alternatives and the relative merits of each.[47]

Finally, Ratushny suggests that commission counsel should be responsible for drafting and serving inquiry witnesses with notices of potential findings of misconduct. The notices should reflect counsel's own appraisal of possible misconduct findings, with the commissioner's role being "limited to approving them as bearing a 'reasonable possibility' of adverse findings."[48]

Each of these recommendations may indeed lend procedural efficacy to an inquiry and, subject to some caveats discussed below, enhance fairness for participants. It should be clear that they also afford considerable latitude – and, indeed, power – for hearings counsel to sculpt the investigative focus and outcomes of the inquiry. This will be the case where hearings counsel assumes the lead in determining the relevance of different witnesses and evidence; assesses privilege claims in the absence of the commissioner; develops overview reports based on document review and interviews in which the commissioner has not been involved, but which will establish the basis for much of the evidentiary hearings; drafts misconduct notices in response to which participants are likely to sculpt their own submissions; and proposes, through

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[45] *Ibid* at 251-52.

[46] *Ibid* at 253 at 255 (although Ratushny acknowledges, again, that such decisions should be subject to high-level approval by the commissioner).

[47] *Ibid* at 257.

[48] *Ibid*.

final submissions, their own material conclusions which, for the reasons Ratushny sets-out, are likely to be viewed by the commissioner as highly informed and persuasive.

It must also be noted that Ratushny's approach still does not bring total transparency to the relationship between commissioner and counsel. For example, can a commissioner's authority to review privilege claims – itself the subject of controversy, considered under a separate heading below – be lawfully delegated to commission counsel? If so, is the "informal" nature of the emergent practice in Ontario actually backstopped by the possibility of coercive authority? Moreover, as counsel is the commissioner's agent, may counsel share observations from a privileged document review with the commissioner? The common sense answer should be "no"; indeed, the bifurcation model would seem designed to ensure the commissioner's remove from viewing, or being influenced by, potentially privileged material. Yet it is not clear that commissioner and counsel are obliged to observe this boundary, and absent express public assurances – ideally specified in an inquiry's rules of procedure – it would be understandable for a witness facing prejudice at the inquiry to have reservations about cooperating with commission counsel in the circumstances.

Those reservations would no doubt be exacerbated by the fact that the bifurcation model is intended to facilitate commission counsel in conducting vigorous cross-examinations where necessary. Somewhat incongruously, Ratushny suggests that any adversarialism in the review of allegedly privileged materials will be "marginal".[49] However, any witness facing the likelihood of adverse cross-examination at the hands of commission counsel would be especially reluctant – and for good reason – to have that individual decide their privilege claims.

The ambiguity in the commission-counsel relationship surrounding privileged document review emblemizes the persistent ambiguity in the extent to which commissioners may direct their counsel, and the extent to which commissioners and counsel may communicate privately, even pursuant to the bifurcation model. The transparency of that relationship will be of obvious concern to inquiry participants facing possible adversity. But it will also be of concern to those wishing to ascertain the actual allocation of responsibility for completing core aspects of an

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[49] *Ibid* at 247.

inquiry's mandate, and more specifically, the extent to which a commissioner has assigned important investigative responsibilities to a delegate.

(c) Resolution through an Adjudicative Hearing

By holding a preliminary adjudicative hearing on the proper interpretation of an inquiry's terms of reference and on resulting standards and procedure, the commissioner may address these concerns. This is because such a hearing would afford participants the opportunity to address the commissioner on what they consider to be the most pertinent aspects of his or her relationship with commission counsel, and oblige the commissioner to clearly articulate the structure of that relationship in a manner that reasonably addresses the participants' claims. This ruling would also bring transparency to the extent of investigative delegation to commission counsel; indeed, it would oblige the commissioner to offer a public rationale for that delegation, and thereby clarify public understanding of the true influence and role of commission counsel in shaping the outcome of the inquiry. It would end speculation as to the degree to which a commissioner does or does not direct the work of counsel in various aspects of an inquiry: the ruling itself would reflect a publicly transparent direction to counsel, and articulate those areas in which the commissioner and counsel may continue to have a private advisory or instructive relationship. In a sense, this would alleviate possible concern that delegation of responsibility to commission counsel weakens the status of the commissioner as the primary "investigator" in the inquiry, because it would bind counsel's conduct to directions publicly articulated by the commissioner in response to the deliberative input of all participants.

The merit of this approach can be illustrated by considering a hypothetical ruling on a commissioner's relationship with commission counsel, forming part of a larger decision on the terms of reference and inquiry conduct flowing from a preliminary adjudicative hearing. I observed above that Ratushny's model of bifurcation does address, to a considerable degree, the concerns of fairness that arise from commission counsel wearing the two 'hats' of cross-examiner and judge. Inquiry participants likely to face cross-examination, by virtue of their implication in factual controversies that are clearly relevant to the commissioner's mandate, would take assurance in knowing that at least their interlocutor will not subsequently have a privileged position to influence decisions impacting their reputation and other interests. With that in mind, the following illustrates what a commissioner's preliminary, adjudicative decision

might look like, having accepted that the bifurcation model is suited to his or her inquiry but also addressing further reasoned claims which confront the ambiguities discussed above.

- *My terms of reference direct me to ascertain facts which, by necessity, may reflect negatively on some of the individual witnesses and participants in this inquiry. In some cases, the prejudice occasioned may be severe. Although the findings of a public inquiry are not legal findings of civil or criminal wrong, they can severely affect the reputations of individuals, cause great personal stress, affect an individual's professional status and livelihood, and indirectly precipitate further legal proceedings. Moreover, this inquiry is likely to involve highly contested factual accounts surrounding issues that the terms of reference direct me to address. In order to decide between these accounts and properly ascertain the truth, it may be necessary for my counsel – and for counsel representing other participants at this inquiry – to cross-examine witnesses. I wish to stress that cross-examination does not, in itself, imply wrongdoing on the part of a witness nor suspicion that the witness lacks credibility. Sometimes, cross-examination is necessary to confirm the credibility of a forthright and honest witness. However, I recognize that this distinction will not always be evident to observers of an inquiry, and that the mere perception of harsh treatment by counsel may raise public suspicions that adversely impact the witness. This could especially be the case where the lawyer conducting cross-examination is commission counsel, and is viewed to speak on behalf of the commission. The seriousness of these concerns means that individualized findings of misconduct should only be reached, and potentially damaging avenues of examination only undertaken, when they are truly necessary to fulfill the inquiry's important mandate.*[50] *It also means that those individuals who may be exposed to personal prejudice, whether through findings of misconduct or through probing cross-examination, must be afforded a high standard of procedural fairness.*
- *The concern has been raised that commission counsel may assume a prosecutorial or otherwise partial mindset toward certain witnesses in conducting cross-examinations. It has also been noted that commission counsel, in gathering and screening documentary and other evidence, may be swayed in her opinion of certain witnesses by matters never publicly scrutinized in the public hearings.*
- *It is not the role of commission counsel to "prosecute" any individual or evidentiary theory at this inquiry, but rather to lead the evidence before me in a comprehensive, probing, and fair-minded manner. As noted above, however, this role is likely to necessitate cross-examination in some instances. While cross-examination is not the same thing as prosecution, it is inherently adverse: it confronts a witness with challenges to his or her factual account or personal credibility, forcing the witness to address them. A*

[50] I consider the standard of necessity that should govern individualized misconduct findings later in this chapter, with a similarly illustrative draft ruling by the commissioner.

person facing cross-examination may understandably view his or her interlocutor as an adversary, and may be alarmed should that adversary subsequently hold special influence in deciding matters of personal consequence – matters which were highly contested during the cross-examination itself.

- *It is recognized by all participants that this inquiry involves a heavy investigative and administrative onus necessitating my reliance on assistance from commission counsel. More specifically, I intend to rely on commission counsel for advice and deliberative support; for help in deciding interlocutory matters and drafting rulings; for gathering and screening documentary evidence and conducting pre-hearing interviews with witnesses; for leading the examination of witnesses during the public hearings, and where necessary, conducting cross-examinations; for advice in reaching factual findings, including possible findings of misconduct; and for assistance in drafting my report, among other matters as detailed elsewhere in this ruling.*
- *Out of concern that counsel responsible for conducting cross-examinations, or for gathering evidence that may not be publicly scrutinized at the inquiry, should not subsequently be involved in the formulation of factual findings that may adversely affect individual witnesses, I have decided to adopt the bifurcation approach advocated by Professor Ratushny. In general terms, this means dividing the responsibility of commission counsel among separate members of my legal team. Counsel "A, B, and C" will serve as my advisory counsel: they will provide me with private advice and deliberative support, and they will assist me in drafting my final report. Counsel "X, Y and Z" will serve as hearings counsel. They will be responsible for gathering and reviewing documentary evidence and administering the public hearings, subject to my direction, as detailed below. They will also be responsible for summoning, examining, and sometimes cross-examining witnesses, again subject to my direction upon terms set-out below. I will not communicate privately with hearings counsel regarding any deliberative matter, including my findings of fact. Hearings counsel will not assist me in drafting interlocutory decisions or my final report. Any position taken by them with respect to my interlocutory decisions or factual conclusions will be stated publicly, with an opportunity for reply by affected participants and witnesses, as further detailed below.*
- *By "X" date, hearings counsel is to provide me with a list of individuals whom they propose to interview prior to the evidentiary hearings. Subject to unforeseen confidentiality concerns – which will be adjudged by me on a case-by-case basis – this complete list will be shared with participants. Participants will not be invited to comment on the list, having been afforded the opportunity to direct me toward relevant lines of investigation during these preliminary hearings, as addressed elsewhere in this decision. I will satisfy myself of the adequacy of the list and direct hearings counsel publicly should I consider it necessary that further individuals be added, or should I wish that any individuals be removed from the list.*

- *Hearings counsel will conduct the interviews privately, with counsel for each interviewee present. I will not direct hearings counsel nor communicate with them concerning the conduct of these interviews. Hearings counsel is to complete the interviews as they see fit, pursuant to the lines of evidentiary inquiry identified elsewhere in this ruling as being germane to my terms of reference.*
- *Hearings counsel are to provide me with summaries of individual witness interviews following the completion of each interview. These summaries are to be simultaneously shared with counsel for the interviewee so that the latter may request any necessary corrections. Should I wish to be informed of additional information not contained in the summary, I will direct hearings counsel to ask additional questions of the interviewee, and give notice to the latter's counsel of such a request. Once I am satisfied with the content of an interview summary, it will be disclosed to all participants, subject to specific confidentiality objections which I will adjudge on a case-by-case basis. The interview summaries are intended to aid me, hearings counsel, and other participants in the conduct of evidentiary hearings. They do not constitute official transcripts or findings of fact, however, and may not be used to cross-examine witnesses during the evidentiary hearings.*
- *"X" weeks prior to the commencement of hearings, hearings counsel are to submit factual overview reports based on their interviews of potential witnesses and a preliminary review of material evidence. These overview reports will be shared with all participants. Should participants believe changes are necessary to the reports, they may request these of commission counsel in writing, copying me. The reports will be used to clarify and focus examinations during the evidentiary hearings – for example, by identifying issues concerning which there is broad factual agreement among participants (or disagreement, for that matter). The reports do not constitute official findings of fact, and may not be used for the purpose of cross-examination. Should I find the reports lacking in any important areas of information, I will publicly direct hearings counsel to supplement them accordingly. I will not direct hearings counsel nor otherwise communicate with them concerning the content of these reports. Hearings counsel is to prepare the reports pursuant to the relevant lines of evidentiary analysis identified separately in this ruling.*
- *Hearings counsel will be responsible for the calling of witnesses during the evidentiary hearings. Witnesses will be called via summons prepared by hearings counsel and delivered to counsel for the respective witnesses not less than "X" days prior to the date of testimony. Hearings counsel will also prepare a master schedule of proposed dates for witness examinations, to be submitted to me not less than "Y" days prior to the commencement of hearings. I will approve all witness summonses before they are issued. I will also approve the master schedule for witness examinations, and any amendments thereto that may be made by hearings counsel during the course of hearings. I will not communicate privately with hearings*

counsel concerning the reasons for summoning individual witnesses. I may direct hearings counsel to summon witnesses whom they have not proposed to summon. In so doing, I will limit my communication with hearings counsel to identifying the witness, the proposed date of summonsing, and reasons sufficient to give that individual appropriate notice of the purpose of their summons.

- *In the ordinary course, hearings counsel will examine all witnesses in chief. Hearings counsel will also arrange a schedule of examination for each witness amongst counsel for all participants. While it is to be expected that these schedules will be developed amicably, participants may raise any objections to their allocation of examination time before me. I will not communicate privately with hearings counsel concerning the schedule of examinations for individual witnesses. Any directions that I give in this respect will be given publicly in the hearings.*
- *I will not communicate with hearings counsel privately concerning the content of witness examinations. Where I feel an important question or area of examination has been neglected, I will either pose my questions to a witness directly or publicly request that hearings counsel pursue a specific line of examination.*
- *As noted previously, it may sometimes be necessary for hearings counsel or counsel for other participants at this inquiry to conduct cross-examinations. I will not communicate privately with hearings counsel concerning the necessity, propriety, or content of any cross-examinations. It will be in the discretion of hearings counsel, and counsel for inquiry participants, to determine whether and when to cross-examine witnesses. I may direct that any counsel at this inquiry, including hearings counsel, cease a line of cross-examination where I consider it to be unhelpful, irrelevant, or otherwise inappropriate. It should be stressed, however, that my allowing a cross-examination to proceed in no way reflects my endorsement of an evidentiary thesis pursued by counsel, or skepticism on my part toward any witness. I retain an impartial mindset toward all witnesses and participants in this inquiry, and will only decide upon my evidentiary conclusions after hearing all of the evidence openly and impartially.*
- *All witnesses summoned to give evidence may, by right, be examined by their own counsel upon the conclusion of examination or cross-examination by all other participants, including hearings counsel.*
- *Witnesses who anticipate that they will be subject to adverse cross-examination, or who have already been subject to significant allegations raised during the hearings, may request, through hearings counsel, that they be afforded the opportunity to be examined in chief by their own counsel. Should counsel for the witness and hearings counsel be unable to agree to a suitable arrangement, a motion may be brought to me for direction. I will not communicate privately with hearings counsel in respect of any witness's request to be examined in chief by their own counsel. However, it is possible for me to direct now that, as a*

matter of fairness, should hearings counsel anticipate the need to conduct a vigorous cross-examination of a witness, hearings counsel should allow that witness's own counsel to lead the witness in chief. This will not only enhance the fairness of the hearings but also their efficacy, by affording all witnesses a preliminary opportunity to share their versions of events as they see fit, assisted by a non-adversarial interlocutor.

- *Should disputes arise as to the admissibility or relevance of evidence adduced during the hearings, these will be resolved by me on a case-by-case basis. I will not direct or otherwise communicate privately with hearings counsel concerning such disputes; any position taken by hearings counsel in such disputes will be entirely at their own discretion.*
- *The standards governing evidentiary relevance and admissibility, including matters of privilege, are set-out elsewhere in this decision.*[51] *For present purposes it is sufficient to note that hearings counsel is not authorized to review documents over which claims of solicitor-client privilege are asserted. Hearings counsel and counsel for witnesses or other participants should attempt to resolve any disagreement as to the privileged character of a document amicably; however, where this is not possible, a motion may be brought before me by either party to decide the matter. Although I recognize the need to be circumspect in dealing with documents that are potentially privileged, I may nevertheless review contested documents privately in order to ascertain the veracity of a privilege claim. Unless finding that such documents are admissible, I will not share their contents with hearings counsel or with any other party (with the exception of advisory counsel, from whom I may seek assistance in deciding such matters). I note that superior court judges are empowered to review allegedly privileged documents in order to ascertain the veracity of privilege claims in civil disputes before them, and consider my role to be analogous in this respect. It should go without saying that knowledge of a legitimately privileged communication will not influence my decisions or my conduct of this inquiry.*
- *At the conclusion of the evidentiary hearings, I will establish a date by which hearings counsel is to present me with final submissions, in writing. These submissions are to present hearings counsel's own appraisal of the material conclusions I should reach in my report. Their content will be left entirely to hearings counsel's discretion, with no direction or communication by me. Upon reviewing hearings counsel's submissions and ensuring that no special confidentiality concerns should limit their disclosure, I will share them with all inquiry participants and make them available for public review. I will then establish an appropriate time by which all participants may provide me with their own final submissions,*

[51] See discussion later in this chapter.

in writing. A final hearing day will be convened in which all participants may make brief concluding oral submissions through their counsel. It will be entirely within the discretion of hearings counsel whether or not they choose to make oral closing submissions, and any such submissions will be made without communication or direction from me.

- *At least "X" weeks before submitting their final written submissions, hearings counsel will issue confidential notices of alleged misconduct to any witness or other individual or organization in respect of whom hearings counsel intends to recommend that a finding of misconduct be made. I deal with the nature and criteria governing findings of misconduct elsewhere in this decision. I will not communicate with hearings counsel concerning the selection of parties to whom notices should be issued, or concerning the content of notices. Hearings counsel is to provide me with copies of all notices of alleged misconduct issued to parties. I may issue additional notices directly in my own discretion. All recipients will be afforded adequate time and opportunity to respond to notices of alleged misconduct, whether issued by hearings counsel or by me, via their final written and oral submissions.*

This reasoning, itself the outcome of an adjudicative hearing, obliging the commissioner to address participants' reasoned claims, builds from Ratushny's bifurcation model and brings it closer to an adjudicative ideal. More specifically, by resolving ambiguities in the relationship between commissioner and commission counsel, it serves to better ensure that the value of adjudication – the high assurance of justice it affords to participants – will be instilled among inquiry participants.

First, it will be clear that the commissioner's decision imposes near total transparency upon his relationship with hearings counsel. Not only does the commissioner make clear that hearings counsel will not participate in deliberations concerning individualized findings of misconduct, he specifies the nature of communication that will (or will not) be permitted between himself and hearings counsel in respect of the main procedural dimensions of the inquiry's investigative hearings. It will be recalled that a separate portion of the commissioner's preliminary adjudicative decision will address the proper interpretation of his terms of reference (at least to the extent possible at the outset of the inquiry). Thus, both participants and public observers of the inquiry may read these reasons in combination with those set-out above to understand the precise division of investigative responsibility between commissioner and hearings counsel, as well as the scope and content of the commissioner's overarching "directions" to counsel in this

respect. The reasons nevertheless preserve deliberative privacy for the commissioner concerning issues that do not engage an equal interest in transparency on the part of all participants, or in areas where further transparency might force a commissioner unreasonably to share preliminary impressions on matters in dispute. This is the case, for example, where the commissioner instructs counsel to summon additional individuals for preliminary interviews or to appear in the hearings: in this case, disclosure of the commissioner's direction is owed to the individual affected, but not to the entire inquiry, given that other participants' interests are not materially impacted to the same degree. Increased clarity in the type of discretion exercised by hearings counsel also serves to underscore the commissioner's impartiality: for example, the commissioner has authority to satisfy himself that overview reports prepared from the witness interviews are adequate to assist the evidentiary hearings, but plays no role in the conduct of witness interviews himself. An open mind is thus reserved for the evidentiary hearings, again paralleling the position of a judge whose evidentiary record is structured by the presentation of proofs and reasoned arguments in a public forum.

Two important differences from the approach advocated by Ratushny concern the issuance of misconduct notices and the scrutiny of privilege claims. Ratushny endorses a model in which the commissioner approves notices of possible findings of misconduct before they are issued to recipients. In the reasoning above, the commissioner need not approve such notices. This affirms the principle that where hearings counsel may assume an adversary posture toward certain witnesses, the commissioner does not. The notices thus issued by counsel provide an appropriate opportunity for recipients to address the allegations (an opportunity augmented by final oral hearings, in which allegations contained in the written closing submissions of other participants may be addressed), but do not betray an endorsement by the commissioner of their plausibility. The commissioner may, however, supplement those notices where hearings counsel has not addressed a misconduct finding the commissioner anticipates having to make in his report; procedural fairness is thus honoured via notice and a reasonable opportunity of reply. The standards governing findings of misconduct will be discussed again under separate heading below.

Second, Ratushny endorses the practice of commission counsel reviewing materials to ascertain the veracity of privilege claims. As noted above, this is at odds with the very basis of bifurcation

– that is, with acknowledging that hearings counsel must sometimes assume an adversarial posture toward certain witnesses by conducting probing cross-examinations. Recognizing that some witnesses may legitimately perceive hearings counsel as an adversary, it is simply unreasonable to expect them to share privileged materials with the very official empowered to make the most damaging use of the information consequently exposed. Granting authority for the commissioner to review privilege claims lends coherency to the bifurcation approach by bringing it closer to the adjudicative ideal, mirroring the authority of a superior court judge to scrutinize privilege claims where these cannot be resolved by disputants. Indeed, the fact that a commissioner may be obliged to review documents over which privilege is asserted, and remain uninfluenced by their contents should he adjudge the privilege to be genuine, establishes a further reason for selecting a judicial commissioner: his role in this respect would complement the reasoning and ethics demanded institutionally of judges. The treatment of evidentiary privilege at a judicial inquiry is considered in further detail under the next section below.

3. Observing the Law of Privilege

It is widely accepted as a matter of law that public inquiries are not beholden to the same stringent standards of evidence as are civil or criminal courts, both as those standards concern issues of admissibility and proof.[52] Indeed, this is an acknowledged desirable feature of inquiries, one of the things that lends them greater flexibility and adaptability to their individual mandates, making them better-suited than courts to address the given issues at hand. This thesis takes no issue with these assertions. Adjudication is about the manner of participation characterizing a particular form of decision-making, one that affords a high assurance of justice to affected parties. It is not about observance of specific evidentiary rules. Judicial fidelity to adjudication in a public inquiry thus need not translate into the adoption of the same standards of evidence as the judge would employ in a court.

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[52] Simon Ruel, in his text *The Law of Public Inquiries in Canada* (Toronto: Carswell, 2010) notes simply: "Commissioners of inquiry have the implicit authority to rule on the admissibility of evidence tendered before them based on the authority to control their proceedings. It has been a long-standing principle that the strict rules of evidence do not apply to the proceedings of a commission of inquiry, with the exception of the exclusionary rules of privilege. This is codified in some public inquiry statutes" (*ibid* at 73). Ontario's recently instated *Public Inquiries Act, 2009*, SO 2009, c 33, Sch 6, states at s 8 that "A commission may collect and receive information that it considers relevant and appropriate, whether or not the information would be admissible in a court …", and that an inquiry may observe "such standards of proof as are commonly relied on by reasonably prudent persons in the conduct of their affairs."

Nevertheless, it also must be acknowledged that practically speaking, inquiries do often draw evidentiary standards and practices from the courts. In his leading text on public inquiries, Ed Ratushny cites existing principles developed in court proceedings to advocate standards for the admission and probity of leading questions,[53] opinion evidence,[54] evidence of consistent or inconsistent statements,[55] good and bad character evidence,[56] and evidence of bias.[57] Only with respect to hearsay evidence does Ratushny explicitly recommend divergence from the practices of courts, noting "A commission of inquiry need not go through … gymnastics in dealing with hearsay evidence. It may simply ask what the value of the evidence is and how fair it would be to consider it."[58] He nevertheless suggests that inquiries should not "clutter the record" with hearsay evidence, and only consider it in the face of "compelling reasons."[59]

Charles-Maxime Panaccio has observed that both procedural fairness and the requirement that an inquiry's factual determinations be capable of withstanding "reasonableness" review are likely to temper the evidentiary flexibility of inquiries (although he stresses that the law in this area is opaque).[60] The findings of past inquiries have been invalidated where courts have found them to lack a reasonable evidentiary basis.[61] In *Mahon v Air New Zealand*,[62] the Judicial Committee of the Privy Council invalidated an inquiry's report where its factual findings were not based on

[53] Ratushny, *supra* note 25 at 321-22.

[54] *Ibid* at 322-23.

[55] *Ibid* at 324-25.

[56] *Ibid* at 325-27.

[57] *Ibid* at 327.

[58] *Ibid* at 324.

[59] *Ibid*.

[60] Charles-Maxime Panaccio, "La determination des faits et de la responsabilité par les commissions d'enquête" in Canadian Bar Association, Québec Branch, *Colloque sur les Organismes d'Enquête* (Cowansville, QC: Éditions Yvon Blais, 2009) 91 at 99.

[61] See e.g. *Morneault v Canada (AG)*, [2001] 1 FCR 30 (FCA), cited in Panaccio, *ibid* at 99.

[62] [1984] A.C. 808.

"probative" evidence, meaning evidence that tended to establish the factual conclusions reached by the Commissioner.[63]

Moreover, there is one important area in which the rules of evidence at an inquiry are necessarily stringent: this is with respect to evidentiary privilege.[64] Both Simon Ruel and Ed Ratushny treat privilege as categorically different from other standards of evidence and subject to stricter enforcement.[65] Some inquiry statutes explicitly require commissioners to observe the laws of privilege.[66] Ratushny suggests that even where this is not the case, "[privilege] would be applicable by … common law."[67] Accordingly, the enforcement of privilege is one area in which the practices of inquiries should, in theory, coalesce into common procedures.

The actual conduct of inquiries is marked by greater ambiguity, however. The case law is inconsistent on the authority of inquiry commissioners, or their delegates, to review documents in order to assess the veracity of privilege claims, in particular with regard to claims of solicitor-client and litigation privilege. It is also unclear whether less fundamental, common law forms of privilege may be adjudicated by inquiries according to less stringent standards than would be applicable in courts. The present discussion will focus on the privilege claims of individuals and non-state entities summoned to give evidence before an inquiry. For these inquiry participants, the proper observance of their privilege claims will be a critical matter of fairness. Indeed, it will go to the very heart of whether the use of coercive authority by an inquiry is just. It will thus be a subject concerning which adjudicative procedure will be essential to assuring a disposition of privilege claims that is worthy of the affected parties' assent.

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[63] As explained by Panaccio, *supra* note 60: "… la Comité judiciare du Conseil Privé a énoncé que l'equité procédurale imposait qu'une commission, lorsqu'elle tire une conclusion de fait, fonde sa décision sur la preuve qui ait une valeur probante, c'est-à-dire sur les éléments qui tendent logiquement à démontrer l'existence de faits concordants avec la conclusion."

[64] Evidentiary privileges have, in some circumstances, been treated by the courts as attracting constitutional or quasi-constitutional protection. As will be discussed further below, solicitor-client privilege is of such fundamental importance to the justice system that its enforcement will sometimes attract the protection of s 7 of the *Charter*.

[65] See Ruel, *supra* note 52 and Ratushny, *supra* note 25 at 340.

[66] See Alberta's *Public Inquiries Act*, RSA 2000, c P-39, s 9(1); British Columbia's *Public Inquiry Act*, SBC 2007, c 9, s 22(2); Newfoundland and Labrador's *Public Inquiries Act, 2006*, SN 2006, c P-38.1, s 12(1); and Ontario's *Public Inquiries Act, 2009*, supra note 18 at s 8(3).

[67] *Supra* note 25 at 340.

(a) Solicitor-Client and Litigation Privilege

In the preceding section, I suggested that fidelity to adjudication – and specifically, bringing coherence to a procedural model in which commission counsel is bifurcated into hearings and advisory roles – would require that the commissioner him- or herself be responsible for verifying privilege claims, including the confidential, prima facie scrutiny of disputed materials where necessary. This role parallels that of a superior court judge presiding over a civil proceeding. Where civil litigants dispute the privileged nature of a document, a superior court judge may conduct a prima facie review of the document in order to assess the veracity of the privilege claim, and possibly order its production to an opposing party. Placing this onus on the commissioner correctly reflects the fact that an individual should not be obliged to have a party adverse in interest (such as hearings counsel) stand in judgment over their claims of privilege. It also reflects appropriate confidence that a judicial commissioner can preserve the same impartiality, despite the opportunity to review potentially privileged documents, as a judge in court.

The model assumes, of course, the legal authority for commissioners to review privileged documents, including those that concern the most fundamental privilege of all: that between a client and his or her solicitor. The existence of that authority demands legal clarification. Ratushny contends that "Where an issue of privilege cannot be resolved informally, it is within the authority of a commissioner to examine the documents, hear submissions on the issue, and make a ruling on its admissibility."[68] He cites the Ontario Divisional Court's decision in *Lyons v Toronto (Computer Leasing Inquiry – Bellamy Commission)*,[69] in which the court affirmed the authority of commission counsel to scrutinize documents over which privilege had been claimed, acting as a delegate of the Commissioner. A rereading of that decision suggests its authority is unclear, however.

Lyons arose from the *Toronto Computer Leasing Inquiry*,[70] an inquiry appointed under Ontario's *Municipal Act, 2001*[71] to investigate computer leasing contracts entered into by the City of

[68] *Supra* note 25 at 247.

[69] (2004), 70 OR (3d) 39 (Div Ct).

[70] City of Toronto, Toronto Computer Leasing Inquiry and Toronto External Contracts Inquiry, *Report* (Toronto: City of Toronto, 2005) (Commissioner: the Honourable Denise E Bellamy).

Toronto upon terms that were indicative of conflict of interest and corruption. The inquiry was led by the Honourable Denise Bellamy, a superior court judge. Lyons, a lawyer who had served as a lobbyist for several companies awarded leasing contracts, was summoned as a witness at the inquiry and required to produce documents pertaining to his dealings with his former clients. Lyons' productions excluded significant, relevant material that was subsequently provided to the inquiry by his employer, a law firm. This material was provided to the inquiry in sealed boxes, to be opened only upon consent of the firm or upon a ruling by the Commissioner. Commissioner Bellamy gave such a ruling, directing that commission counsel review the contents of the boxes to determine their relevance and ascertain possible matters of solicitor-client privilege. Should a dispute arise as to the privileged nature of a document, it was to be referred to a designated judge of the Superior Court. Disputes concerning relevance were to be referred to the Commissioner. Lyons objected to this procedure, claiming that it breached solicitor-client privilege, constituted an unreasonable search and seizure in violation of s 8 of the *Charter*, and violated his right to fundamental justice under s 7. The matter was ultimately referred to the Divisional Court.

The court affirmed that solicitor-client privilege is "a substantive right that is of fundamental importance in our legal system and protected by s. 7 of the *Canadian Charter of Rights and Freedoms* as a principle of fundamental justice."[72] It nevertheless rejected Lyons' claims on several grounds. For one, it denied Lyons' characterization of commission counsel as standing in an adversarial relationship: "the applicant is wrong in his characterization of Commission counsel as an agent of the state who is in an adversarial position, analogous to a Crown prosecutor. Commission counsel is not a prosecutor, nor is an individual such as the applicant deemed to be an adversary of commission counsel."[73] The court also found that, by virtue of the Commissioner delegating her authority to review privileged documents to counsel – an authority

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[71] SO 2001, c 25, s 274.

[72] *Supra* note 69 at para 26 [citations omitted].

[73] *Ibid* at paras 39 and 42.

it considered her to possess by virtue of being a superior court judge – counsel could be expected to act with equivalent impartiality.[74]

The problem with this reasoning is that it fails to account for the fact that judges serving as inquiry commissioners do so as extra-judicial, persona designata appointees, not as judges sitting in court. Their inherent powers do not follow them. Indeed, the Supreme Court has affirmed that only superior courts, not judges acting in a personal capacity, may determine claims of solicitor-client privilege, barring the explicit extension of statutory authority in this respect. In *Canada (Privacy Commissioner) v Blood Tribe Department of Health*,[75] the Supreme Court unanimously held that the federal Privacy Commissioner's statutory power to compel document production "in the same manner and to the same extent as a superior court of record"[76] did not include the power to review documents over which privilege is claimed. Justice Binnie wrote for the Court:

> The Privacy Commissioner is an officer of Parliament vested with administrative functions of great importance, but she does not, for the purpose of reviewing solicitor-client confidences, occupy the same position of independence and authority as a court. It is well established that general words of a statutory grant of authority to an office holder such as an ombudsman or a regulator, including words as broad as those contained in s. 12 [of the *Personal Information Protection and Electronic Documents Act*], do not confer a right to access solicitor-client documents, even for the limited purpose of determining whether the privilege is properly claimed. That role is reserved for the courts. Express words are necessary to permit a regulator or other statutory official to "pierce" the privilege.[77]

This reasoning would seem logically to extend to executive agents, such as inquiry commissioners, whose institutional independence may be even more vulnerable than independent officers of Parliament mandated with statutory oversight functions. Thus, as Simon Ruel notes, *Lyons* appears to have been wrongly decided: it mistakenly treats an inquiry commissioner who happens to be a superior court judge as possessing the same powers as a superior court.[78]

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[74] *Ibid* at para 35: "In my view, the Commissioner, a judge of the Superior Court of Justice, has the power to determine whether documents are privileged and, therefor, inadmissible in commission hearings." See also *ibid* at para 37: "In my view, if a judge may inspect potentially privileged documents in the civil litigation context, a judge sitting as a Commissioner in the context of an inquiry under the *Municipal Act* is also able to do so."

[75] [2008] 2 SCR 574, 2008 SCC 44.

[76] Quoting from the *Personal Information Protection and Electronic Documents Act*, SC 2000, c 5, s 12.

[77] *Supra* note 75 at para 2.

[78] See Ruel, *supra* note 52 at 77, n 55.

It should also be noted that the court in *Lyons* based its decision on an additional (and firmer) ground: that the privilege asserted by Lyons was not his own, but that of his former clients, who did not themselves seek to defend it in the inquiry.[79] This is a further reason to doubt the case's authority in guiding the conduct of public inquiries when it comes to reviewing privilege claims.

No Canadian inquiries statute confers express authority on commissioners to obviate claims of solicitor-client privilege. The procedure for review of potentially privileged documents advocated in the preceding section thus must be caveated by acknowledging that such a review, even to assess the prima facie veracity of a privilege claim, must be on consent of the participants. The facts of *Lyons* should nevertheless underscore the difficulty in assigning this role to commission counsel rather than to the commissioner. Had the privilege properly been Lyons' to claim, it would have been entirely understandable for him to resist commission counsel scrutinizing the documents. The very purpose of the inquiry was to investigate possible impropriety in the allocation of municipal contracts, and the purpose of summoning Lyons was to ascertain whether his business relationships with the City amounted to impropriety. To suggest that commission counsel, responsible for cross-examining Lyons to this effect, was not adverse to him in interest is simply disingenuous; to reiterate a criticism central to this dissertation, it relies on a categorical distinction between inquiries and courts that has no basis in the actual experiences of participants in a public inquiry.

If the law requires that commissioners have individuals' consent to conduct a prima facie review of their privilege claims, then this establishes a further reason in favour both of appointing a judicial commissioner and of that commissioner holding a preliminary adjudicative hearing on procedure and on her terms of reference. The judicial status of the commissioner should give participants assurance that privilege claims can be assessed without tainting the commissioner's impartiality, and that the efficiency of allowing the commissioner to adjudicate these claims is in the mutual interest of all participants, avoiding the cost and delay of referral to the courts. Critically, this assurance will depend upon the commissioner affirming fidelity to her judicial status, and its ethical and methodological significance. The reasoning outlined in the preceding section, concerning a commissioner's relationship with commission counsel, would demonstrate

[79] *Supra* note 69 at para 43.

to participants the extent to which the commissioner has undertaken to preserve her impartiality – specifically, by eliminating any private, deliberative influence by hearings counsel. The commissioner could now complement these reasons by affirming her ability to determine privilege claims fairly and impartiality:

- *As noted elsewhere in these reasons, it will sometimes be necessary for hearings counsel to conduct cross-examinations of witnesses. I have outlined clear, transparent boundaries in my relationship with hearings counsel. These are intended to assure witnesses that should hearings counsel pursue a line of cross-examination that they, the witness, reasonably consider to be adverse, hearings counsel will not subsequently hold private influence over me in reaching my factual conclusions. I have adopted a bifurcated model with my commission counsel in order to preserve fairness for all participants in this inquiry, and in particular to affirm my own impartiality.*
- *In the ordinary course, hearings counsel will be responsible for leading evidence in the public hearings. While these preliminary reasons are intended to mitigate interlocutory disputes, it is possible that participants in the hearings may object to the production of certain evidence on grounds of relevance or privilege. Such objections may be moved before me orally or in writing. Hearings counsel will be responsible for replying to such motions. In order to preserve the efficiency and timeliness of this inquiry, I will not hear from other participants in respect of such motions. They may, however, address hearings counsel regarding their concerns, and hearings counsel may consider including these in their submissions.*
- *Where a participant other than hearings counsel seeks to adduce evidence, and this evidence is objected-to by another participant, the matter may similarly be decided on a motion before me. Given hearings counsel's overall responsibility for the conduct of hearings, she may participate in such a motion at her discretion. Otherwise, participation will be limited to the disputing parties.*
- *Commissions of inquiry do not observe the same technical standards of evidence as courts. Indeed, divergence from these standards is appropriate to facilitate a thorough investigation. Evidence adduced in the public hearings must nevertheless be relevant; it must be adduced with the aim of shedding light on issues relevant to my investigative mandate, and not simply to impugn the reputations of individual witnesses. For this reason, I will adjudicate disputes on evidentiary relevance by asking whether the potential probative value of a given item of evidence outweighs its potential prejudicial effect. Participants to such disputes should direct their submissions to this question.*
- *This inquiry does not have the authority to review or publicize information that is subject to solicitor-client privilege. Disputes as to whether or not certain evidence is subject to such privilege are to proceed in the manner outlined above, but with the following modifications. Neither hearings counsel nor counsel*

for any participant seeking to adduce evidence is entitled to review impugned documents in order to ascertain the veracity of a privilege claim. On consent of the individual claiming privilege, I may review such documents in order to determine whether they are properly the subject of solicitor-client privilege. I will review the documents privately, discussing their contents only with advisory counsel. I will also limit myself to a prima facie review of the documents – that is, a minimally intrusive review oriented to evaluating the privilege claimed, and nothing more. I will then give an order either requiring production of the document or affirming its inadmissibility due to solicitor-client privilege.

- *Disclosure of documents to me so that I might evaluate their privileged character will not in any way be treated as a waiver of privilege.*
- *It is well known that I am a judge of the Superior Court of Justice. Although my service in this inquiry is not a judicial task, and I do not carry it out with the authority of the Superior Court, my judicial status is nevertheless important to inquiry conduct. It informs my responsibility to complete this inquiry with fairness, impartiality, and independence from any form of outside interference. In the context of civil disputes, judges of the Superior Court have the authority to ascertain the veracity of solicitor-client privilege by reviewing impugned documents. These documents are seen only by the judge, and not shared with adverse parties. The prima facie review of the documents does not diminish a judge's impartiality, nor is the judge influenced in his or her decision-making by having viewed material that is properly the subject of solicitor-client privilege. Should I be required to examine documents for solicitor-client privilege in this inquiry, I will adopt the same impartial mindset, and the same respect for privilege properly claimed, as I would in court.*
- *To reiterate, where a participant asserts solicitor-client privilege over certain material, and provided that claim has at least a tenable basis, I may only review the material on consent of that participant, even for the minimal purpose of verifying the claim. It therefor remains open to participants to decline my access to such material absent a court order. Where this is the case, and hearings counsel persists in the belief that an item should be admitted, the matter will be referred to a designated judge of the Superior Court for determination. I wish to emphasize that I consider it detrimental to the effective conduct of this inquiry for such recourse to be taken lightly. Given the extensive measures adopted at this inquiry to ensure fairness and to protect my impartiality, recourse to a designated judge to adjudicate privilege claims should be exceptional. Should a designated judge determine that a participant's assertion of solicitor-client privilege is frivolous, it will be within the independent discretion of hearings counsel to seek an order for costs compensating the commission for expenses associated with the court hearing.*

The clear point of these reasons, in addition to honouring the legitimate privilege claims of participants, is to mitigate recourse to court proceedings outside the inquiry by honouring equivalent standards of justice within it. Given the fundamental character of solicitor-client privilege, and the serious consequences that would result from its breach (both individually, and to the integrity of the justice system), there is no reason why such high standards should not be observed. More specifically, there is no reason why a judicial commissioner should not observe the same standards and procedure as a judge in court – meaning, in effect, that he or she should decide privilege claims impartiality, and adjudicatively, giving equal hearing to the reasoned claims of adverse parties and issuing a decision that rationally addresses them.

A brief discussion of litigation privilege is warranted. Although litigation privilege similarly protects an individual's communications with his or her lawyer, it also extends to certain communications made by the lawyer on the individual's behalf (such as discussions with experts) in contemplation of litigation. While thus broader in ambit, it is also more limited in time: unlike solicitor-client privilege, which never expires, litigation privilege lapses with the expiry of the litigation or any related proceedings.[80] Simon Ruel observes:

> Legal advice and litigation privilege are conceptually distinct and are driven by different policy considerations, but both serve the administration of justice. They often co-exist in relation to the same information and documents. In this context, it seems difficult to argue, with respect to access, review, and determination, that litigation privilege would be on a different footing than legal advice privilege. If [sic] follows that the determination of both legal advice and litigation privilege should be within the exclusive jurisdiction of courts of law.[81]

Ruel is correct to assert that, given the overlap between solicitor-client and litigation privilege, there is no reason to treat litigation privilege differently in a public inquiry. His above statement should only be qualified by noting that individuals may nevertheless allow a commissioner to conduct a prima facie review of privileged documents on consent, and thus the reasoning outlined in this section could be applied with equal force to claims of litigation privilege.

(b) Common Law Confidentiality

Solicitor-client and litigation privilege are not the only type of confidential communication protected at common law. The law recognizes the importance and value of numerous other confidences – such as that between a physician and patient, or between an

[80] See generally *Blank v Canada (Minister of Justice)*, 2006 SCC 39, [2006] 2 SCR 319 at paras 26-41.

[81] *Supra* note 52 at 78.

individual and a member of clergy from whom he or she seeks spiritual counsel – by limiting their disclosure in legal proceedings. Unlike solicitor-client privilege, however, these confidences are not so essential to the proper functioning of the justice system that they receive near absolute or quasi-constitutional protection. Rather, a form of privilege is extended to them according to four criteria developed at common law, with the party asserting privilege bearing the onus of proving the criteria. These are:

> (1) The communications must originate in a confidence that they will not be disclosed.
> (2) This element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties.
> (3) The relation must be one which in the opinion of the community must be sedulously fostered.
> (4) The injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of the litigation.[82]

There is no obvious barrier in law to public inquiries adjudicating common law claims of privilege,[83] subject of course to the possibility that dissatisfied parties may seek judicial review of a commissioner's determination. The fourth criteria parallels the approach advocated above concerning questions of evidentiary relevance: that is, the probative value of disclosure should outweigh its prejudicial effect. Ruel argues that "the fact that the Executive has chosen to call a public inquiry in relation to a particular matter is an important consideration in favour of disclosure when considering the fourth criteria … in that there is a strong public interest in having a commission of inquiry consider all the information relevant to its mandate."[84] Moreover, "[t]he fact that a commission of inquiry does not determine rights or responsibility but constitutes a fact-finding process, may also weigh in favour of disclosure."[85]

The latter propositions warrant closer examination. It is true that the formation of a public inquiry signifies that important public issues must be investigated. It does not necessarily follow that all evidence sought to be adduced in the inquiry's hearings – which, it should be noted, may be adduced by participants as well as by commission counsel – is integral to the pursuit of that

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[82] Ruel, *supra* note 52 at 85-86, citing the classic "Wigmore" criteria: John Henry Wigmore, *Evidence in Trials at Common Law*, vol 8, 4th ed (Boston: Little, Brown, 1961) at 543.

[83] Ruel, *ibid* at 86.

[84] *Ibid.*

[85] *Ibid.*

mandate. More importantly, however, it is not clear why "the fact that a commission of inquiry does not determine rights or responsibility" should have special significance under the fourth criteria for assessing common law privilege. The injury sought to be averted by conferral of common law privilege is that of deeply personal, private communications being made public, thus undermining confidence in the privacy of communications that society has deemed worthy of protection and respect. The fact that legal consequences may also be wrought by disclosure is significant, but by no means the central basis for enforcing the privilege in the first place. Indeed, the danger posed to the types of personal confidences protected by common law privilege is likely even more pronounced in a public inquiry than in a trial, given the publicity attracted by inquiry proceedings and the atmosphere of scandal that sometimes surrounds them. Moreover, the very fact that inquiries do not reach enforceable findings (including the fact that they do not place liberty at risk) could equally be cited as a reason against compromising common law confidentiality, as any injury to truth-seeking would be less consequential than in the criminal context. The categorical distinction drawn between inquiries and trials in this respect, as in others, would appear to be ill-founded when we refocus our attention on the actual, legitimate interests and concerns of individuals affected, and on what should be owed to them as a basic matter of fairness.

It is enough that, as in a trial setting, the individual claiming common law privilege has the onus of demonstrating its existence; there should be no special presumption favouring disclosure based on the fact that public inquiries are, generally speaking, important. Here too an adjudicative dynamic is appropriate as between the participant claiming privilege, any interlocutor (including hearings counsel), and the commissioner. The fact that a judge is commissioner should assure the claimant that he or she will receive a hearing on equally just terms as in a court; and in order to enforce this equivalency, the commissioner would be required to observe boundaries in his or her communications with hearings counsel, as outlined in the previous section, and decide claims of common law privilege from a position of scrupulous impartiality. By giving this assurance proactively – that is, by lending transparency to his or her relationship with hearings counsel, and adopting transparent procedures that reinforce impartiality – the commissioner would help instill confidence in the proceedings and avert the likelihood of recourse to judicial review. Our hypothetical commissioner's decision on a preliminary, adjudicative hearing could thus be supplemented with the following reasons:

- *I am legally obliged to observe the same principles of common law privilege as would be enforced by a superior court. Accordingly, where a witness or other participant resists the production of certain evidence on the basis that its production would compromise confidential communications protected by common law privilege, the witness may raise such an objection before me. He or she will bear the onus of demonstrating:*
    - *That the communication arose in confidence;*
    - *That this confidence was essential to preserving the relationship of the parties making the communication;*
    - *That the relationship between the parties making the communication is one which, as a society, we recognize warrants respect and protection; and*
    - *That any injury to that relationship which would result from disclosure outweighs the potential value of disclosure to the inquiry.*
- *Hearings counsel may, in her discretion, provide me with reply submissions addressing these criteria. Where a participant other than hearings counsel seeks to adduce the impugned communications, he or she may also make reply submissions.*
- *In considering submissions under the fourth criteria, above, I will be mindful of the special prejudice that may arise to individuals from having highly personal or sensitive communications divulged in such a public forum as this inquiry. In order for disclosure to be valuable to the inquiry, there must be a credible belief that it will shed light on a factual question relevant to the inquiry's mandate. The importance of addressing that question must be proportionate to the potential injury that may result from disclosure.*
- *I may also consider submissions on whether communications properly subject to common law privilege may be heard by me in camera, following the standards for in camera hearings outlined elsewhere in these reasons.*

4. Findings of Misconduct

Official findings of misconduct are the most severe consequences that may be wrought by an inquiry. One would accordingly expect the law governing this area of inquiry conduct to be consistent and clear. Surprisingly, the opposite is true: both the scope of the authority for commissioners to issue misconduct findings, and the procedural standards that should precede them, are subject to legal ambiguity and inconsistency in inquiry practice. This lack of predictability and consistency seriously impacts the ability of inquiries to afford procedural fairness, and their efficacy in averting challenges on judicial review.

While inquiries are legally prohibited from stating findings of civil or criminal wrong, the scope of this injunction is unclear, both as it concerns factual findings from which legal inferences can be made, and as it concerns the application of legal norms generally to evaluate conduct. This complicates two further challenges commonly facing inquiry commissioners: namely, defining appropriate standards by which to judge the conduct of individuals impacted by deficient organizational or systemic settings, and avoiding hindsight bias. I consider each of these issues in turn below, before considering how the central ambiguities in the law are best resolved. I conclude by suggesting, somewhat counter-intuitively, that resolution of these ambiguities in a manner consistent with fidelity to adjudication may actually serve to mitigate unnecessary adversarialism at public inquiries.

(a) Scope of the Authority to Issue Findings of Misconduct

Some of the most important case law governing the ability of inquiries to reach findings of misconduct arises from the federalism context. As will be discussed in greater detail below, several provincial commissions of inquiry have been challenged in their ability to issue misconduct findings in terms allegedly equivalent to a finding of criminal wrong – the criminal law being an area of exclusive federal jurisdiction under the Constitution. The case law on point confirms that inquiries may not be used as surrogate criminal investigations or prosecutions, but nevertheless affords wide latitude for provincial inquiries to investigate subject-matter, and issue findings of misconduct, related to the administration of justice or other valid fields of provincial jurisdiction.

In *Krever*, the Supreme Court endorsed for the first time a general limitation against inquiries making findings of *either* criminal or civil wrong. Cory J wrote for the Court:

> 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, a commission of inquiry is an investigation into an issue, event or series of events. The findings of a commissioner are simply findings of fact and statements of opinion reached by the commissioner at the end of the inquiry. 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. … To put it another way, even if a commissioner's findings could possible be seen as determinations of responsibility by members of the public, they are not and cannot be findings of civil or criminal responsibility.[86]

[86] *Supra* note 20 at para 34.

This statement is intriguing because it suggests that limits on the authority of an inquiry flow not just from formal constraints in its enacting legislation or the jurisdiction of its commissioning government, but from the institutional character of the inquiry itself.[87] As David Mullan observes, the Court in *Krever* did not precisely state a legal basis for its observation that a public inquiry cannot make civil or criminal law findings.[88] Since *Krever* concerned a federal public inquiry, its commissioning government held jurisdiction over criminal law and could appoint courts empowered to reach either civil or criminal findings. The commonsense interpretation of *Krever* is simply that a body not obliged to observe the same procedural and evidentiary standards as a court should not be able to exercise equivalent powers. Mullan suggests that this principle is likely undergirded by three, interrelated matters of clearer legal foundation – namely: the concern that public inquiries not usurp the inherent jurisdiction of s 96 courts; the concern that public inquiries not undermine the principle of judicial independence; and the demands of fundamental justice imposed by s 7 of the *Charter*.[89]

It remains unclear, however, exactly how close inquiry commissioners may come to reporting findings that substantively convey the elements of criminal offences or civil wrongs, but which do so in non-express terms. It is beyond controversy that inquiries may not issue findings stating expressly that "X murdered Y", or that "X was negligent, and his negligence was the cause of Y's injury." Yet inquiries may still (and very often do) state factual findings from which inferences of legal wrong can be made. For example, the final report of the *Walkerton Inquiry*[90] included findings that Stan and Frank Koebel, both utilities operators, had failed to observe safety measures contributing to the contamination of a regional water supply, and had attempted

[87] Panaccio makes a similar observation regarding Lamer J's decision for the majority in *Starr*: " … même si en apparence la question semble être uniquement constitutionelle, il demeure que le raisonnement du juge Lamer, comme celui de la Cour d'appel dans *Nelles*, semble être motivé par une certaine conception de ce qu'une commission d'enquête devrait et ne devrait pas être autorisée à faire" (*supra* note 60 at 104).

[88] David Mullan, *Administrative Law* (Toronto: Irwin Law, 2001) at 392.

[89] *Ibid*.

[90] Ontario, Walkerton Inquiry, *Report of the Walkerton Inquiry* (Toronto: Queen's Printer for Ontario, 2002) (Commissioner: the Honourable Dennis O'Connor)

to conceal their omissions when e-coli contamination of the water became evident.[91] As Commissioner O'Connor reported:

> Stan and Frank Koebel engaged in a host of improper and unsafe operating practices during the years leading up to the May 2000 tragedy, some of which had a direct impact on the outbreak. The failure to measure daily chlorine residuals at Well 5 on May 13, or on the following days, was a lost opportunity to detect the contamination and to take the necessary steps to protect the community. … [A]lthough daily chlorine residual monitoring would not have prevented the outbreak, it is very probable that it would have significantly reduced the outbreak's scope.
>
> …
>
> Finally, Stan Koebel's repeated failure to disclose the adverse results from the May 15 samples to the local health unit and others led to a delay in the issuance of a boil water advisory. If Mr. Koebel had been forthcoming, as he should have been, it is likely that between 300 and 400 illnesses would have been avoided.[92]

Similarly, in the final report of his inquiry into the death of Robert Dziekanski, Commissioner Braidwood concluded that "shameful conduct by a few [RCMP] officers,"[93] which included unnecessary and excessive use of a conducted energy weapon, contributed substantially to the death.[94] While these types of finding are certainly different from formal findings of civil wrong or criminal guilt, it is not difficult to derive strong civil and criminal inferences from them. Perhaps more importantly, it is not clear that the stigma borne by the subjects of such findings is less than that resulting from criminal guilt or civil liability. If an inquiry report thus conveys a strong, well-publicized impression that crimes or civil wrongs have been committed, has the injunction against such findings truly been honoured?[95]

Different inquiry commissioners have approached this challenge in different ways. Many have pursued an approach similar to the *Walkerton* and *Braidwood* examples above – that is, by

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[91] *Ibid* at 182-84. The Commissioner also reported that the Koebels had not intended for their actions to cause harm; that their training and oversight by the Ministry of the Environment had been inadequate; that they had not understood e-coli contamination to be potentially fatal; and that apologies given by both men at the inquiry were sincere.

[92] *Ibid* at 216.

[93] British Columbia, Braidwood Commission on the Death of Robert Dziekanski, *Phase 2 Report: Why?: The Robert Dziekanski Inquiry* (Vancouver: Braidwood Commissions of Inquiry, 2010) (Commissioner: the Honourable Thomas R Braidwood) at 14.

[94] *Ibid* at 16.

[95] See Panaccio, *supra* note 60 at 101: "… le débat tourne véritablement autour d'une seule et même question: un conclusion relevant du droit criminal peut-elle surgir de simples constatations de fait, sans qu'il y ait application des norms du droit criminal et application d'une peine?"

disclaiming that their reports should not be construed as conveying findings of civil or criminal wrong, but nevertheless offering pointed accounts of misconduct from which those wrongs can be inferred.[96] Others have adopted a more reserved approach, either avoiding commentary on individual conduct altogether despite latitude to do so under their terms of reference,[97] or taking pains to define non-criminal or non-civil standards of conduct by which to assess the actions of individuals subject to their review.[98] Additionally, some commissioners have set-out factual reports in language deliberately free from evaluative commentary, letting the facts speak for themselves.[99] While in some cases these approaches may be tailored to the specific contexts of

[96] In the Introduction to his *Report of the Walkerton Inquiry*, *supra* note 90, Commissioner O'Connor observed at 35-36: "The purpose of the inquiry is not to make findings of liability or responsibility in a legal sense, but rather to report on all the circumstances surrounding the events in Walkerton and all the causes of those events so as to help ensure the safety of drinking water in the future. … [T]hroughout the report, I occasionally use terms such as 'fault', 'responsible,' and 'accountable,' which have a legal connotation. I do not intend, in this report, to reach any conclusions in law. Readers should attach the normal, non-legal meaning to words of this nature." Commissioner Braidwood prefaced his factual findings with the following summary of the law: "The Supreme Court of Canada has ruled that a commission of inquiry may make findings of misconduct, which it interpreted as 'improper or unprofessional behaviour,' or 'bad management.' The Court recognized that a finding of misconduct may damage a person's reputation, but damaged reputations may be the price that must be paid to prevent recurrence of a disaster. Findings of misconduct should not be the principal focus of a public inquiry; they should be made only in those circumstances where they are required to carry out the mandate of the inquiry. The Court added that a commissioner should endeavor to avoid making evaluations of his or her findings of fact in terms that are the same as those used by courts to express findings of civil or criminal liability. However, a commissioner should not be expected to perform linguistic contortions to avoid language that might be conceivably interpreted as importing a legal finding": *supra* note 93 at 37-38 [citations omitted].

[97] See e.g. Commissioner Iacobucci's approach in his *Internal Inquiry* (Canada, Internal Inquiry into the Actions of Canadian Officials in Relation to Abdullah Almalki, Ahmad Abou-Elmaati and Muayyed Nureddin, *Report* (Ottawa: Minister of Public Works and Government Services, 2008) (Commissioner: the Honourable Frank Iacobucci)). The Commissioner determined that "The individual officials whose actions were material to my mandate were employed with these institutions [CSIS, the RCMP, and the Department of Foreign Affairs and International Trade], and were acting within a chain of command established by them. I found no evidence that any of these officials were seeking to do anything other than carry out conscientiously the duties and responsibilities of the institutions of which they are a part. My findings … are therefor directed to these institutions. It is neither necessary nor appropriate that I make findings concerning the actions of any individual official, and I have not done so": *ibid*, *Executive Summary* at 32-33. I consider the significance of distinguishing between individual and institutional forms of misconduct later in this chapter. See also the discussion in Ratushny, *supra* note 25 at 383-85.

[98] See the discussion of Commissioner Oliphant's inquiry into the Mulroney-Schreiber affair later in this Part.

[99] To a certain extent, this appears to have been the approach of Commissioner Wright in the *Stonechild Inquiry*, discussed *infra* at notes 100ff and accompanying text. Commissioner Wright did make critical evaluative commentary on witness credibility and the adequacy of a police investigation, but declined to opine on the causation of a suspicious death, which would necessarily have involved imputing responsibility to named individuals. Instead, he opined on key conflicted facts surrounding the death, and allowed those facts to speak for themselves. As Ratushny notes, the late Justice Archie Campbell advocated an approach whereby "It may be that the problem of adverse findings and findings of misconduct can be avoided by simply saying what happened; instead of characterizing it legalistically": *supra* note 25 at 378, quoting Archie Campbell, "The Bernardo Investigation Review" in Allan Manson and David Mullan, eds, *Commissions of Inquiry: Praise or Reappraise?* (Toronto: Irwin Law, 2003) at 394. Panaccio also supports this approach (*supra* note 60 at 110). Ratushny is skeptical of

their inquiries, they are also suggestive of underlying ambiguity in the proper interpretation of the law. The nature of this difficulty can be illustrated by an example.

The *Stonechild Inquiry*[100] was commissioned by the Saskatchewan government in 2003 to inquire into the circumstances surrounding the death of Neil Stonechild, a 17 year-old Aboriginal youth whose frozen body was found in a barren industrial area on the outskirts of Saskatoon. On the evening of Stonechild's death, he had been reported to the Saskatoon police for causing a disturbance in a local apartment complex, and circumstantial evidence suggested that Stonechild may have died after having been apprehended and deliberately abandoned by two police officers.

An internal investigation by the Saskatoon police concluded that Stonechild's death showed no evidence of foul play. When two subsequent deaths implicated the Saskatoon police in abandoning Aboriginal men in remote areas, the province referred the Stonechild case to the RCMP. The RCMP completed an extensive investigation, eventually reporting their findings to the provincial Department of Justice. The provincial prosecution service concluded that "while there was evidence that Mr. Stonechild had contact with members of the Saskatoon Police Service the night he died, it would not be recommending charges be laid because there was insufficient evidence to do so."[101] The province subsequently launched the inquiry, appointing Justice David Wright of the Saskatchewan Court of Queen's Bench as Commissioner.

Commissioner Wright's terms of reference directed him as follows:

> 1. The Commission of Inquiry appointed pursuant to this Order will have the responsibility to inquire into any and all aspects of the circumstances that resulted in the death of Neil Stonechild and the conduct of the investigation into the death of Neil Stonechild for the purpose of making findings and recommendations with respect to the administration of criminal justice in the province of Saskatchewan. The Commission shall report its findings and make such recommendations, as it considers advisable.

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whether commissioners could employ non-evaluative language and still satisfy the questions directed by their terms of reference, although he agrees that evaluative language should not be "legalistic" (*ibid* at 394).

[100] Saskatchewan, Commission of Inquiry into Matters Relating to the Death of Neil Stonechild, *Report of the Commission of Inquiry into Matters Relating to the Death of Neil Stonechild* (Regina: Government of Saskatchewan, 2004) (Commissioner: the Honourable David H Wright) [Wright, *Report*].

[101] As characterized by the Court of Appeal for Saskatchewan in *Re Stonechild*, 2008 SKCA 81 (sub nom *Hartwig v Saskatchewan (Inquiry into Matters Relating to the Death of Neil Stonechild)*) at para 22 [*Stonechild*].

2. The Commission shall perform its duties without expressing any conclusion or recommendation regarding the civil or criminal responsibility of any person or organization, and without interfering in any ongoing police investigation related to the death of Neil Stonechild or any ongoing civil or criminal proceeding.[102]

It is noteworthy that the ambit of the Commissioner's inquiry was defined in only generic terms: he was directed to investigate "the circumstances that resulted in" Stonechild's death, and "the conduct of [police] investigations". The terms did not pose specific questions relating to the public concerns that prompted the inquiry – for example: What caused the death of Neil Stonechild? Did members of the Saskatoon Police conduct themselves appropriately in any contact that they had with Stonechild on the evening of his death? Did their actions in any way cause or contribute to his death? Did the Saskatoon Police conduct an adequate investigation into Stonechild's death? If they did not, in what ways was the investigation defective? Do those defects, if any, suggest an attempt by the Saskatoon Police, or by any of its officers, to conceal individual or organizational wrongdoing?

It may seem obvious that such questions would flow from the Commissioner's obligation to inquire into "any and all" circumstances surrounding Stonechild's death, but that assumption is cast into doubt by the injunction against the inquiry stating findings of civil or criminal wrong – findings which answers to the above questions could clearly engender. An exceedingly difficult interpretive and logistical task was thus left to the Commissioner to fulfill his investigative terms without stepping offside of the injunction.

Commissioner Wright's inquiry focused extensively on the conduct of two police officers who responded to the disturbance complaint involving Mr Stonechild on the night of his death. Among other evidentiary issues, the Commissioner was required to assess the credibility of the officers, who variously denied having apprehended Stonechild and claimed to have poor recollections of the evening. He was also required to assess the credibility of a witness who testified that he had seen Mr Stonechild in the back of a police cruiser accompanied by the two officers, and of several additional witnesses whose hearsay evidence variously confirmed and contradicted this account. Finally, the Commissioner considered conflicting opinion evidence offered by a number of forensic experts, focusing largely on whether abrasions to Mr

[102] Quoted in *Stonechild*, *ibid* at para 24.

Stonechild's face and wrists could have been caused by police handcuffs. Commissioner Wright's summary findings of fact can be reproduced in their totality:

> 1. Neil Stonechild was the subject of two complaints of causing a disturbance on the evening of November 24, 1990.
> 2. Constable Bradley Senger and Constable Larry Hartwig, members of the Saskatoon Police Service, were dispatched at 11:51 p.m. to investigate a complaint about Neil Stonechild at Snowberry Downs.
> 3. Hartwig and Senger arrived at Snowberry Downs within minutes and carried out a search of the area. In the course of doing so, they encountered Neil Stonechild.
> 4. The constables took Stonechild into custody.
> 5. In the early morning hours of November 25, 1990, Stonechild died of cold exposure in a field in the northwest industrial area of Saskatoon.
> 6. Neil Stonechild's frozen body was found in a field in the northwest industrial area of Saskatoon on November 29, 1990.
> 7. There were injuries and marks on Stonechild's body that were likely caused by handcuffs.
> 8. The Saskatoon Police Service carried out an investigation. The preliminary investigation properly identified a number of suspicious circumstances surrounding the death.
> 9. The principal Investigator assigned to the case, Morality Sergeant Keith Jarvis, carried out a superficial and totally inadequate investigation of the death of Neil Stonechild.
> 10. Jarvis was informed by Jason Roy that Neil Stonechild was in the custody of the Saskatoon Police Service when Roy last saw Stonechild on the night of November 24/25, 1990. Jarvis did not record this important information in his notebook or Investigation Report.
> 11. Jarvis and his superior, Staff Sergeant Theodore (Bud) Johnson, concluded the investigation almost immediately and closed the file on December 5th, 1990, without answering many questions that surrounded the Stonechild disappearance and death.
> 12. Jarvis dismissed important information provided to him by two members of the Saskatoon Police Service relating to the Stonechild disappearance and death.
> 13. In the years that followed, the chiefs and deputy chiefs of police who successively headed the Saskatoon Police Service, rejected or ignored reports from the Stonechild family members and investigative reporters for the Saskatoon StarPheonix that cast serious doubts on the conduct of the Stonechild investigation. The self-protective and defensive attitudes exhibited by senior levels of the police service continued, notwithstanding the establishment of an RCMP Task Force to investigate the suspicious deaths of a number of Aboriginal persons and the abduction of an Aboriginal man. These same attitudes were manifested by certain members of the Saskatoon Police Service during the Inquiry.[103]

The Commissioner also impugned the integrity of the two officers, suggesting that their testimony had been deceptive. The following excerpts from his report are representative:

> In all of the circumstances, [Cst. Hartwig's] assertion that he did not recall what happened is simply not credible. I conclude that he recalled what happened, and his assertions are a deliberate deception designed to conceal his involvement.
>
> …

[103] Wright, *Report*, *supra* note 100 at 212.

> The two constables insist that they know nothing about the disappearance and death. If that is true, why would they not have contacted the investigating officer when they returned to work on November 29, the very day the body was discovered? I would fully expect them to have gone to the investigating officer to give him a full report of what they knew, including the … Snowberry Downs disturbance.
>
> Why would [Cst.] Senger keep quiet? I can only conclude that he chose to conceal his involvement with Stonechild on November 24/25.[104]

Notably, the Commissioner did not opine directly on whether the two police officers were responsible for Mr. Stonechild's death, or on whether they transported him to the industrial field northwest of Saskatoon and abandoned him there. The Commissioner's approach is thus distinguishable in a subtle way from the *Walkerton* and *Braidwood* reports, in that he did not opine on causation.

It is unclear whether Commissioner Wright stopped short of opining on the factual cause of Stonechild's death due to an absence of evidence, the injunction against civil or criminal findings in his terms of reference, or both. We may nevertheless conclude that the Commissioner felt it consistent with the injunction that he reject the officers' denial of having encountered Stonechild; that he find the officers *had* taken Stonechild into custody; that he find the timing of the officers' response to a subsequent dispatch was consistent with them having diverted themselves to the area where Stonechild's body was found;[105] and that he find the marks on Stonechild's body were likely caused by handcuffs. Despite the absence of a direct opinion on causation, it is impossible to escape the strong inference that the two officers were responsible for Stonechild's death. The legality of these conclusions was affirmed by the Court of Appeal for Saskatchewan, hearing a challenge from the two officers. The court's reasons neatly illustrate the difficulties presented by the case law.

The officers rested their objections on two important cases restricting the authority of provincial inquiries to opine on criminal conduct. The first was *Starr v Houlden*,[106] in which the Supreme Court invalidated an Ontario inquiry whose terms of reference, by duplicating language of the

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[104] *Ibid* at 82-85.

[105] *Ibid* at 194.

[106] *Supra* note 6.

Criminal Code[107] and focusing investigative questions on specific individuals, had effectively asked the Commissioner to opine on the criminal culpability of those individuals. The second was *Re Nelles*,[108] a decision of the Ontario Court of Appeal in response to a stated case question[109] posed by the *Grange Inquiry*,[110] commissioned in the early 1980s to investigate suspicious infant deaths at Toronto's Hospital for Sick Children. The Commissioner in that case had asked the court if he possessed authority to opine on "whether the death of any child at the Hospital for Sick Children … was the result of the actions, accidental or otherwise, of any named person or persons."[111] In reasons that would be cited approvingly in *Starr*,[112] the Court of Appeal held that the Commissioner did not have this authority, finding:

> … the Order in Council specifically limits the commissioner by forbidding him to express any conclusion of law regarding civil or criminal responsibility for a death or the deaths. In our view, such a conclusion may be expressed by findings of fact which without more, when found against a named person, constitute a conclusion of criminal or civil responsibility. In the circumstances, if in carrying out the direction in the Order in Council the commissioner, in determining the cause of death makes such findings, then he is by this specific limitation precluded from naming the persons whose act caused or contributed to the death or deaths of the children.
>
> …
>
> Further, the fact that the findings or conclusions made by the commissioner are not binding or final in future proceedings is not determinative of what he will decide. What is important is that a finding or conclusion stated by the commissioner would be considered by the public as a determination and might well be seriously prejudicial if a person named by the commissioner as responsible for the deaths in the circumstances were to face such accusations in further proceedings. Of equal importance, if no charge is subsequently laid, a person found responsible by the commissioner would have no recourse to clear his or her name.[113]

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[107] RSC, 1985, c C-46.

[108] *Supra* note 6.

[109] Ontario's then *Public Inquiries Act*, RSO 1990, c P41 empowered commissioners to initiate stated case proceedings in the Divisional Court in order to clarify the scope of their authority where the latter was challenged by participants (s 6, *ibid*). The question posed by Commissioner Grange resulted in both majority and dissenting opinions, precipitating an appeal to the Court of Appeal.

[110] Ontario, Royal Commission of Inquiry into Certain Deaths at the Hospital for Sick Children and Related Matters, *Report of the Royal Commission of Inquiry into Certain Deaths at the Hospital for Sick Children and Related Matters* (Toronto: Ministry of the Attorney General, 1984) (Commissioner: the Honourable SGM Grange).

[111] As summarized in *Stonechild*, *supra* note 101 at para 44.

[112] *Supra* note 6 at 1398-99.

[113] *Nelles*, supra note 6 at 219-220. The court also reasoned at 215-16: "A public inquiry is not the means by which investigations are carried out with respect to the commission of particular crimes. … Such an inquiry is a coercive procedure and 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."

These reasons convey three, interrelated principles: the first simply is that the formal limits of an inquiry's terms of reference, in this case barring findings of civil or criminal wrong, should be observed; the second is that an inquiry should not result in prejudice to subsequent court proceedings by opining on the legal issues properly reserved for those proceedings; and the third is that an inquiry should not inflict public stigma equivalent to a finding of criminal wrong on an individual, given the absence of any further opportunity for that individual to acquit herself. The latter concern is implicitly affirmed by the Supreme Court in *Krever*. It will be recalled that although the legal basis for restricting inquiries from making civil or criminal findings in *Krever* is unclear, significant attention was devoted to the formal distinctness of inquiries and the fact that their participants are not afforded the same evidentiary and procedural safeguards as they would receive in a court. Implicitly, the stigma of civil or criminal findings should be reserved for the judicial forum in which appropriate safeguards are in place. In the criminal law context, these safeguards include the high evidentiary onus of proof beyond a reasonable doubt.

The Court of Appeal nevertheless rejected the officers' claim that Commissioner Wright's conclusions were equivalent to those prohibited by *Starr*, *Nelles*, and *Krever*. Concerning *Krever*, the court observed: "… the restriction against making determinations of criminal or civil liability does not mean a commission of inquiry is precluded from making findings of fact. Rather, speaking generally, it means commissions may not assess factual matters with reference to normative legal standards."[114] *Starr* was distinguished on the basis that the *Stonechild Inquiry* was properly directed at matters concerning the administration of justice in Saskatchewan, and did not direct the Commissioner to opine on individual conduct in terms duplicating the *Criminal Code*.[115] The court noted that *Nelles* "has not been widely applied", and quoted Cory J's reasons in *Krever* where he described the *Grange Inquiry* as "tantamount to a preliminary inquiry into a specific crime."[116] It was thus distinguishable by the fact that the *Stonechild Inquiry* did not involve

[114] *Stonechild*, *supra* note 94 at para 36.

[115] *Ibid* at paras 52-53.

[116] *Krever*, *supra* note 20 at para 45, quoted in *Stonechild*, *supra* note 101 at para 47. This aspect of the Court's reasons in *Krever* is perplexing. To quote those reasons at greater length: "In *Nelles*, the court found that the purpose of the inquiry was to discover who had committed the specific crime of killing several babies at the Hospital for Sick Children in Toronto. By the time the case reached the Court of Appeal, one criminal prosecution for the deaths had failed and an extensive police investigation into the deaths was still continuing. When it established the commission,

an ongoing, contemporaneous criminal investigation: indeed, it was struck following the completion of such an investigation by the RCMP, and as a result of the failure of that investigation to quell public concerns surrounding the Stonechild case.[117]

The court considered a stronger parallel to lie between the *Stonechild Inquiry* and a former British Columbia commission whose legitimacy had been affirmed by the Supreme Court in *O'Hara v British Columbia*.[118] The inquiry in that case was constituted to investigate allegations of police misconduct (specifically, the alleged abuse of a person held in custody). Its terms of reference were highly specific, directing the commissioner to ascertain "whether [a named individual] sustained injuries while detained in police custody and if so, the extent thereof, the person or persons who inflicted them, the reason for so inflicting them and the time and place the injuries were sustained."[119] It should be clear that these terms effectively invited the Commissioner to describe both the *actus* and the *mens rea* of a criminal offence. The Supreme Court nevertheless upheld their validity, with Dickson CJ observing:

> [T]he present inquiry is aimed at getting to the bottom of an incident of police misconduct which has undermined the proper administration of justice. The federal authorities have no jurisdiction over the discipline of police officers who are the subject of the inquiry … The inquiry is mandated to investigate alleged acts of wrongdoing for purposes different from those which underlie criminal law and criminal procedure. The purpose of the inquiry is not to determine criminal responsibility. As such, it is no different from a coroner's inquiry, the constitutionality of which [has been] affirmed by this Court …[120]

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the government described it as an inquiry into deaths thought to have been the result of deliberate criminal acts. Further, the Attorney General had stated that if further evidence became available which would warrant the laying of additional charges, they would be laid and the parties vigorously prosecuted. The court clearly viewed the proceedings as tantamount to a preliminary inquiry into a specific crime. For the commissioner to have named the persons he considered responsible would, in those circumstances, have amounted to a clear attribution of criminal responsibility." If this characterization of the inquiry's purpose is correct, it is unclear why the Court did not go further and pronounce that, applying its own interpretation of the law, an inquiry such as *Nelles* should have been found invalid. How can a preliminary inquiry – clearly a criminal law procedure, with a criminal law purpose – be struck on an ad hoc basis by a provincial government without trenching on federal jurisdiction over the criminal sphere? Moreover, how could it satisfy s 7's demands for fundamental justice under the *Charter*? We are left with the uncomfortable implication that the *Grange Inquiry* may have been invalid, but that its invalidity was never pronounced by a court.

[117] *Stonechild*, *ibid* at paras 47-49.

[118] [1987] 2 SCR 591.

[119] Quoted in *Stonechild*, *supra* note 101 at para 55.

[120] *Supra* note 118 at 610-11. For additional supportive authorities concerning the ability of provincial governments to establish inquisitorial processes related to the administration of justice, but concerning subjects that overlap with the sphere of criminal law, see *Di Iorio v Warden of the Montreal Jail*, [1978] 1 SCR 152; *Faber v the Queen*, [1976] 2 SCR 9; *Attorney General of Quebec and Keable v Canada*, [1979] 1 SCR 218; and *Bisaillon v Keable*, [1983] 2 SCR 60.

Notably, although not emphasized by the court in *Stonechild*, the inquiry in *O'Hara* had similarly been struck when public controversy persisted following the exhaustion of alternate investigative measures. The allegations of police abuse in that case prompted an internal police investigation, and a decision by provincial prosecutors that insufficient evidence existed to proceed with criminal charges. A further inquiry under the provincial *Police Act*[121] supported the veracity of the victim's complaint but was unable to identify the perpetrators, concluding that a cover-up had taken place.[122] *Stonechild* and *O'Hara* thus shared a history in which the initial suspicion of abuse escalated to suspicion of cover-up when standard oversight mechanisms failed to ensure public confidence in the integrity of the police. The significance of this commonality will be considered again below. For present purposes it suffices to note that, on the strength of authorities such as *O'Hara*, the court considered Commissioner Wright's conclusions to have sufficient grounding in the administration of justice to be intra vires provincial jurisdiction.

Whatever the merit of this disposition on the facts, it is illustrative of a concerning lack of clarity in the law. For one thing, the court's decision to distinguish *Nelles*, narrowing the latter's relevance consistent with the Supreme Court's comments in *Krever*, is perplexing. *Nelles* stands for three principles, only one of which is that an inquiry not disrupt future or contemporaneous criminal proceedings – the basis on which the court distinguished the case from *Stonechild*. On the further principle that inquiries should not inflict the same stigma as a finding of criminal guilt, the difference between the two inquiries is less clear. Indeed, the nurses who faced scrutiny at the *Grange Inquiry* and police officers scrutinized in *Stonechild* would seem to have had a common interest in avoiding the most stigmatizing implication possible: that they were responsible for having committed murder. It is more plausible that Commissioner Wright was, in fact, attempting to apply *Nelles* when he stopped short of opining on the cause of Stonechild's death: by omitting an opinion on causation, he honoured the general language of *Nelles* prohibiting findings that "name the persons whose act caused or contributed to [a crime]." The

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[121] RSBC 1979, c 331, s 40.

[122] *O'Hara*, *supra* note 118 at paras 3-4.

same approach was not observed in the *Braidwood*,[123] *Walkerton* or *O'Hara* inquiries, however: in each of those cases, the commissioners included factual findings against named individuals clearly implicating them in the commission of crimes. While the latter approach would appear to be more commonplace, it is not clear whether Commissioner Wright's approach or that of the other commissioners best accords with the letter and spirit of the law.

Second, we may question the substance of the distinction between the terms of reference in *Starr* and those in *Stonechild*, among other inquiries. Can it really be said that an inquiry has less to do with ascertaining the possible criminal conduct of individuals simply because the terms of reference are cautiously drafted to avoid the language of the *Criminal Code*? What if the terms in *Starr* had been drafted to avoid such language, but directing the Commissioner to inquire into the same facts: would the Ontario government then have been able to constitute effectively the same inquiry, driven by the same political motives and entailing the same consequences for individuals, but justified ostensibly in reference to other heads of provincial power? To do so would be to permit the province to do indirectly what it could not do directly, yet this is the dominant interpretation given to *Starr* in the case law: an interpretation that focuses on the language of terms of reference and their relation to a credible intra vires purpose, but not on the substantive received effects of an inquiry on individuals.[124]

Finally, it is noteworthy that the court in *Stonechild* interpreted *Krever* to restrict inquiries from assessing facts in reference to "normative legal standards." It is unclear whether the limitation supported by the Supreme Court in *Krever* concerns strictly findings of civil wrong and criminal guilt, or also findings that other "normative legal standards" have been breached. Of course, this invites the further thorny question of what constitutes such a standard. A finding implicating officials in facilitating torture, for example, would suggest the breach of several legal normative standards, including the *Charter*, but would also suggest a breach of government policies, international norms, and basic ethics. Common sense suggests that inquiries cannot possibly be

[123] Three of the police officers whose conduct was scrutinized in the *Braidwood Inquiry* challenged the constitutionality of notices of alleged misconduct that were issued against them. They based their claims in part on a characterization of the allegations as trenching on the criminal law sphere. Giving reasons that mirror those in *Stonechild*, the Court of Appeal for British Columbia rejected this characterization. See *Bentley v Braidwood*, 2009 BCCA 604 at paras 44-55.

[124] See e.g. *Bentley v Braidwood*, *ibid*.

restricted from findings that potentially overlap with normative legal standards, given the extensive overlap between laws and basic societal conceptions of right and wrong.[125] But can a commissioner be specifically guided by laws and legal principles in applying standards of misconduct at his inquiry, provided he steers clear of the criminal law and civil findings of negligence? May he evoke such laws in making misconduct findings in his report, or at least acknowledge that they set the background for those findings? The next section considers these questions.

(b) The Use of Legal Norms to Inform Standards of Misconduct

The *Oliphant Inquiry*[126] into business dealings between former Prime Minister Brian Mulroney and Karlheinz Schreiber illustrates the challenge presented by the use of legal norms to inform standards of misconduct. Commissioner Oliphant, then Associate Chief Justice of Manitoba's Court of Queen's Bench, was presented with terms of reference directing him to determine, inter alia,

> 1. What were the business and financial dealings between Mr. Schreiber and Mr. Mulroney?
> …
> 11. Were these business and financial dealings appropriate considering the position of Mr. Mulroney as a current or former prime minister and Member of Parliament?
> 12. Was there appropriate disclosure and reporting of the dealings and payments?
> 13. Were there ethical rules or guidelines which related to these business and financial dealings? Were they followed?[127]

Adopting a process reminiscent of that advocated in this thesis, Commissioner Oliphant convened a preliminary hearing amongst the core participants[128] to his inquiry, seeking input on the proper interpretation of terms 11-13 above. Specifically, he considered it necessary to determine by what "norms and standards" conduct might be considered "appropriate" or "inappropriate" under terms 11-12, and what "ethical rules and principles" should be considered

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[125] As Panaccio observes, *supra* note 60 at 105-106, civil and criminal wrongs are simply juridical expressions of moral standards widely held in society. One cannot neatly separate legal and moral wrongs, normatively or linguistically, when they share common content.

[126] Canada, Commission of Inquiry into Certain Allegations Respecting Business and Financial Dealings Between Karlheinz Schreiber and the Right Honourable Brian Mulroney, *Report* (Ottawa: Minister of Public Works and Governments Services Canada, 2010) (Commissioner: The Honourable Jeffrey J Oliphant) [Oliphant, *Report*].

[127] Oliphant, *Report: Volume 1: Executive Summary*, *ibid* at 4-5 [Oliphant, *Report*].

[128] Only the Attorney General for Canada, Karlheinz Schreiber, and Brian Mulroney were granted full standing to participate in the evidentiary hearings of the inquiry. Accordingly, only they and commission counsel participated in the commissioner's preliminary hearing on his terms of reference.

under term 13. The Commissioner acknowledged that, prior to the commencement of hearings, these questions could only be addressed "at a conceptual level", but that it was nevertheless "important … [for] all parties granted standing, particularly Mr. Mulroney, [to] know by what standard the appropriateness of Mr. Mulroney's business and financial dealings, as well as the disclosure and reporting of those dealings and payments, will be assessed."[129]

The most contested issue in the hearings was whether Commissioner Oliphant could consider legislation and legal standards in determining the norms by which he was to judge Mr Mulroney's conduct. No party contested the injunction against the Commissioner stating findings of civil or criminal culpability. However, counsel for the Attorney General submitted that the Commissioner should consider "legislation, rules, guidelines, and jurisprudence" applicable to the conduct of public office holders within the timeframe relevant to the inquiry's review.[130] These included "the *Parliament of Canada Act*, R.S.C. 1885, c. P-1, s. 41; the *Financial Administration Act*, R.S.C. 1985, c. F-11, ss. 80 and 81; the *Criminal Code*, R.S.C. 1985, c. C-46, ss. 119, 121 and 122; and the *Income Tax Act* 1985, c. 1 (5th Supp.), s. 220(3.1)."[131] With the exception of s 220(3.1) of the *Income Tax Act*, each of these provisions describes a criminal offence, including the offences of fraud, bribery, and corruption. Counsel for the Attorney General submitted that "taken together, these statutes, and the offences identified therein, reflect society's disapproval of the particular types of conduct governed by them. … [A]n understanding of what types of conduct are subject to sanctions may inform [the Commissioner's] view as to whether particular conduct is appropriate in the context of the Terms of Reference."[132]

Counsel for Mr Mulroney argued for a different interpretation of the Terms of Reference. Using statutory criminal offences to define "inappropriate" conduct for the purpose of the inquiry would, in his view, be tantamount to the Commissioner doing indirectly what he could not do

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[129] See the Commissioner's *Ruling on Standards of Conduct*, 29 February 2009, in Oliphant, *Report: Volume II: Factual Inquiry*, *supra* note 126 at Appendix 9-1, 377ff.

[130] *Ibid* at para 8.

[131] *Ibid* at para 9.

[132] *Ibid*.

directly.[133] Noting that Mr Mulroney's conduct was the central focus of the inquiry, he argued that the standard for judging that conduct must be clear and contemporaneous with the events under review. The only standard meeting this criteria, in his submission, was that set-out in the 1985 *Conflict of Interest and Post-Employment Code for Public Office Holders* ("1985 Ethics Code"), a policy implemented by the Mulroney government itself.[134]

The Commissioner adopted the position advocated by the Attorney General. Two sources of authority had particular influence on his decision. The first were the so-called "Cory Principles", set-out by Justice Cory in *Krever*:

> Perhaps the basic principles applicable to inquiries held pursuant to Part 1 of the [federal Inquiries] Act may be summarized in an overly simplified manner in this way:
>
> (a)(i) a commission of inquiry is not a court or tribunal, and has no authority to determine legal liability;
>
> (ii) a commission of inquiry does not necessarily follow the same laws of evidence or procedure that a court or tribunal would observe.
>
> (iii) it follows from (i) and (ii) above that a commissioner should endeavor to avoid setting out conclusions that are couched in the specific language of criminal culpability or civil liability. Otherwise the public perception may be that specific findings of criminal or civil liability have been made.
>
> (b) the commissioner has the power to make all relevant findings of fact necessary to explain or support the recommendations, even if these findings reflect adversely upon individuals;
>
> (c) a commissioner may make findings of misconduct based on the factual findings, provided that they are necessary to fulfill the purpose of the inquiry as it is described by the terms of reference;
>
> (d) a commissioner may make a finding that there has been a failure to comply with a certain standard of conduct, so long as it is clear that the standard is not a legally binding one such that the finding amounts to a conclusion of law pertaining to civil or criminal liability;
>
> (e) a commissioner must ensure that there is procedural fairness in the conduct of the inquiry.[135]

On their face, these principles would seem to limit recourse to normative legal standards by virtue of the language in principle (d), "… so long as it is clear that the standard is not a legally

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[133] *Ibid* at para 20.

[134] *Ibid* at paras 21-22.

[135] *Supra* note 20 at para 57, cited by Commissioner Oliphant in *supra* note 119 at para 24.

binding one …". Commissioner Oliphant nevertheless stressed only the express reference to criminal or civil "conclusions of law" in that principle, thus implying that the injunctive scope of the principle is limited to such findings. In this respect, he was influenced by the reasoning of Commissioner Iacobucci in his *Internal Inquiry*.[136] Commissioner Iacobucci similarly conducted a preliminary hearing on the interpretation of his terms of reference, seeking direction on the "norms and standards" that he should use to assess "deficiencies" in individual or organizational conduct. He observed that "basic principles … emerge from legal sources including Canadian law, the *Charter*, and various international instruments …", and that these principles may be incorporated into standards of conduct without constituting formal findings of civil or criminal wrong.[137] He accordingly applied an "objective standard" of deficient conduct at his inquiry, stated simply as conduct "[falling] short of the norms that would be followed by a reasonable person placed in comparable circumstances."[138] This conduct could include "failing to meet a standard or norm that existed at the time", "failing to establish a standard or norm when there should have been one", and "maintaining a standard or norm that was itself deficient."[139] Contemporaneous laws, legal norms, and international instruments could be considered in contextually assessing conduct under these standards.

For his part, Commissioner Oliphant adopted language from a statement made by Mr. Mulroney himself, while Prime Minister, articulating the standard of conduct expected of cabinet ministers in his government: "there is an obligation … not simply to observe the law but to act in both official and personal capacities in a manner so scrupulous that it will bear the closest public scrutiny."[140] This standard could be applied objectively and, having been set by the former Prime Minister, was a standard known to him at the relevant times and not one created in hindsight. Importantly, it articulated a duty to be bound by, and to exceed, the requirements of applicable laws. Accordingly, the Commissioner held that his construal of possible misconduct could be "informed by" the statutes identified by the Attorney General, "not for the purpose of assessing

[136] *Supra* note 97.

[137] *Ibid* at 341, cited in Commissioner Oliphant's ruling, *supra* note 129 at para 56.

[138] *Ibid*.

[139] *Ibid*.

[140] *Supra* note 129 at para 63.

criminal or civil liability, but for the purpose of understanding what is considered to be inappropriate conduct."[141]

Suspending for the moment an appraisal of this outcome from a legal perspective, it poses an evident practical difficulty. If standards of misconduct may be informed by statutes, including sections of statutes that specifically define criminal offences, then how are participants to direct their submissions on those subjects without effectively pleading in respect of findings of criminal wrong? Borrowing the language of Commissioner Iacobucci, how can one state the norms that would have been followed "by a reasonable person placed in comparable circumstances" without engaging, by necessary implication, in questions of civil liability? Would it be permissible for commission counsel to make final submissions to the commissioner in which statutory provisions are itemized, and an individual's non-compliance with those provisions noted, provided counsel describes this non-compliance as "inappropriate" rather than "unlawful"? Moreover, were the Commissioner to allude to statutory prohibitions in his final report, then describe factual conduct in clear contravention of those provisions, would he have truly avoided making criminal findings simply by the use of indirect language?

The significance of this ambiguity is underscored by a further ruling issued by Commissioner Oliphant, addressing a motion in which Mr Mulroney's counsel sought clarification of the original decision. Counsel asked that the Commissioner clarify whether (a) he intended to make findings by referring to the statues, and (b) if he did not, what utility he intended to derive from them. Rather than resolving the practical challenge, the Commissioner's additional ruling augmented it.

First, Commissioner Oliphant asserted that it may be useful for him to consult the statutes while preparing his report in order to *avoid* inadvertently stating findings in the language of statutory offences.[142] Yet that usage was clearly not the basis on which the Attorney General referred the Commissioner to the provisions in the first place, nor was it advanced as a reason for

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[141] *Ibid* at para 65.

[142] See the Commissioner's *Ruling on Application by the Right Honourable Brian Mulroney for Clarification of Ruling on Standards of Conduct*, 1 April 2009, at para 17, available online: http://epe.lac-bac.gc.ca/100/206/301/pco-bcp/commissions/oliphant/2010-07-20/english/documents/pdf/clarificationstandardsofconduct_en.pdf.

considering the statutes in the Commissioner's earlier ruling. For the Commissioner to privately review any statute in order to avoid improper findings is clearly a matter within his discretion; it could only be exercised to the benefit of impugned witnesses, and is irrelevant to the issue of how those statutes might contribute standards that *inform* misconduct findings.

Second, in seeking to clarify his earlier ruling, Commissioner Oliphant employed the following logic:

> At paragraph 65 of the Standards Ruling, I used the expression "I may be informed by" in relation to how I might utilize certain statutes. At no time did I intend to inform myself through these statutes as to specific deficiencies in conduct that may lead one to infer that I am commenting on criminal or civil liability. My use of the term "inform" as to these statutes was in reference to their assisting me in identifying a level of appropriate conduct. One can only determine if there are deficiencies in conduct after one has determined the standard by which the conduct under scrutiny can be judged on any given set of facts.
>
> By way of example, I know that it is not my role to conclude, or even comment on, whether specific sections of the *Income Tax Act* were violated. I am clearly aware that I am precluded from doing so. However, I am directed by the Terms of Reference to inquire and answer a question as to whether there was appropriate disclosure and reporting of any financial dealing. Depending on the evidence that comes before me, I may need to inform myself as [to] what the *Income Tax* Act says about reporting and disclosure in order to determine whether reporting and disclosure was appropriate.[143]

These reasons simply beg repetition of the questions at the heart of the motion: namely, what does it mean to avoid commenting on compliance with the *Income Tax Act*, while simultaneously informing oneself "about what the *Income Tax Act* says about reporting and disclosure in order to determine whether the reporting and disclosure was appropriate"? Doesn't the latter necessarily equate to the same substantive conclusion as the former? If it doesn't, then a clearer explanation is required to differentiate them.

Finally, the Commissioner conceded that he should not have included the *Criminal Code* among those statutes that might inform the standards of conduct applied at his inquiry, reasoning: "I must state, upon reflection, that the *Criminal Code* is of little, if any, value in this endeavour. As a statute that proscribes, rather than prescribes, conduct, it appears to be of trifling value in assisting me in setting the standard for conduct in any given fact scenario."[144] Yet the provisions of the *Parliament of Canada Act* and the *Financial Administration Act* cited by the Attorney General

[143] *Ibid* at paras 19-20.

[144] *Ibid* at para 21.

also impose "proscriptions" – indeed, in the case of the latter statute, it proscribes an indictable offence punishable by 14 years' imprisonment! Again, the Commissioner's ruling invites ambiguity by implying that he might rely only on "prescriptive" provisions of the referenced statutes, offering no account of what those provisions might be, and failing to substantiate a meaningful distinction between proscriptive and prescriptive laws.

This criticism is not intended to be unduly harsh. Commissioner Oliphant should be lauded for convening a preemptive hearing concerning the standards that would be applied at his inquiry, and for attempting to clarify an earlier decision that arose from that hearing. These measures certainly enhance fairness, and are especially warranted where the inquiry focuses on individualized suspicions of misconduct. His rulings nevertheless illustrate the near impossibility of stating standards of conduct with clarity and precision when the law itself is unclear concerning the scope of its limitation against findings of legal culpability. One way of interpreting the *Stonechild* and *Oliphant* terms of reference is that their executive drafters deliberately avoided stating standards by which individual conduct should be assessed, owing to the very ambiguities in the law canvassed here, and thus leaving the Commissioners to confront a thorny interpretive task and likely challenges to their authority on judicial review. Both Commissioners acted conscientiously in grappling with this challenge, but the inconsistency of their approaches, and of the approaches of other inquiries, exacerbates rather than resolves the underlying ambiguity.

(c) Organizational Misconduct and Hindsight Bias

Before considering how the case law might be reinterpreted to resolve these ambiguities, two further issues must be addressed. The first concerns the interaction of individual and organizational or systemic findings of misconduct, and the second concerns the challenge of avoiding hindsight bias.

It is an oft-repeated mantra that the ultimate purpose of most public inquiries is to identify systemic, rather than individualized, deficiencies and reforms. Indeed, the recommendatory mandates of inquiries invariably ask commissioners to suggest legal and policy improvements to the operation of institutions, be they organs of government, a given administrative body, or the regulatory frameworks applicable to a given area of public life. Yet individual and institutional conduct are closely interlinked. As Ratushny observes:

> … [Systemic flaws] often emerge in issues such as leadership, relationships, morale, past practices and institutional 'culture.' They are, essentially, any factors that transcend individual conduct but influence events, including individual conduct. They may impose rigidity in dealing with problems, or create 'gaps' by discouraging cooperation and coordination. They may generate insensitivity and create barriers. They often do not appear to be offensive on their face but only upon understanding their influence upon consequences. … [T]hey could be characterized as 'institutional misconduct.'[145]

Despite the focus of most inquiries on such systemic issues, the specific controversies that prompt inquiries often draw public attention to the conduct of individuals. In each of the inquiries discussed in this section, for example, highly specific actions of individuals were the initial genesis of public concerns, and investigating that conduct was essential to informing proposals for systemic reform. Nevertheless, the interconnection of individual conduct with systemic issues complicates the tasks of determining, first, the degree to which inquiries should focus their scrutiny on individuals to begin with, and second, appropriate and fair standards by which individuals may be judged.

A powerful illustration is provided by the *Missing Women Commission of Inquiry*.[146] One of the central investigative conclusions of Commissioner Oppal's inquiry was that police forces involved in the missing women investigations held widespread and inaccurate beliefs about vulnerable women living and working in Vancouver's downtown eastside: for example, that the women were a transient population, and thus their "disappearance" was not prima facie indicative of foul play.[147] These mistaken beliefs were informed by broader societal prejudices held toward aboriginal persons, sex workers, and drug users, which in turn influenced police culture. Commissioner Oppal thus characterized a core deficiency in police practices as a matter of "systemic bias":

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[145] Ratushny, *supra* note 25 at 368.

[146] British Columbia, Missing Women Commission of Inquiry, *Forsaken: The Report of the Missing Women Commission of Inquiry* (British Columbia: The Commission, 2012) (Commissioner: the Honourable Wally Oppal) [Oppal, *Forsaken*].

[147] Oppal, *Forsaken*, *ibid*, Volume IIB: *Nobodies: How and Why We Failed the Missing and Murdered Women* at 70-71. This mistaken belief was premised on isolated instances in which women initially reported missing were later found. It failed to account for the fact that the vast majority of the missing women were closely tied to the Downtown Eastside by drug addiction, limited financial means, involvement with drug treatment programs and other community resources, and family connections, including care for their own children. It also neglected critical information provided to the police by family members, friends, and community workers who had regular contact with the women.

> The police did not consciously decide to under-investigate the missing women or to deny protection to women in the DTES, but the effect of the policing strategies employed resulted in exactly those outcomes.
>
> I conclude that there was systemic bias in the police response to the missing women investigations. In particular, I find that systemic bias:
>
> - Allowed faulty stereotyping of street-involved women in the DTES to negatively impact missing women investigations;
> - Resulted in the failure to take the lives of the women into account in the policing strategies, particularly failing to recognize the duty to protect an endangered segment of our community; and
> - Contributed to a failure to prioritize and effectively investigate the missing women cases.[148]

These conclusions were crucial to several of the Commissioner's policy recommendations.[149] They were also based on extensive factual conclusions detailing the conduct of individual officers in several investigations.[150]

Subject to only a few exceptions, Commissioner Oppal did not employ critical evaluative language in describing individual conduct. He also made the point of singling out several police officers for praise, despite the overriding effect of flawed institutional practices.[151] Police responsibility for failing the missing and murdered women was framed within broader societal responsibility for the women's marginalization:

> It is important to underscore that a finding of systemic bias should not in any way be taken to mean that the police did not care about the women. They clearly cared, and many worked diligently over a long period of time to catch the perpetrator. Systemic bias means that some aspects of the policing decisions and strategies reflect pervasive stereotypes about this group within our community.
> …

[148] *Ibid* at 238.

[149] See generally the 11 recommendations grouped under "Improved Missing Person Policies and Practices" in *ibid*, Executive Summary, at 165-67.

[150] See *ibid*, Volume IIB, Part 3: *Critical Police Failures*, and Part 4: *Underlying Causes of the Critical Police Failures*, at 2-283.

[151] See *ibid*, Executive Summary at 26. In the Commissioner's words: "I conclude that the initiation and conduct of the missing and murdered women investigations were a blatant failure. I hasten to add these systemic police failures were not all encompassing. In the middle of the gross systemic inadequacies and repeated patterns of error, there were hardworking individual police officers who acknowledged the crisis and strived valiantly to solve the disappearances of the missing women" (*ibid*). The Commissioner goes on to name six individual officers, citing them as "a credit to policing and to our community" (*ibid*).

> The police failures in this case mirror the general public and political indifference to the missing women.[152]

The Commissioner's decision to exercise restraint in criticizing individual police officers was controversial, and attracted the accusation that he had not dispatched his responsibility to attribute responsibility for the women's victimization. In a study examining the potential for public inquiries to serve as instruments of truth and reconciliation, Kim Stanton observed: "Notwithstanding … positive aspects of the Report, Oppal's conclusions are nonetheless problematic since he fails to hold anyone responsible for the harms wrought by the numerous police failures that he identifies."[153] She quotes Ian Mulgrew, a commentator for the *Vancouver Sun*, who observed: "the police investigations were 'blatant failures,' there were 'patterns of error,' there was an 'absence of leadership,' there were 'outdated policing systems,' … Yet no one was to blame."[154]

While the *MWCI* is vulnerable to criticism on separate grounds (considered in Chapter 4), blaming the Commissioner for failing to attribute responsibility to individual police officers misunderstands and simplifies the challenging task with which he was faced. It is trite to point out that the conduct of individuals contributes to the cultural or systemic characteristics of organizations of which they are a part. Individual malice or negligence may also impact the proper functioning of organizations and be a significant causal factor in systemic failings. In limited instances, the Commissioner did attribute such damaging conduct to individuals.[155]

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[152] *Ibid*, Volume IIB at 237.

[153] Kim Stanton, "Intransigent Injustice: Truth, Reconciliation and the Missing Women Inquiry in Canada" (2013) 1 Transitional Justice Review 59 at 85.

[154] *Ibid* [citation omitted]. Roderick Macdonald has observed: "… the desire to turn an investigation of a system failure into a quest for individual wrongdoing is often what lies behind calls for 'who did what to whom' inquiries: find the political actor who sinned; blame him or her; and make him or her take the fall. Acting in such a manner is to waste the opportunity presented by 'who did what to whom' investigations", which should be to "root out wrongful system issues": *ibid*, "Interrogating Inquiries" in Allan Manson and David Mullan, eds, *Commissions of Inquiry: Praise or Reappraise?* (Toronto: Irwin Law, 2003) 473 at 483.

[155] For example, the Commissioner concluded that Sandy Cameron, a civilian employee of the Vancouver Police Department, had exhibited an inappropriate and unhelpful attitude when receiving missing person reports concerning Aboriginal women and sex workers, and that this resulted in "a significant adverse impact" on communication between families and the police (Oppal, *Forsaken*, *supra* note 146, Volume IIB at 61-62). The Commissioner nevertheless observed that "the problems went beyond a single individual", and that it would be inappropriate to single-out Ms Cameron for blame as her status as a front-line intake worker made her an easy target (*ibid* at 62). He criticized two members of the VPD's missing women investigation team, Detective Constables Fell and Wolthers, for single-mindedly pursuing a specific suspect at the expense of following orders,

However, it is also the case that individual conduct is shaped by organizational culture, and indeed by societal assumptions and practices at large. Where this conduct is improper, but its impropriety stems from a more fundamental defect at an organizational (or indeed, societal) level, then on what terms should the individual be judged? Is it appropriate that the individual be held out for sanction, or subject to special scrutiny and accusation in a highly public forum? Conversely, should that person be sheltered from undue scrutiny and criticism on the assumption that their behaviour, while improper, is likely no different than that of the average person placed in equivalent circumstances? These questions obviously reflect deeper, vexing ethical and jurisprudential debates that likely defy simple answers. The Commissioner must nevertheless resolve them on a practical level, and do so in a manner that satisfies his obligation to complete a thorough investigation while honouring his sense of fairness. It is not a straightforward assumption that this resolution should be made in favour of individualized criticism.

The difficulty in parsing individual from organizational misconduct (and vice versa) overlaps with a second challenge: that of hindsight bias. Briefly stated, hindsight bias occurs when current knowledge, standards, or perspectives are applied retrospectively to past conduct, placing that conduct in a more negative light than would be the case were it to be judged by contemporaneous knowledge, standards, or perspectives. Hindsight bias may contribute to individuals being subjected to unfair or unrealistic expectations. It may also result in the consequences of certain actions or inaction seeming obvious in retrospect when they were not at the time.[156]

In the *Oliphant Inquiry*, it was universally acknowledged that Prime Minister Mulroney's conduct should be assessed in reference to standards that were contemporaneous with the conduct itself. This provides a relatively straightforward illustration of a measure taken to avoid hindsight bias.

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completing other important assignments, or working as "team players", and noted that their investigative techniques were defective and improper (*ibid* at 203-205). Again, however, the Commissioner devoted greater attention to failures of oversight and accountability that allowed this conduct to occur (*ibid*). In itemizing detailed systemic failures under the heading "A Want of Leadership: Supervision and Management Issues", the Commissioner prefaced all of his remarks by noting: "Consistent with my overall approach to the Commission's work, I focus on the systemic lack of leadership rather than addressing specific individual errors or failures. While I refer to specific conduct of individual senior managers and executives … I do so for explanatory and illustrative purposes only. My comments should not be taken in any way as findings of misconduct" (*ibid* at 239).

[156] See Ratushny, *supra* note 25 at 362-63 and Campbell, *supra* note 99 at 396.

More complicated scenarios are presented when commissioners are tasked with assessing conduct in reference to standards that are not fixed targets in the same manner as a law or well-publicized policy: for example, the state of professional consensus or scientific knowledge at a given point in time, or the relative acceptability of widely held attitudes or beliefs.

The *MWCI* again provides illustration. In preliminary comments to his factual findings, Commissioner Oppal quoted counsel for the Vancouver Police Department concerning the danger of hindsight bias:

> The hindsight that we have now is similar to looking down at a landscape from above with a bird's eye view. Today we see one clear path connecting the Downtown Eastside to the horrors of the pig farm, but during the investigation itself, the investigators stood on the surface of a flat landscape with hundreds of possibilities and few landmarks to guide them. There was little to suggest to the investigators which way to turn to find the missing women and all reasonable possibilities had to be explored.[157]

The Commissioner acknowledged that the conduct of individuals should not be judged in hindsight, and affirmed his belief that the officers involved in the missing women investigations acted in good faith.[158] He nevertheless stressed a distinction between retrospective and prospective uses of hindsight. While retrospective hindsight can inflict unfair and misleading conclusions, prospective use of hindsight is critical to an inquiry's mandate in identifying deficiencies that can be corrected via forward-looking practices and reforms. This involves commenting on what "should have happened", not necessarily for the purpose of criticism, but for the purpose of demonstrating that better policies and practices are feasible and should be observed in the future.[159] In this respect, Commissioner Oppal was influenced by the late Justice Archie Campbell's commentary on hindsight bias in his independent review of the Paul Bernardo investigations. As noted by Ed Ratushny, Justice Campbell considered hindsight to be "the 'most insidious' of all of a commissioner's temptations. … [He] drew a distinction between formulating recommendations, where hindsight is essential, and assessing past conduct, where hindsight is unfair."[160]

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[157] Oppal, *Forsaken*, Volume IIA, *supra* note 146 at 4.

[158] *Ibid*.

[159] *Ibid* at 5-6.

[160] Ratushny, *supra* note 25 at 362.

Hindsight bias is closely connected to the challenge of discerning appropriate standards for the conduct of individuals within flawed institutions, since hindsight itself can cast a distorting lens over the influence of those flaws on individual behaviour. Commissioner Oppal considered it appropriate to adopt different standards for judging individual and organizational misconduct at his inquiry:

> … I take the view that a finding of individual misconduct should be limited to situations where conduct is motivated by improper, malicious or corrupt intentions. There is no purpose achieved by blaming individuals for mistaken behaviour or errors. While I identify errors and make findings that are critical of some individuals involved in the police investigations, I find that these errors amount to, at most, an error in judgment. These findings fall short of my definition of misconduct and are not, in any case, the focus on my report. …
> …
>
> Police organizations may themselves be subject to a finding of misconduct for failing to establish a norm or standard of conduct when there reasonably should have been one, or for establishing or maintaining a norm or standard that is deficient. An inquiry into potential systemic misconduct is fully consistent with my approach.[161]

In the next section, I consider the importance of this distinction in further detail. For present purposes, it is intended merely to be illustrative of one Commissioner's approach to the challenge of setting clear, fair standards by which to assess misconduct, accounting both for the interrelationship of individual and organizational conduct and the danger of hindsight bias. While different approaches will no doubt suit different inquiries, important guiding principles may nevertheless be discerned by resolving the ambiguities in the law governing findings of misconduct – and in particular, by reconsidering the jurisprudential authorities through the lens of a culture of justification and judicial fidelity to adjudication.

(d) Resolving the Ambiguities

It is worthwhile to begin by revisiting the "Cory Principles" cited earlier, and the apparently narrow authority of *Nelles*. It will be recalled that the Supreme Court in *Krever* analogized *Nelles* to a preliminary inquiry in the criminal law setting. This is a somewhat surprising analogy, given the general tendency in the jurisprudence to differentiate inquiries from the proceedings of courts. In any event, it was intended to suggest that the limits against Commissioner Grange opining on matters of causation were factually isolated: the strong parallel between the type of investigation commanded by his terms of reference and the actual

[161] Oppal, *Forsaken*, Volume I, *supra* note 146 at 172.

parameters of a criminal investigation warranted restraint. Yet the *Nelles* decision and *Krever* also share an important characteristic in common, one with potentially broad application: they both stress the importance of public perception in delimiting the proper scope of inquiry findings.

In *Krever*, Justice Cory observed in part:

> …
>
> (iii) it follows from (i) and (ii) above that a commissioner should endeavor to avoid setting out conclusions that are couched in the specific language of criminal culpability or civil liability. Otherwise the public perception may be that specific findings of criminal or civil liability have been made.
>
> …
>
> (d) a commissioner may make a finding that there has been a failure to comply with a certain standard of conduct, so long as it is clear that the standard is not a legally binding one such that the finding amounts to a conclusion of law pertaining to civil or criminal liability …[162]

Public perception is evoked in paragraph (iii) expressly, and it is implied in paragraph (d). The emphasis on perception is even stronger in *Nelles*:

> What is important is that a finding or conclusion stated by the commissioner would be considered by the public as a determination and might well be seriously prejudicial if a person named by the commissioner as responsible for the deaths in the circumstances were to face such accusations in further proceedings. Of equal importance, if no charge is subsequently laid, a person found responsible by the commissioner would have no recourse to clear his or her name.[163]

This attentiveness to public perception is significant because the manner in which a finding is perceived by the public is a question of *effect*. That is, it matters not that the purpose of such a finding may be properly grounded in provincial jurisdiction: a commissioner may make a bona fide effort to answer factual questions concerning the administration of justice in a province, but if his findings are nevertheless liable to be perceived as findings of criminal guilt, they engage the concerning effect that *Krever* and *Nelles* seek to forestall. As *Krever* makes clear,[164] concern for public perception cannot serve as an absolute barrier to findings that are liable to be misperceived: a commissioner cannot walk on eggshells because some members of the public

[162] *Supra* note 20 at para 57 [emphasis added].

[163] *Supra* note 6 [emphasis added].

[164] In Justice Cory's oft-cited words, "… commissioners should not be expected to perform linguistic contortions to avoid language that might conceivably be interpreted as incorporating a legal finding": *supra* note 20 at para 52.

may jump to highly adverse and stigmatizing conclusions without understanding the nuances and legal caveats of a commission's findings. But a strong argument lies that the converse is also true: it should not be enough that terms of reference are technically within the jurisdiction of a commissioning government, or that the commissioner avoid explicit language of criminal guilt, for a commission to then have authority to inflict stigma equivalent to a criminal finding. Were this the case, the inquiry instrument would be prone to blatant misuse, since findings implying criminal culpability can almost always be framed as relevant to broader, systemic concerns within the jurisdictions of appointing governments. The focus on constitutionally valid purpose would be used to cloak excessive and unnecessarily deleterious effects.

In Canadian constitutional law, legislation with a constitutionally invalid effect is not saved by a constitutionally valid purpose. Similarly, an administrative procedure that violates natural justice will not be saved because it is constituted in order to reach important ends. In a culture of justification, means and ends (which include effects) must be carefully calibrated according to a standard of proportionality. In this way, a law that trenches on constitutional requirements may still be saved where its negative effects are not disproportionate to the constitutionally valid, purposive goods it actually achieves.

The most obvious example of this model of analysis arises in proportionality analysis under s 1 of the *Charter*, but it has a counterpart in the law of Canadian federalism. The ancillary doctrine stipulates that Canada's federal and provincial governments may, respectively, enact laws purposively grounded in their spheres of jurisdiction but which incidentally affect subjects outside their jurisdiction. The key is that these incidental effects be proportionate to the valid, intra vires purpose. Legislation that exceeds jurisdiction in only a minor way may be justified by a relationship of "functionality" to the overall, valid legislative scheme. However, where the extra-jurisdictional incursion is significant, the impugned aspects of the legislation must be highly important – or "integral" – to the valid overall scheme.[165]

Curiously, the ancillary doctrine is not mentioned in those decisions concerning provincial inquiries accused of trenching on federal jurisdiction over criminal law. In *O'Hara*, Dickson CJ

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[165] The Supreme Court's leading decision on the ancillary doctrine, from which these principles are drawn, is *General Motors of Canada Ltd v City National Leasing*, [1989] 1 SCR 641, 58 DLR (4th) 255.

based his support for a provincial inquiry constituted to investigate the misconduct of police officers solely on the characterization of its terms of reference as being within jurisdiction for the administration of justice. The same characterization was applied straightforwardly by the Saskatchewan Court of Appeal in *Stonechild*. Yet both of these inquiries would likely have survived analysis under the ancillary doctrine. Doing so would have involved first recognizing that the types of finding occasioned by their terms of reference *did* trench on the criminal law sphere. In other words, it would involve acknowledging that investigations into conduct embraced by criminal offences, even if they do not result in formally criminal findings, do incur on the criminal sphere if they evaluate conduct by standards overlapping with the criminal law and impose findings with similar substantive effects from the vantage point of public perception.

The second analytic step would have involved asking whether the extent of incursion on the criminal sphere was justified by the importance of that incursion to valid provincial purposes. For the sake of argument, let us assume that the extent of incursion is significant, owing to the stigma borne by individuals perceived in the eyes of the public to have committed serious crimes. Recall that both inquiries were constituted when public concern for the integrity and accountability of the police (a matter central to the administration of justice) persisted following the exhaustion of standing oversight mechanisms. Indeed, the exhaustion of those mechanisms heightened public concern by suggesting that possible cover-up of police misconduct lay at the root of the inability to confirm wrongdoing. In these circumstances, the public interest in both inquiries was exceedingly high, and the subject-matter that each considered was particularly grave. Moreover, those aspects of the inquiries that overlapped with criminal law were central, or "integral", to their respective mandates: they concerned the resolution of factual disputes that were the very basis of public concern to begin with. Both inquiries would thus likely have survived scrutiny under the ancillary doctrine, because their impugned aspects were integral to highly important and valid provincial purposes.

Were the law to recognize that inquiries incidentally incur on the criminal law in investigating subjects akin to those in *Stonechild* and *O'Hara*, and by imposing findings likely to carry similar stigma as formally criminal findings, it is likely that further challenges would arise under the *Charter* seeking to invalidate such findings for failing to observe criminal law standards of due

process. As with the aspect doctrine, such challenges would ultimately engage reviewing courts in measuring the important public purposes of inquiries against frank recognition of their harsh, individualized effects.

The clearest anchor for a *Charter* challenge would lie in s 7, protecting individuals' rights to life, liberty, and security of the person. In *British Columbia (Human Rights Commission) v Blencoe*,[166] the Supreme Court recognized that security of the person can be violated where the state imposes serious psychological distress on an individual. In the Court's words, such violations are limited to "serious psychological incursions resulting from state interference with an individual interest of fundamental importance."[167] Examples include state interference with a woman's control over her reproductive health, or with an individual's decision to end his or her life, or with a sexual assault victim's relationship of confidence with a therapeutic counselor.[168] Returning to the inquiry context, it would thus be necessary, as a threshold issue, for a s 7 claimant to demonstrate that the prejudice of either scrutiny by an inquiry, or of an adverse inquiry finding, engaged psychological distress at this high level.[169] The individual would then be required to demonstrate that the imposition of this distress was not in keeping with fundamental justice, the second branch of s 7 analysis. As the Court held in *Charkaoui v Canada*,[170] the question at this stage "is whether the principles of fundamental justice relevant to the case have been observed in substance, having regard to the context and seriousness of the violation. The issue is whether the process is fundamentally unfair to the affected person. If so, the deprivation of life, liberty, and security of the person simply does not conform to the requirements of s 7."[171]

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[166] [2000] 2 SCR 307.

[167] *Ibid* at para 82.

[168] *Ibid* at para 86.

[169] The claimant would have to overcome the prohibitive language in *Blencoe* that such psychological distress "[does] not easily include the type of stress, anxiety and stigma that result from administrative and civil proceedings" (*ibid* at para 83). Nevertheless, as discussed below, there are several grounds on which public inquiries engaging particularly severe findings of misconduct can be distinguished from typical administrative or civil proceedings.

[170] [2007] 1 SCR 350.

[171] *Ibid* at para 22.

It is possible that inquiry witnesses facing equivalent prejudice as the police officers in *Stonechild* and *O'Hara* – that is, official findings stigmatizing them with the clear implication of criminal guilt, and concerning serious crimes such as murder, criminal negligence causing death, or assault – could satisfy s 7's heavy onus for proving state-imposed psychological duress. Although the Court in *Blencoe* cautioned that s 7 did not confer a right to be free from public stigma,[172] it also did not rule out the possibility of stigma rising to a level that activates s 7. The claimant in *Blencoe*, who failed to substantiate an alleged violation of his s 7 rights, had been stigmatized by allegations of sexual harassment in a proceeding before the British Columbia Human Rights Commission. Importantly, the allegations arose from private complainants and did not originate from the state; the Commission process was confidential; the allegation of stigma rested in large part on procedural delay, part of which the claimant himself had contributed to; and no formal findings had yet been reached. By contrast, when individuals are alleged to have committed misconduct in the inquiry context – either explicitly via a formal notice prior to an official finding, or implicitly through the inquiry's terms of reference or the cross-examination of commission counsel – those allegations do emanate directly from a public authority. The same is true with even clearer force of actual findings of misconduct issued by the commissioner, who makes those findings as an independent delegate of the executive branch of government. Inquiry proceedings are not only public, they are among the most heavily publicized events in Canadian legal and political life, attracting far more attention than a typical trial.[173] Their findings are vested with special authority in public perception if not in legal enforcement, because of the high esteem typically vested in commissioners. There is thus a strong case to be made that the subjects of adverse findings in inquiries like those in *Stonechild* and *O'Hara* face greater stigma than the claimant in *Blencoe*. And it is reasonable to assume that any person would find such a stigma highly psychologically distressing, especially someone who is factually innocent and whose supposed guilt has not been established beyond a reasonable doubt.

The greater challenge would lie in satisfying the second branch of s 7 – that is, in showing that the psychological duress imposed by an inquiry was not in keeping with standards of

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[172] *Supra* note 166 at para 79.

[173] Consider, for example, the fact that testimony by key inquiry witnesses is often televised live on major news channels.

fundamental justice. By simply reaching this stage of analysis, however, a significant step would have been taken beyond the existing jurisprudence. Specifically, by frankly recognizing that very adverse inquiry findings do trigger injury to security of the person, the question of what procedural and substantive safeguards are necessary to render those findings "fundamentally just" is brought into sharper focus. The inadequacy of the present case law is that, in not grappling with the harsh effects of inquiries more candidly, the categorical distinction between inquiries and courts is too easily evoked to excuse procedural standards that are ill-defined. Fidelity to adjudication, consistent with a rule of law culture based on justification, can address this inadequacy. For those inquiries that do engage the very harshest effects, it can provide a very compelling statement of procedures and standards capable of rendering those findings fundamentally just. In other words, the very procedural and substantive commitments detailed in the hypothetical commissioner's ruling earlier in this chapter, and the very existence of the hearing and ruling themselves, constitute measures intended to make the harsh effects of an inquiry fundamentally just.

The high assurance of justice instilled by an adjudicative hearing on the terms of reference should, in the vast majority of cases, be adequate to afford fundamental justice to affected individuals. This is especially so when we consider an additional (although oft-neglected) feature of the jurisprudence on public inquiries: the fact that misconduct findings are to be justified on a standard of *necessity*. That requirement considerably augments the procedural and evidentiary safeguards already detailed in this chapter. In fact, it logically reproduces a form of proportionality analysis analogous to s 1 of the *Charter* – the analytic standard required to justify harsh effects even if s 7 has been violated.

In *Krever*, Cory J held that before including a finding of misconduct in a final report, a commissioner should consider the finding <u>necessary</u> to fulfilling his or her terms of reference. To quote again from the "Cory Principles":

> …
>
> (b) the commissioner has the power to make all relevant findings of fact <u>necessary to explain or support the recommendations</u>, even if these findings reflect adversely upon individuals;
>
> (c) a commissioner may make findings of misconduct based on the factual findings, <u>provided that they are necessary to fulfill the purpose of the inquiry as it is described by the terms of reference</u>;

…[174]

While Cory J's reasons are extensively cited in support of the limitation against inquiries stating civil or criminal findings, his emphasis on necessity is widely neglected. This is unfortunate, since applying a standard of necessity to adverse inquiry findings provides a critical link in resolving the existing ambiguities in the case law.

This may be illustrated by imagining that an inquiry finding is obliged to satisfy the requirements of s 1 of the *Charter*. While the specific rigor of analysis commanded by s 1 is not required of all administrative decisions, as discussed in Chapter 2, the basic features of proportionality – rationality, intelligibility, and justification – *are* required of decisions that seriously affect individuals. Typically, proportionality analysis is reserved for instances in which a right has already been infringed. A standard of necessity for misconduct findings nevertheless invites us to consider proportionality as an analytic shorthand for criteria that must be applied against all possible findings of misconduct: that is, as a protection that supplements the procedural and substantive measures that have already been discussed in this chapter, as opposed to one that is activated only when they are deficient in protecting individual rights. The significance of this observation is clarified below.

Applying proportionality analysis, for a commissioner's adverse finding to be legitimate, the commissioner would be required to demonstrate: (1) that the finding has a pressing and substantial objective; (2) that it is rationally connected to the fulfillment of that objective; (3) that the objective could not be fulfilled by a less-damaging alternative; and (4) that the injury inflicted by the finding is proportionate to its benefit in light of the objective.

The first step, requiring a pressing and substantial objective, would be answered by the commissioner's terms of reference: the need to investigate an important matter of public concern or controversy, and to make informed findings and recommendations, would almost invariably satisfy this step. The standard of necessity then speaks to the remainder of the proportionality test. Taking Justice Cory's words at their plain meaning, to say that a finding of misconduct must be "necessary" to "explain or support" a commissioner's recommendations,

[174] *Supra* note 20 at para 57.

implies that those recommendations cannot be supported or explained *without* the finding. Similarly, to say that a finding is "necessary" to fulfilling the purpose of an inquiry means that that purpose cannot be fulfilled without it. Thus, if it can be assumed that an inquiry has a pressing and substantial purpose, a finding *necessary* to that purpose will certainly satisfy the next two stages of proportionality analysis: it will be rationally connected to the purpose, and given that the purpose cannot be fulfilled without it, there can logically be no less-damaging alternatives to the finding being made.

Finally, step 4 would direct the commissioner to inquire whether a finding of misconduct nevertheless imposes a hardship exceeding the benefit attained. In the inquiry context, this question would go to the validity of the terms of reference themselves: if the terms pursue an important objective, but necessitate findings which, although necessary to that objective, inflict unacceptable hardship on individuals, then the original appointment of the inquiry is likely invalid. It can be credibly argued that this would be the case where an inquiry truly *is* constituted as a surrogate criminal proceeding, tasked specifically to ascertain the guilt of named individuals, without affording them the rights and safeguards of a court.

If the high public importance of an inquiry can be assumed, as well as the constitutional validity of its original appointment, then steps 2 and 3 of proportionality analysis can be isolated as an effective means for a commissioner to ascertain the necessity of misconduct findings. Specifically, in order to determine whether those findings are "necessary" in the sense implied by the Cory Principles, the commissioner could ask whether they rationally further his or her terms of reference, and whether there exist alternatives to those findings that would be equally effective in fulfilling the terms. This would considerably strengthen the assurance of justice already afforded to participants by the procedural and substantive standards outlined previously in this chapter. Crucially, it would almost certainly validate any findings that did trench on s 7 of the *Charter*, either by ensuring observance of fundamental justice or by preempting s 1 analysis itself. The same is true of findings challenged on federalism grounds: any finding truly necessary to a valid provincial purpose (or, to use the language of the ancillary doctrine, "integral" to the purpose) would survive its incidental extra-jurisdictional effects. Where this is not the case, then logically the inquiry appointment itself is invalid by virtue either of its terms *necessitating* findings

whose harshness violates s 7 and cannot be justified under s 1, or by virtue of the purpose being constitutionally invalid to begin with.

A standard of necessity for misconduct findings lends new intelligibility to the approaches of Commissioner Wright in the *Stonechild Inquiry* and Commissioner Oppal in the *MWCI*. It will be recalled that Commissioner Wright's terms of reference directed him to investigate the "circumstances that resulted in the death of Neil Stonechild" and the "conduct of the investigation into the death". They also directed that he do so "for the purpose of making findings and recommendations with respect to the administration of criminal justice in the Province of Saskatchewan". The terms did not specifically ask the Commissioner to opine on whether individual officers of the Saskatoon police caused or contributed to Stonechild's death. Applying a standard of necessity, Commissioner Wright would have had to ask whether such a finding was necessary to explaining or supporting his recommendations, or to otherwise fulfilling his mandate. More specifically, he would have had to ask: (1) is such a finding rationally connected to the purpose of my inquiry, as defined by the terms of reference?; and (2) are there reasonable means of fulfilling that purpose without inflicting the highly adverse finding that two named individuals were responsible for Stonechild's death? While a finding that the two officers caused Stonechild's death would certainly have furthered the inquiry's purpose, it is not clear that that purpose was not equally fulfilled by findings that stopped short of opining on causation. This is the very ambiguity left open by the general language of the terms of reference. In the absence of a specific question directing the Commissioner to opine on the cause of Stonechild's death, it is reasonable that he might decline the most adverse and stigmatizing finding possible and instead present other factual conclusions that he considered appropriately responsive to his mandate.

As discussed previously, those conclusions invited a strong inference of criminality concerning the two police officers. A strong case would nevertheless lie for the Commissioner to justify this effect on a standard of necessity: without opining on key, disputed aspects of the factual circumstances surrounding Stonechild's death – whether or not he encountered the two police officers; whether they took him into custody; whether the physical presentation of his remains was indicative of his having been in custody – how could the Commissioner have given any meaningful account of those circumstances? Moreover, how could he have done so without

opining on the relative credibility of witnesses who gave conflicting testimony, thus necessarily commenting adversely on the credibility of the officers whose testimony he disbelieved?

As the Commissioner's mandate directed him to opine on the adequacy of the police investigation, a standard of necessity would also justify him pointing out key evidentiary facts that should have been addressed in the investigation but were not. In sum, the standard of necessity would have required that the Commissioner satisfy himself that those adverse findings he did reach: (a) rationally furthered the inquiry's purpose; and (b) could not have been avoided through findings that were less damaging but equally fulfilling of his mandate. Commissioner Wright's selective commentary on key facts, often allowing the facts to speak for themselves without evaluative language, suggests that he did hold himself to this standard.

The same can be said of Commissioner Oppal's limited observations on individual misconduct in the *MWCI*, and his distinction between individual and organizational misconduct. The *MWCI* terms of reference directed the Commissioner to "inquire into and make findings of fact respecting the missing women investigations,"[175] and to make recommendations for the improvement of investigations concerning missing persons and suspected multiple homicides. Applying a standard of necessity to the Commissioner's adverse findings, it is plausible that certain findings of individual misconduct, while relevant to the Commissioner's mandate, were not essential to formulating his key findings of fact or informing related recommendations, both of which had an organizational or systemic focus. Those instances in which individuals acted with specific ill-intent could also be legitimately distinguished on this basis: reporting them as findings of misconduct may have been necessary because the damaging effects wrought by such conduct would have exceeded that which could be accounted for by merely systemic factors.

This approach would also intrinsically draw a commissioner's attention to the challenge of differentiating individual from organizational misconduct and to the challenge of hindsight bias. By requiring that commissioners consider reasonable alternatives to individual findings of misconduct, reserving the latter for true instances of necessity, attention is appropriately focused on systemic or organizational deficiencies which are the predominant focus of most inquiries.

[175] British Columbia, *Missing Women Commission of Inquiry*, Terms of Reference, online: www.missingwomeninquiry.ca/terms-of-reference/.

When individual misconduct findings are made, the need to justify them on a standard of necessity will, in turn, require clear articulation and justification of the basis on which individual conduct is being judged: it would be impossible to argue that a finding is necessary, and that reasonable alternatives are lacking, without stating what norm or expectation is breached by the wrongful conduct, and how the former relates purposively to the commissioner's investigation. The temptation of improper or unfair standards – including those that don't adequately account for the influence of systemic deficiencies on individual conduct, or that are imposed purely in hindsight – would be subverted by the need to articulate standards with such precision.

This approach would also serve as a corrective against deliberately vague drafting of inquiry terms of reference. Where governments wish to avoid commissioners adopting a prudent approach, as Commissioner Wright did in the *Stonechild Inquiry* by declining to opine on the specific cause of Stonechild's death, they should state questions in the terms of reference that are sufficiently specific to justify such findings on a standard of necessity.

A standard of necessity accommodates the fact that, in circumstances of very high public importance – such as those in *Stonechild*, where a genuine crisis of confidence persists following the exhaustion of standing accountability mechanisms – governments may be justified in commissioning inquiries that require commissioners to make findings from which inferences of criminal or civil wrong may be made. The importance of such inquiries justifies their harsh effects, provided they are genuinely necessary and proportionate to the valid, purposive ends of the inquiry. The barrier against inquiries stating express findings of criminal or civil fault remains appropriate as an indicator of findings that can never be justified by the standard of necessity: findings of such consequence to their subjects will always be disproportionate to the aims of an inquiry, in the absence of safeguards equaling those available to an individual in court. An interesting parallel lies between this observation and the Australian jurisprudence on incompatibility. That jurisprudence requires judges to "behave judicially" in extra-judicial assignments, meaning they must conduct themselves fairly and with scrupulous independence. They nevertheless cannot issue formally legal decisions in those roles, because to do so would be to appropriate a constitutional function reserved formally for judges *qua* judges. The prohibition against Canadian inquiries stating civil or criminal findings, while according with standards of fundamental justice and proportionality, also safeguards the jurisdiction of Canadian courts.

David Mullan's comment that this prohibition is undergirded in part by s 96 of the *Constitution Act, 1867* is proven to be highly prescient.

If inquiries can issue findings from which inferences of criminality or civil wrong can be made, it would be a fraught distinction to restrict commissioners from drawing from general legal principles – informed by legislation, case law, and jurisprudence – in order to inform the standards of conduct applied at their inquiries. Again, the central concern should be one of justification, based on a standard of necessity. Commissioners should be obliged to state the standards they are applying with precision, so that the necessity of such standards can be ascertained in reference to the terms of reference. Where a highly specific legal standard is employed, approaching an actual finding of criminality or civil liability, an exceedingly high threshold of justification will be required. Standards that cross this line into the criminal or civil sphere cannot be justified and must be avoided, as the current law requires.

Respectfully, the decisions on standards of misconduct issued by Commissioner Oliphant were deficient in this respect. They evoked the relevance of specific statutes, without stating with precision the guidance these standards were intended to offer, other than helping to define conduct (unspecified by the Commissioner) that could be considered "inappropriate". In the absence of greater specificity, we are left to wonder why the simple, non-legal standard of "utmost scrutibility" articulated by Prime Minister Mulroney himself was not sufficient to determine whether or not his actions were "inappropriate." One suspects that the Commissioner did not articulate a more specific use that he intended to derive from the statutes because this would have involved evoking specific provisions describing offences. This is exactly the type of ambiguity a standard of necessity should prohibit.

Commissioner Iacobucci's approach, by contrast, was more appropriate in that it defined the specific principles he intended to derive and apply from legal sources: specifically, legal principles that inform the definition of torture, and the obligations state actors must observe to avoid complicity in its practice. In fairness, his task was simplified by a further decision to focus findings of misconduct on institutional rather than individual subjects. Commissioner Oliphant's terms of reference, by focusing on the conduct of named individuals, denied him this flexibility.

The principle of necessity will require that standards of misconduct be tailored to the distinct contexts of individual inquiries. A preliminary adjudicative hearing on a commissioner's terms of reference will afford him or her the opportunity to hear submissions from inquiry participants most likely to be affected by such findings, concerning the necessary and proportionate measures by which conduct should be judged. The clarification brought to the law by the principle of necessity would allow those submissions to be focused on common terms. The same would be true of submissions made at the close of an inquiry, following the confidential issuance of notices of possible findings of misconduct. While the content of a commissioner's preliminary ruling on standards of misconduct will invariably be contextual, we can imagine for present purposes a ruling in circumstances similar to the inquiries in *Stonechild* and *O'Hara*: that is, where a genuine crisis in confidence persists following the exhaustion of standing accountability mechanisms. The commissioner might reasonably rule as follows:

- *My terms of reference direct me to explain the circumstances surrounding an individual's alleged detention by the police and injuries he allegedly suffered while in police custody. They also direct me to make recommendations, informed by my factual conclusions, concerning any necessary improvements to the laws, policies, and practices governing the conduct of police officers in the province.*
- *While my terms of reference do not pose specific questions concerning the conduct of individual police officers, nor do they pose specific questions concerning the conduct of the police as a whole, the controversy precipitating this inquiry is well known. "A" alleges that he was taken into police custody during the night of October 17, 2014 and physically assaulted. An investigation by the police complaints commissioner concluded that A's complaint was legitimate, but that the offending officers, if any, could not be identified with precision. A chief reason that any offending officers could not be identified is that no records exist of A's arrest or detention. The police commissioner opined that the absence of such records could be indicative of a cover-up.*
- *It is trite to point out that public inquiries are commissioned to address legitimate public concerns, which sometimes rise to a crisis of confidence in the integrity of important public institutions such as the police. While many facts in this inquiry are in dispute, there is a common understanding of its impetus. This common understanding, together with the submissions of participants to these hearings, inform me that my mandate to explain "the circumstances surrounding" A's alleged detention and mistreatment includes, at minimum:*
    - *Ascertaining, if possible, whether A was arrested and taken into detention by the police on the night of October 17, 2014;*

  - *Ascertaining, if possible, whether A was assaulted by any police officers on the night of October 17, 2014;*
  - *Ascertaining, if possible, why no police record exists of A's alleged arrest and detention; and*
  - *Ascertaining, if possible, whether the absence of such a record is the result of any impropriety, deliberate or otherwise, by police officers or personnel, and if so, the nature of that impropriety.*
- *I consider these to be the minimum factual questions required my mandate, as I cannot envisage a means of fulfilling that mandate without attempting to answer them, or at least offering an account of why they cannot be answered. They represent the key disputed facts at the core of public concerns prompting this inquiry: namely, whether "A" was the victim of an assault by the police, and if so, whether any further impropriety lies in there being no record of his arrest or detention. These are also the minimum factual questions that I will need to answer in order to determine what, if any, recommendations are warranted to improve the governance of police conduct in the province.*
- *Answering the above questions will require me to establish, and to publicly report, the evidentiary basis for my conclusions. In doing so, I will no doubt be confronted with further factual disputes subsumed in the above questions. Notably, these are likely to include:*
  - *The nature of A's contact with any police officers on the night of October 17, 2014;*
  - *Whether specific, identifiable police officers arrested A or otherwise took him into custody;*
  - *Whether specific, identifiable police officers assaulted A, and if so, the nature of the assault;*
  - *Whether any individual police officers or personnel are responsible for there being no record of A's arrest or detention on the night of October 17, and if so, the manner in which they are responsible.*
- *It impossible to know until the evidentiary hearings are underway whether it will be necessary for me to opine on these questions in order to establish a basis for my core findings. I cannot predict which aspects of the evidentiary record will inform my findings until that record is before me. I nevertheless acknowledge that answering the preceding questions may involve adverse commentary on the conduct of identifiable individuals. This adversity is real and potentially severe. Although I cannot make findings of criminal guilt or civil liability, my findings may still inflict significant personal stigma on individuals. It is thus appropriate that such findings only be made when the evidence clearly supports them; when the standards by which individuals are being judged are fair and are clear; and where such findings are necessary to fulfill the purpose of the inquiry.*
- *The standard of proof applicable to findings of individual misconduct in this inquiry will be a balance of probabilities. This standard, which is equivalent to the standard of proof required in civil trials,*

appropriately reflects the gravity of issues to be confronted by the inquiry while stopping short of the highest evidentiary standard available in our justice system – that of proof beyond a reasonable doubt, which is confined to the criminal law sphere. Should I find it necessary to opine on facts that could not be ascertained on a balance of probabilities, I will appropriately qualify the language in my report, making clear the inconclusive nature of the evidence but noting, if possible, the likelihood of various competing versions of events. Any findings that reflect adversely on their subjects, but which fall below the standard of proof based on the balance of probabilities, will be confined to organizational or systemic subjects.[176]

- *In articulating a standard by which individual conduct may be judged in this inquiry, I am mindful of the need to avoid hindsight bias. Hindsight bias occurs when individual conduct is judged through the lens of present knowledge and standards, as opposed to the knowledge and standards that could have been reasonably expected of the individual at the time of the conduct under review.*
- *I am also mindful of the fact that, where organizational practices or policies are flawed, individual compliance with them may render adverse effects. Organizational culture may also affect individual conduct in deleterious ways. On the one hand, it is important not to judge individuals harshly for mere observance of flawed policies or practices, or participation in a retrograde organizational culture: to do so would be to misunderstand the nature of these problems, which are matters of collective responsibility rather than individual blame. On the other hand, certain forms of misconduct cannot be excused by flawed organizational practices, policy, and culture. This is the case where those flaws should have been evident to the individual at the time, or where individual conduct was motivated by some form of ill-intent taking it outside the framework of conduct sanctioned by the organization.*
- *With these considerations in mind, I reserve the option to issue both organizational findings of misconduct and individual findings of misconduct.*
- *Organizational findings of misconduct will be reserved for instances, if any, in which I consider unreasonable deficiencies to have existed at an organizational level. These may include practices, policies,*

[176] In the Introduction to his report from the *Walkerton Inquiry*, *supra* note 90, Commissioner O'Connor explained at 37: "Because this is not, strictly speaking, a legal proceeding, in certain cases I have not made 'findings of fact' based either on a balance of probability (the civil test) or on proof beyond a reasonable doubt (the criminal test). Instead of making findings of fact, I have set out my conclusions by expressing them in terms of the probability or likelihood of something happening or not happening. In some cases I increase the certainty of my conclusion by using the qualifier 'very'". While generally I accept the merit in this approach, particularly as it lends specificity and clarity to a commissioner's degree of confidence in his conclusions, I also think it appropriate that individualized findings of misconduct be based on a balance of probabilities, given their necessarily injurious effects. A lesser standard might be employed with respect to organizational misconduct, where the stigma of a misconduct finding is attributed diffusely and does not impact the dignity of any single individual.

matters of culture, or other organizational characteristics. By "unreasonable", I mean deficiencies which should have been avoidable, accounting for contemporaneous knowledge and circumstances. Although individual decision-makers within organizations contribute, collectively, to practices, policies, and culture, any findings of organizational conduct will not be directed at those individuals. Rather, they will be directed at the applicable organization as a whole, treating the deficiency as a matter of collective responsibility. Individual conduct that contributes distinctly to a deficiency may be the subject of an individual finding of misconduct, provided it meets the standard for individual misconduct described below.

- *Findings of individual misconduct will only be made subject to the following criteria:*
  - *In the case of police officers, misconduct will be defined as contravention of standards of professional conduct that should have been known to the individual officers at the time of the impugned conduct.*
  - *In the case of police officers and all other individuals, actions motivated by malice, or by the deliberate will to do harm, or by the deliberate will to conceal or escape responsibility for errors or wrongdoing, will be classified as misconduct.*
- *Findings of misconduct, whether individual or organizational, will only be made where necessary to fulfill my mandate under the terms of reference. This means that the findings must rationally further my responsibility to address public concern regarding A's alleged detention and assault by police officers on the night of October 17, 2014, or to inform or explain any recommendations I consider necessary to improve the governance of police conduct in the province. For greater clarity, a finding of misconduct is "necessary" where there are no reasonable, alternate ways for me to fulfill my mandate without stating the finding.*

It will be noted that these reasons enforce important substantive and procedural distinctions surrounding individual and organizational findings of misconduct. Only individual findings of misconduct require proof on the balance of probabilities and the demonstration of ill-intent by their perpetrators, although both types of finding should be justified on a standard of necessity. The effects of misconduct findings are harsher for individuals, who bear their stigma personally, than they are for organizations, where the effects of an adverse finding are diffuse. This warrants the higher safeguards afforded to individualized misconduct findings. The rationale for requiring that organizational findings of misconduct nevertheless be based on a standard of necessity reflects the fact that such findings should still be in answer to specific concerns directed by an

inquiry's terms of reference. The standard of necessity requires commissioners to constantly ground criticism in the legitimate public interests that warrant an inquiry. There is no reason why the quality of their findings would not be enhanced by applying this expectation to both individual and organizational findings of misconduct. Appropriate latitude with respect to findings of organizational misconduct is provided by lessening the stringency of standards by which conduct is assessed, and by lessening the burden of proof.

In Chapter 5, I consider the possibility of inquiries focused exclusively on organizational or systemic issues, in which individual misconduct findings are clearly uncalled-for on the face of the terms of reference. I suggest that judges approached to conduct such inquiries must consider their appointment with great skepticism, since participants are unlikely to have legitimate demands for an assurance of justice equivalent to an adjudicative proceeding. The inquiries considered in the present chapter, however, are those in which terms of reference clearly invite the possibility of either individual or organizational findings of misconduct, or a combination of the two. Judges are suited to service on such inquiries, in part, because the potentially prejudicial effects on individuals – including those whose participation in an inquiry is compelled – warrants a very high assurance of justice in the process. A preliminary adjudicative hearing of the type described in this chapter is a means of providing that assurance. Intriguingly, affording such participants a preliminary adjudicative hearing need not, necessarily, convert the evidentiary hearings themselves into a court-like, adversary process. Indeed, the preliminary adjudicative hearing may serve to reorient the expectations of participants for the remainder of the process by mitigating the likelihood or scope of individualized scrutiny. This concept is examined in the final section, below.

(e) Limiting Adversarialism

It may seem odd to conclude a chapter concerning the procedural implications of fidelity to adjudication with an argument as to how this might limit the descent of inquiries into adversarialism. Adjudicative procedures and adversarialism, to a certain extent, go hand in hand: adjudication is about a contest of viewpoints, heard equally and decided impartially, and it takes for granted the existence of a dispute demanding resolution. I have also noted the inherent way in which some inquiries are adversarial – namely, by exposing witnesses to cross-examination and individuals to adverse findings – and have criticized as disingenuous the suggestion that their investigative character in some way diminishes the adversity they pose to those whom they

treat harshly. Nevertheless, there is an important way in which observance of adjudicative principles in the manner described in this chapter may limit adversarialism at an inquiry.

So far, I have suggested that commissioners afford inquiry participants the adjudicative opportunity to be heard in respect of the commissioner's interpretation of his or her terms of reference, and concerning appropriate procedural and substantive commitments that flow from that interpretation. I have not suggested that an inquiry's evidentiary hearings themselves be structured according to an adjudicative format. To be clear, providing inquiry participants an assurance of justice equivalent to that of a judge-led, adjudicative hearing does require that they be heard on disputed factual issues to an extent appropriate to their interest, and on structurally equal and impartial terms. This does not mean, however, that every inquiry participant should be allowed an unfettered ability to press their particular evidentiary theories before the commissioner, or that the hearings should devolve into a process driven by participants and not by the commissioner and his hearings counsel.

In the next chapter, I consider principles governing the issuance of standing at public inquiries. My focus is primarily on how standing, as a means of facilitating public participation and confidence in an inquiry, can also intrinsically reinforce independence and mitigate the threat of political manipulation. The vision of inquiry conduct offered in the present chapter takes standing for granted: it assumes that participants to a preliminary, adjudicative decision on the interpretation of a commissioner's terms of reference have been judged to possess an interest in the inquiry sufficient to warrant this participation. Having met this threshold, it is appropriate that all participants have an opportunity to advocate an interpretation of the terms of reference, with consequent substantive and procedural recommendations, as a means of apprising the commissioner of how the inquiry specifically affects *them*. In turn, the commissioner's obligation to impartially and rationally address their claims gives participants a strong assurance of justice in the entire process. It should also secure their reasonable assent to the process as ultimately defined by the commissioner.

In other words, the preliminary adjudicative hearing goes a long way to instilling the high assurance of justice that is the core purpose of adjudication. The assurance of justice here is given in respect of how the commissioner defines the just ends he is to pursue, and how he

defines means that are rational and proportionate to those ends. It is thus possible that a commissioner may, in response to the preliminary adjudicative hearing, define means and ends that mitigate the types of substantive concern that undergird highly adversarial hearings. For example, the commissioner might determine that although evidence will be heard concerning individual conduct, it will only be necessary for him to make findings of individual misconduct in the face of malice or deliberate ill-intent, proven on the balance of probabilities. By so framing individual conduct as principally relevant to systemic concerns, barring exceptional cases of malice, the commissioner might help to instill a hearings atmosphere in which individualized accusation is minimized and witnesses are encouraged to be forthcoming in identifying systemic errors, even where this means acknowledging personal mistakes. The propriety of such an approach depends, of course, on context and on specific terms of reference. It is also possible that a commissioner may need to hear the evidence, including individualized accusations, before ascertaining whether individual misconduct findings on a standard other than malice are necessary to fulfilling his terms of reference. Conducting a preliminary adjudicative hearing will be beneficial regardless: either by mitigating the necessity or scope of such accusations, or by verifying their legitimacy, and the terms on which they will be assessed.

There is, of course, a paradoxical implication to this thesis, which is that the further an inquiry moves away from an adversarial contest of potentially damaging facts, the lower the need for the types of procedural accommodations advocated in this chapter; indeed, the lower the justification for appointing a judicial commissioner to begin with. The significance of this paradox is to direct a prospective judicial commissioner to close scrutiny of proposed terms of reference prior to accepting an inquiry mandate. Terms that entail the strong likelihood of accusation and adverse effects on individuals warrant judicial service, even if a preliminary adjudicative hearing mitigates the adversarial quality of the evidentiary hearings to some degree. The judge's role is validated by the legitimate need for the instantiation of adjudicative values, even if the preliminary hearing is their primary conduit. Where a judge confronts proposed terms of reference that present no clear need for such values, because there is no legitimate basis on which the terms are likely to invite accusations and adversity, he or she must question whether a judge is truly suited to the appointment. I expand on this concept in Chapters 4 and 5.

Conclusion

This chapter began by focusing on the characteristic of inquiries that immediately activates concern for the just use of their powers: the fact that those powers include the capacity to compel individuals to be scrutinized in a highly public setting, inflicting the stigma of accusation and possibly eventuating formal findings of misconduct. I have argued that in a rule of law culture in which individuals are entitled to seek justification for the received effects of official power, the assurance of an adjudicative hearing is an appropriate counterpart to those harsh effects. Specifically, I have suggested that the use of coercive authority by a judicial inquiry is just when those affected by it are afforded equal opportunity to direct the commissioner to the proper interpretation of his or her terms of reference, and to appropriate evidentiary and procedural standards in the treatment of witnesses, and where the commissioner is obliged to rationally address those claims from an impartial perspective. I have outlined how observance of this principle is likely to reform inquiry conduct with respect to the relationship between commissioners and counsel, observance of the law of privilege, and the issuance of findings of misconduct. I have also suggested that despite the likelihood that inquiries engaging similar prejudice for individuals will observe similar procedures and standards, fidelity to adjudication enables principled adaptation of procedure to context. This is illustrated by the possibility that, in some circumstances, a preliminary adjudicative hearing will diminish the likelihood of highly adversarial evidentiary hearings.

A final observation is warranted in conclusion. In Chapter 2, inquiries were described as kaleidoscopic institutions, meaning they are the locus for diverse expectations, objectives, and interests on the part of various participants and observers. A preliminary adjudicative hearing affords a commissioner the opportunity to offer a clear, public statement of his or her interpretation of the terms of reference at an early stage, clarifying public understanding of the nature and purpose of the inquiry process. Critically, it also requires that that statement account for and meaningfully address participants' own understandings and expectations of the inquiry. It thus reinforces the status of the inquiry as a public enterprise, in which participants are viewed not just from the utilitarian perspective of aiding an investigative mandate, but as stakeholders with legitimate interests of justice in the process, and of substance in its eventual outcome. Affording participants this status is appropriate not just from the perspective of fairness, but from that of independence, for an inquiry obliged to rationally address the claims of participants

in interpreting its mandate is less likely to be subverted by the political objectives of its commissioning government. This concept is the starting point for the next chapter, concerning the independence and openness of judge-led inquiries.

Independence

Introduction

This chapter continues to explore the methodological implications of judges observing fidelity to adjudication in the conduct of commissions of inquiry. It does so by confronting two further areas of difficulty identified in Chapter 2 – namely, the challenges judicial commissioners face in protecting their independence given the political character of inquiries, and the challenge presented by government claims to secrecy. As in the case of procedural fairness, I argue that fidelity to adjudication provides judges with a principled basis to address these challenges, avoiding several of the problems that have emerged in inquiries where independence has been cast into doubt. Once again, my aim is not to set-out a comprehensive code of conduct, but to demonstrate the operability and merit of fidelity to adjudication in confronting especially important and difficult cases.

This chapter begins by considering two issues of central importance to a commissioner's independence. The first is the manner in which standing is afforded to inquiry participants. The second is the degree to which a commissioner should apprise him- or herself of the political background and motives for an inquiry in interpreting its terms of reference. In both cases, fidelity to adjudication draws the commissioner to view the inquiry not just as an executive instrument, but as a social process engaging legitimate stakeholdership amongst participants. This in turn directs the commissioner toward protections necessary to ensure appropriate respect for the interests and potential contributions of participants, linking them to public confidence in the independence and integrity of the commission.

I then consider the challenge of government claims to secrecy in the inquiry context. This challenge is closely linked to the commissioner's independence, since secrecy diminishes his or her capacity to instill public confidence through an open and transparent process. By limiting the access of non-governmental participants to key aspects of an inquiry's evidentiary record, it may also undermine respect for those participants' interests and contributions. Indeed, the challenge of secrecy at a public inquiry may be so great that it should preclude judicial service outright. I consider this possibility in the final portion of the chapter, and suggest how fidelity to

adjudication may be observed in those rare instances where judges are suited to preside over "private" inquiries.

1. Standing

In his article, "Public Inquiries: Independence is the Key", Gus Van Harten observes:

> Among all statutory decision-makers, a public inquiry calls for the most rigorous protection of its institutional independence because the inquiry must review official conduct at any place or level of decision-making, including at the highest levels of government; it must investigate thoroughly and fairly matters of grave concern and potential embarrassment to the powerful; and it must report fully on what is uncovered.[1]

Van Harten endorses the use of judges to conduct public inquiries on this basis. "Independence", he suggests, "must trump any case for substantive expertise",[2] making judges ideal candidates to ensure the remove of inquiries from political interference. He also notes that independence must exist not only in the mind of a commissioner, but as a matter of public perception: "the perceived independence of any inquiry is traceable to the perceived independence of the commissioner."[3]

This dissertation supports Van Harten's claim that independence is one of the crucial reasons justifying judicial leadership of public inquiries. It also contends that judicial independence, both as an actual mental state and as a perceptible feature of judicial conduct,[4] is closely linked with procedure. I argued in Chapter 2 that the public confidence rightly placed in judges to conduct themselves with independence and impartiality is derived from the institutional role played by

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[1] Gus Van Harten, "Public Inquiries: Independence is the Key" in Laverne Jacobs and Sasha Bagley, eds, *Nature of Inquisitorial Processes in Administrative Regimes: Comparative Perspectives* (Surrey: Ashgate, 2012) 223 at 223.

[2] *Ibid* at 225.

[3] *Ibid.*

[4] The Supreme Court observed in *Valente v the Queen*, [1985] 2 SCR 673 that judicial independence and impartiality, although closely interrelated, are distinct concepts. "Independence" refers to the judge having an independent state of mind as well as objective institutional safeguards against interference from the political branches of government. "Impartiality" refers to the judge actually hearing from litigants with a neutral and open mind. A judge serving as an inquiry commissioner clearly will not have the same institutional safeguards of secure tenure and remuneration as a judge in court. She should nevertheless have objective safeguards stipulated in an appointing Order in Council, and conduct herself in a manner that will assure reasonable participants and observers of her independent and impartial mind. In this Chapter I will deal with some of the objective safeguards that should be included in an Order in Council, and suggest that a commissioner's demonstration of subjective independence and impartiality will be contingent on observing an appropriate structural relationship with participants through rules of standing.

judges in court, where those values are affirmed not only by constitutional safeguards, but by the observance of adjudicative procedure. Similarly, in the inquiry context, just as commissioners need institutional safeguards against the executive and legislative branches, so too must they effect procedures that satisfy observers and participants, especially those most directly affected by an inquiry, of their independence. The procedures outlined in Chapter 3 go partway to achieving this end. They are nevertheless predicated on the correct, original ascertainment of a right to participate in the inquiry to begin with, and on the proper correlation between the scope of that right and specific procedural accommodations. In other words, they are predicated on effective rules of standing.

Simon Ruel suggests that

> … there are two types of standing before public inquiries: persons or organizations with a substantial and direct interest in the subject-matter of the inquiry – the participants; and persons or organizations with a clearly ascertainable interest or genuine concern, and particular perspective, knowledge, experience or expertise which the commission may determine will be useful to the conduct of the inquiry – the public interest interveners.[5]

In this chapter, I use the term "participant" to denote holders of both types of standing. Moreover, I suggest that these "types" are better classified as bases, or justifications, for standing, recognizing the fact that in many cases they will be mixed; that is, participants will have both valuable contributions to make to an inquiry's mandate while also being affected by that mandate in significant ways.

In Chapter 2, I introduced the *Missing Women Commission of Inquiry* (*MWCI*) to illustrate how interference with a Commissioner's allocation of standing, through denial of funding for participants, could undermine an inquiry's independence. The denial of funding to certain participants in the *MWCI* removed their capacity to be heard on equal terms with others taking contrary views on key facts. Although adjudicative values were not the only ones relevant to instilling confidence in the *MWCI*, their denial was highly consequential.

In this Part I consider the *MWCI* in more detail, both in order to demonstrate how the present law of standing is operationalized in an inquiry, and how inquiry conduct might be improved by

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[5] Simon Ruel, *The Law of Public Inquiries in Canada* (Toronto: Carswell, 2010) at 55.

fidelity to adjudication. Fidelity to adjudication reframes the manner in which matters of standing should be analytically approached, drawing a commissioner's attention both to substantive commitments in the conduct of an inquiry and to assurances he or she should attain from an appointing government before an inquiry commission is even accepted. I begin by outlining Commissioner Oppal's original decision on standing, which is representative of the standards that are (and should be) applied in allocating participant status at an inquiry. I then consider how several defects in the realization of standing opportunities precipitated a loss of confidence in the inquiry. Relating these defects to the denial of procedural and substantive equality, I conclude by suggesting how fidelity to adjudication might have averted this unfortunate outcome.

Few Canadian public inquiries have been as fraught with controversy as the *MWCI*. The inquiry faced a mass withdrawal of participation by prominent civil society groups;[6] former employees accused commission staff of sexual harassment, necessitating an independent "inquiry into the inquiry";[7] counsel for the family members of 25 murdered or disappeared women accused the commission of enabling a police cover-up;[8] and it has been suggested that prominent commission staff, and the Commissioner himself, had conflicts of interest that should have disqualified their involvement in the inquiry.[9] I do not deal with all of these criticisms. However,

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[6] Union of British Columbia Indian Chiefs et al., *Open letter: Non-participation in the Policy Forums/Study Commission*, 10 April 2012, available online: www.ubcic.bc.ca/files/PDF/OpenLetterstoMWCI_041012.pdf.

[7] An independent report commissioned by the inquiry to review these allegations is available on the Commission's website, British Columbia, Missing Women Commission of Inquiry, online: www.missingwomeninquiry.ca/2012/06/june-13-2012-independent-investigation-report/. The report found no basis to support the allegations.

[8] See the discussion commencing at note 55 below, and accompanying text.

[9] While Commissioner Wally Oppal had a 25 year career as a judge in British Columbia, he was also involved in provincial politics following his retirement from the bench, serving both as a Liberal MLA and as Attorney General of the province. In the latter role, he defended the decision of provincial crown prosecutors to stay 20 murder charges against Robert Pickton following Pickton's conviction on an initial 6 charges. He also refused calls for a public inquiry into missing and murdered women while Pickton's trial and appeals were underway. Whatever the legal merit of these decisions, they were understandably controversial among family members of the murdered women and members of the downtown eastside community. Given Oppal's recent association with the Pickton file, and more importantly with the very government that appointed the inquiry, including his leadership of a department whose conduct would be under review, it is surprising that he was selected for the appointment. Respectfully, I believe that Mr Oppal should have declined the appointment and encouraged the BC government to select a commissioner capable of projecting the utmost independence and impartiality. See Kim Stanton, "Intransigent Injustice" (2013) 1 Trans J Rev 59 at 70-73. Allegations of conflict of interest have also been directed against the Executive Director of the Commission, who was a former member of the Vancouver Police

I do attempt to demonstrate that the mistreatment of standing at the *MWCI* was a critical contributing factor to the unraveling of the inquiry, so much so that these wider public concerns may have been mitigated had rights of standing been properly honoured.

(a) The MWCI Ruling on Standing

The *MWCI* was constituted by provincial Order in Council on 27 September 2010.[10] The Commissioner did not formally determine which participants would be granted standing until 2 May 2011, however, only seven months prior to his original reporting deadline.[11] This lapse in time was due in part to initial controversy over the scope and focus of the inquiry. As Commissioner Oppal has explained, the *MWCI* was originally intended to be purely a "hearings commission", conducted pursuant to Division 3 of British Columbia's *Public Inquiry Act*.[12] Such an inquiry "can only consider information and recommendations that are presented to the commissioner through court-like hearings."[13] When the Commissioner initially sought applications for standing, several applicants indicated their reticence to be limited to these hearings:

> … many members of the community who wished to participate did not wish to take part in the more formal hearings process which would necessarily involve obtaining counsel and being subject to cross examination. Rather they wished to participate in a

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Department, and against a senior member of the Peel Regional Police commissioned to prepare an independent review of police conduct. See generally British Columbia Civil Liberties Association (BCCLA) et al., *Blueprint for an Inquiry: Learning from the Mistakes of the Missing Women Commission of Inquiry* (Vancouver: BCCLA, 2012) at 50-51. I find these allegations to be less persuasive: the Executive Director ceased to work for the VPD in 1988, long before the time period under review by the Commission, and was recruited specifically for his expertise in policing. The external reviewer had no obvious reason to be partial to any inquiry participant, other than the fact that she was a police officer. Nevertheless, the breadth of roles assumed by the Executive Director, which included interviewing some police witnesses prior to their testimony, assisting commission counsel in preparing examinations, and "helping" the external police reviewer to complete her report, does appear to have been highly unorthodox and possibly improper. At minimum, it is untoward that the full scope of the Executive Director's functions could not be publicly articulated by commission counsel when questioned by the media: see Brian Hutchison, "Missing Women Commission official told to 'help' on arm's length report" *National Post* (4 April 2012), online: www.nationalpost.com.

[10] See the main page of the *MWCI* website, British Columbia, Missing Women Commission of Inquiry, online: www.missingwomeninquiry.ca.

[11] The Commissioner's *Ruling on Participation and Funding Recommendations*, 2 May 2011 [Oppal, *Standing*], is included as Appendix G-1 to his final report: British Columbia, *Forsaken: The Report of the Missing Women Commission of Inquiry, Volume IV: The Commission's Process* (Victoria: British Columbia Government, 2012) (Commissioner: the Honourable Wally T Oppal) [Oppal, *Report, Vol. IV*] at 76-101.

[12] SBC 2007, c 9.

[13] *Ibid.*

> more informal way by simply telling their stories and making recommendations on policy.[14]

This concern was augmented by public criticism of the terms of reference, which confined the Commissioner to reviewing police investigations of the missing women cases between 1997 and 2002, together with a decision by crown prosecutors to stay criminal proceedings against Robert Pickton in 1997.[15] The view was widely expressed that British Columbia's crisis of missing women extended beyond these events – encompassing, for example, the notorious disappearance of Aboriginal women along Highway 16 (the "Highway of Tears") in northern British Columbia.[16] The Commissioner accordingly requested, and was granted, an extension to his terms of reference: his inquiry would be a joint "hearings" and "study" commission, combining formal evidentiary hearings with additional methods of gathering and analyzing information, including "[community] consultations, publication of policy discussion reports to solicit and facilitate public submissions, and research and interviews."[17] In light of the Commission's hybrid structure, Commissioner Oppal considered it appropriate to "craft forms of participation that [were] appropriate to the skills and expertise of different individuals and organizations",[18] which he did via his Ruling on Standing.[19]

First, the Commissioner determined that an official grant of standing would only be needed for the hearings portion of the inquiry; participation in the study phase would be open-ended and require no pre-approval.[20] For the evidentiary hearings, he defined two categories of standing: one for "full participants" and another for "limited participants." Full participants would be allowed to exercise "all rights of participation … [in the] hearings, including cross-examining

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[14] Oppal, *Standing*, *supra* note 11 at 78.

[15] The inquiry's Terms of Reference are reproduced as Appendix 1 in Oppal, *Report, Vol. IV*, *supra* note 11 at 28-29.

[16] These concerns still resonate today, as widespread calls are made for a federal public inquiry into the disappearance of Aboriginal women and girls.

[17] Oppal, *Report, Vol. IV*, *supra* note 11 at 24. See generally the Commissioner's discussion of the Study Commission process in *ibid* at 24-26.

[18] Oppal, *Standing*, *supra* note 11 at 78.

[19] Oppal, *Standing*, *ibid*.

[20] *Ibid*.

witnesses and making submissions."[21] They would also be allowed complete access to documentary evidence gathered by the Commission.[22] Limited participants would be allowed to attend the evidentiary hearings, but could only exercise rights of examination and cross-examination with the Commissioner's leave.[23] They would nevertheless be allowed to make closing submissions. Moreover, they were expected to "play a leading role in the study portion of the inquiry."[24]

The criteria applied to determine whether and under which category applicants would be granted standing were derived variously from the provincial *Public Inquiry Act*,[25] the practices of past commissions, and doctrinal authorities.[26] These criteria were:

- Whether and how an applicant's interests were affected by the Commission. This included whether the applicant faced possible findings of misconduct; whether the applicant had "personal involvement" in the subject-matter of the Commission; and whether the applicant's "well-being or reputation" might be affected.[27]
- Whether an applicant's participation would "further the conduct" or "contribute to the fairness" of the inquiry. This included the possibility that some participants, while not immediately affected by the inquiry according to the first criteria, might nevertheless "have a particular perspective or expertise that would assist the Commission in furthering its mandate."[28]

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[21] *Ibid* at 79-80.

[22] *Ibid* at 80.

[23] *Ibid*.

[24] *Ibid*.

[25] *Supra* note 12 at s 11(4).

[26] Notably Ruel, *supra* note 5 at 57-58 and Ed Ratushny, *The Conduct of Public Inquiries: Law, Policy, and Practice* (Toronto: Irwin Law, 2009) at 187-91, both cited in Oppal, *Standing*, *supra* note 11 at 81.

[27] Oppal, *Standing*, *supra* note 11 at 81.

[28] *Ibid* at 81-82 (emphasis removed).

The Commissioner granted full participant status to the Vancouver Police Department and Vancouver Police Board; the Vancouver Police Union; the Government of Canada (representing the RCMP); the Criminal Justice Branch of the provincial Ministry of the Attorney General; a coalition of eight families related to Robert Pickton's victims (which later expanded to include the family members of 25 women); and a former officer of the Vancouver Police Department. He also granted full participant status to several non-governmental community organizations, grouped into four coalitions: the Coalition of Sex Worker-Serving Organizations; the Committee of the February 14 Women's Memorial March and the Downtown Eastside Women's Centre; the Vancouver Area Network of Drug Users, Walk4Justice, and the Frank Paul Society; and the Native Women's Association of Canada. Limited participant status was awarded to eleven organizations, including Amnesty International, the British Columbia Civil Liberties Association, West Cost LEAF, the Union of BC Indian Chiefs, and the First Nations Summit.[29]

The following reasons for granting standing to the Coalition of Sex Worker-Serving Organizations generally reflect the value perceived by Commissioner Oppal in facilitating participation by the community groups:

> In its application, the Coalition of Sex Worker-Serving Organizations submits that many of its members have encountered challenges and barriers when attempting to report violence to the police and participating in the criminal justice process. It also submits its members will be profoundly affected by the outcome of the inquiry. As a result, I accept that the Coalition of Sex Worker-Serving Organizations may be affected by the Commission's findings.
>
> The Coalition of Sex Worker-Serving Organizations also submits that the perspective of sex workers and sex worker serving organizations is essential to the conduct of the inquiry and will promote public confidence. Specifically, the Coalition of Sex Worker-Serving Organizations submits it will contribute to the Commission's understanding of the challenges faced by many women in engaging the police for protection. I accept the Coalition of Sex Worker-Serving Organizations would further the conduct of the inquiry by providing the perspective of sex workers and sex worker serving organizations.
>
> Finally, I accept that since most of the missing women in the DTES were involved in sex trade work, representation of sex worker serving organizations would contribute to the fairness of the inquiry.[30]

Clearly the Commissioner considered these groups to comprehensively meet his criteria for full participant status: they were directly impacted by the subject-matter of the inquiry through their

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[29] *Ibid* at 99-100.

[30] *Ibid* at 87.

membership, and had important evidence (indeed, allegations) to share concerning interactions between missing and murdered women and the police. Given the unique capacity for the groups to speak on behalf of sex workers and other residents of the downtown eastside, their participation would lend confidence and fairness to the inquiry, while also enhancing the thoroughness of its investigation. Indeed, the groups represented the closest surrogate available to the Commissioner to replace the testimony of the missing women themselves.

The latter point is important to bear in mind when considering the Commissioner's recommendation that the community groups receive public funds to support their participation. Recall that full participant status was primarily directed to the "hearings" portion of the inquiry, furnishing the right to full documentary disclosure and to cross-examine witnesses. In recommending that the groups receive funding, the Commissioner did so on the basis of *necessity*; that is, he considered it impossible for the groups to effectively participate in the inquiry without that support. In his words: "I have reviewed the Affidavit evidence provided by these applicants in support of their funding applications and I am satisfied they would not be able to participate in the hearing portion of the inquiry without funding."[31] He accordingly recommended funding for the groups in anticipation that they would "play a leading role in the evidentiary hearings."[32]

These reasons underscore the sense in which denial of the Commissioner's funding recommendations interfered with his independence. The community groups' participation wasn't simply a matter of the Commissioner's preference: rather, he gave detailed and considered reasons why their participation was necessary to provide evidence and perspectives that the hearings might otherwise be denied. Without funding, in turn, the Commissioner could not conduct an inquiry that met what he considered appropriate standards of investigative thoroughness or fairness. Nor could he broker an appropriate level of public confidence. Regrettably, the denial of funding to the groups would be only an initial blow to public confidence in the inquiry.

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[31] *Ibid* at 100 [emphasis added].

[32] *Ibid*.

(b) Collapse of Confidence in the MWCI

It will be recalled from Chapter 2 that Commissioner Oppal attempted to compensate for the lack of community legal representation by appointing independent counsel to represent "downtown eastside (DTES) interests" and "Aboriginal interests" at his inquiry.[33] From the outset, this approach was problematic. While the Commissioner was clearly taken off-guard by the denial of his funding request, and his appointment of independent counsel was no doubt well-meaning, it was a decision taken without consulting the groups affected. Kim Stanton observes that the absence of a true solicitor-client relationship with independent counsel, denying the capacity to give instructions or to exercise solicitor-client confidences, "was an untenable situation for the groups."[34] The Committee of the February 14 Women's Memorial March and the Downtown Eastside Women's Centre issued an open-letter denouncing the approach:

> The DEWC and Women's Memorial March Committee as a formal Coalition with a grant of full standing before the Missing Women Commission of Inquiry, is opposed to the proposal regarding the independent lawyer to present all the perspectives of the DTES. Our group was not even contacted by the Commission to see if we were amenable to this proposal, rather it was presented as a 'fait accompli' and expressions of interest from lawyers were sought within three days.
>
> …
>
> **The participation of the DEWC and the Women's Memorial March Committee in the Commission of Inquiry, the ability to provide instructions, and the ability to access documents will all be negated by this proposal.** The effect of the proposal is similar to the revocation of our full grant of standing and the denial of the funding recommendation. These *amicus* lawyers are not actually accountable to any 'client' and are not taking instructions from any specific group. Therefore, there is no structural guarantee that the voices of women … will be at the centre of this process. Nor will these 'independent' lawyers have the capacity to defend and support women who are witnesses and build the same trust relationship with individual women. Finally, given the current wording of the undertakings that have to be signed regarding the confidentiality of legal documents, it is our understanding that we will not even be privy to the details in the legal documents. We believe that these legal documents, particularly all those documents that implicate police and other officials, MUST be accessible to and made available for the public to see.[35]

The letter went on to refer to the appointment of independent counsel as a form of "tokenism", reducing the perspectives of different individuals and groups to a single voice, and pointed out

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[33] Oppal, *Report, Vol. IV*, *supra* note 11 at 10.

[34] *Supra* note 9 at 78.

[35] Downtown Eastside Women's Centre and Women's Memorial March Committee, Open Letter, 5 August 2011, online: womensmemorialmarch.wordpress.com/2011/08/05/amicusproposal/. See also Stanton, *ibid.*

that the denial of counsel exacerbated barriers to community witnesses who were already deterred by the prospect of cross-examination by lawyers at the inquiry.[36]

Such a firm denunciation could only confound the already difficult task of independent counsel brokering relationships of trust with the communities they were intended to represent. The Commissioner himself spoke to this challenge in his final report. Reflecting on difficulties identifying 'lay' witnesses from the downtown eastside to testify before the inquiry, the Commissioner noted:

> Helpful information … would have come from women involved in the survival sex trade at the relevant time and other members of the DTES community. However, identification of these witnesses created challenges for Commission staff. Due to lack of funding, many of the Participants were unable to devote time and resources to identifying potential witnesses for the Commission. As a result, the Commission had to identify and find potential witnesses without these Participants' valuable advice and experience. This was particularly challenging with regard to community witnesses since the Commission lacked the long-standing relationships of trust that some participant organizations had established with community members of the DTES. Some potential witnesses were unwilling to speak to Commission staff and testify during the Commission's hearings.
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> …
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> To a certain extent, we tried to overcome these barriers with the appointment of Independent Counsel to present the interests of Aboriginal and DTES communities. We had hoped they would be able to develop relationships with those populations and suggest witnesses and otherwise provide advice and assistance. However, there is no question it can take many years to develop the trust needed to engage with persons who have a long history of distrust for government institutions (and lawyers).[37]

These difficulties are reflected in the record of witnesses called to testify at the inquiry. The Commissioner noted in his report that the hearings were divided generally into four phases, focused respectively on the "conditions and lives" of women in the downtown eastside; scrutiny of two internal reviews completed by the VPD and RCMP; the evidence of family members of the women; and the events of the missing women investigations themselves.[38] Despite the fact that only two of these phases focused specifically on the police, the testimony of police witnesses overwhelmingly dominated the hearings.

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[36] *Ibid*.

[37] Oppal, *Report*, *Vol. IV*, *supra* note 11 at 14.

[38] *Ibid* at 18.

To a certain extent, the prominence of police witnesses was to be expected: the inquiry was, after all, tasked with identifying flaws in the investigations and recommending measures to ensure they were not repeated. Nevertheless, the scale of police representation at the inquiry, combined with the lack of legal representation for community groups and relative dearth of witnesses speaking directly to women's experiences in the downtown eastside, conspired to corroborate widely held views that the inquiry gave unbalanced attention to the views of police.

On 6 March 2012, fifty-three days into the formal evidentiary hearings, independent counsel for Aboriginal interests resigned from her position.[39] By that point in the inquiry, thirty-nine hearing days had been taken-up by police witnesses.[40] Those non-police witnesses who had already testified were comprised largely of family members of the murdered and missing women, a limited number of community workers and service-providers, and three experts who authored reports on the circumstances of women and survival sex workers in the downtown eastside.[41] No witnesses had yet been called to speak distinctly from an Aboriginal perspective. One expert retained by the Commission to prepare a report on systemic racism in policing had refused to complete his mandate, citing a lack of Aboriginal representation at the inquiry. Robyn Gervais, who served as the Commissioner's original appointee to represent Aboriginal interests, indicated that she had attempted in vain to locate an alternate expert. She cited a lack of confidence in the inquiry process as the reason for further experts' reluctance to participate.[42]

A perceived imbalance in the representation of witnesses was worsened by time pressure on the inquiry. At first, the Commissioner imposed few limits on the length of cross-examinations.[43] By early 2012, it was clear that the Commission was in danger of failing to complete the hearings in time to meet its reporting deadline, which had already been extended by the provincial

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[39] Statement of Robyn dean Gervais to the *Missing Women Commission of Inquiry*, 6 March 2012.

[40] *Ibid.*

[41] See the complete list of inquiry witnesses, together with the dates of their testimony, in Oppal, *Report, Vol. IV*, Appendix C, *supra* note 11 at 161-79.

[42] *Supra* note 39.

[43] In fact, the Commissioner indicates in his final report that he did not begin to impose time limits on examinations and cross-examinations until 14 May 2012, seven months into the hearings and only three months prior to the Commission's extended reporting deadline in July, 2012: see Oppal, *Report*, *Vol. IV*, *supra* note 11 at 22.

government. Accordingly, commencing 11 January 2012, the Commissioner began to issue a series of "Process Management Directives" intended to lend greater procedural efficacy to the inquiry. One such directive issued on 11 February 2012 stated that for the remainder of the inquiry, witnesses would be called in panels. Notably, these panels were to include many of the police officers and senior personnel centrally involved in the missing women investigations.

Ms Gervais noted in her letter of resignation that although this directive was made without consulting participants, she was encouraged by the Commissioner's statement that the use of panels might enable broader participation by community witnesses. She accordingly developed two panels to represent Aboriginal community interests, the first focused on the Vancouver Police Department's Native Liaison Society, and the second focused on the experiences of Aboriginal people living in Vancouver's downtown eastside. Yet Ms Gervais' request that four hearing days be devoted to the panels was declined without formal reasons. As she expressed in her statement resigning from the Commission:

> … I trust that you can understand my reaction when I was told without explanation that there would be one day allotted for the Native Liaison Society panel and that the second panel was dismissed entirely.
>
> …
>
> Given that these hearings are largely about missing and murdered Aboriginal women, I feel that I shouldn't have to fight to have the voices of the Aboriginal community heard;
>
> In my view, as counsel for Aboriginal interests, I should have been provided at least four days of hearing without question;
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> …
>
> It would appear that nothing has changed. This week, you are again scheduled to hear evidence about the missing women investigation through a police filter. By the end of the week, you will have heard 42 days of police evidence and minimal evidence from the Aboriginal community;
>
> …
>
> The delay in calling Aboriginal witnesses, the failure to provide adequate hearing time, the ongoing lack of support from the Aboriginal community, and the disproportionate focus on police evidence have led me to conclude that Aboriginal interests have not and will not be adequately represented in these proceedings[.][44]

[44] *Supra* note 39.

Shortly after Ms Gervais' resignation, those participants who had been granted limited participant status withdrew en masse from the inquiry, including from its study commission phase. In an open letter to the Commissioner, they cited (among several concerns) Ms Gervais' resignation as confirming "our belief that this was a tokenistic appointment that could never have been expected to effectively represent the broad and essential perspectives of First Nations people."[45]

By this point, suspicion had also begun to take root that the inquiry was not just unbalanced in hearing predominantly from police witnesses, but that it was inhibiting a probing review of the scope of their misconduct. This suspicion arose variously from the impression that the Commissioner was rushing the inquiry with his move to panel hearings, and from pointed accusations made by Cameron Ward, counsel for the 25 families, that the Commission was enabling a police "cover-up." While categorically rejected by the Commissioner and almost certainly exaggerated and factually ill-founded, Ward's allegation received sympathetic media coverage, fomenting belief that the inquiry process had lost credibility.

Commissioner Oppal's announcement of the panel approach prompted immediate criticism. Brian Hutchison, who covered the inquiry for the *National Post*, reported on 21 February 2012:

> Wally Oppal surprised inquiry participants and stakeholders by issuing a 'process management directive' that will see some witnesses – including Vancouver police and RCMP officers who oversaw bungled missing women investigations – lumped into panel groups and questioned by lawyers in a manner 'more co-operative' and 'less adversarial' than the grillings and intense cross-examinations experienced by earlier witnesses.
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> …
>
> Mr. Oppal suggested his directive will streamline the inquiry. Most important, he said, it will encourage participation by people who are intimidated by the traditional evidentiary hearings process.
>
> …
>
> But relatives of missing and murdered women say that putting witnesses in group panels and handling them with kid gloves is the wrong approach. They are especially concerned about Mr. Oppal's plan to hear from police officers in groups.
>
> 'The adversarial process works for police,' said Lori-Ann Ellis, sister-in-law of Cara Ellis, one of Pickton's alleged murder victims. 'Sometimes, they need to be pushed …'. Ms. Ellis said the families of Pickton's victims were not consulted before Mr.

[45] *Supra* note 6.

> Oppal made his directive. "I think it would have been nice [if] we were told in advance," she told reporters, after Mr. Oppal made his surprise announcement.[46]

It is noteworthy that Commissioner Oppal framed the move to panel-based hearings as motivated in part to encourage participation by witnesses who might otherwise be deterred by the prospect of adversarial cross-examination.[47] The Commissioner had already introduced a vulnerable witness protocol – following a motion by Independent Counsel for DTES interests – on 16 November 2011, three months prior to the move to panel hearings.[48] The protocol stipulated that any vulnerable witness, defined as a sex trade worker, victim of sexual assault, or Aboriginal woman, could access its protections as of right.[49] These protections included the option of testifying accompanied a supportive person; testifying behind a screen or in a separate room; the imposition of a publication ban on a witness's identity; and the submission of evidence by affidavit rather than by oral testimony.[50] The protocol also stated that *any* witness, whether or not they were vulnerable, could request the opportunity testify behind a screen, in a separate room, or to make use of other testimonial aids as appropriate.[51]

Given the existence of these measures, it is perplexing that the further step of requiring testimony to be given in panels should be applied to *all* remaining inquiry witnesses, regardless of their status, including senior police officers whose attendance at the inquiry was required by summons. In his final report, Commissioner Oppal defended the panel hearings by referring to the successful use of panels in other inquiries. Yet the examples he cited concerned the use of panels to scrutinize and compare the opinions of experts, not individuals giving first-hand

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[46] Brian Hutchison, "Victims' families angered by surprise shift to 'less adversarial' hearings at Pickton inquiry", *National Post* (21 February 2012) online: www.nationalpost.com.

[47] See *Process Management Directive 3* (11 February 2011), included as Appendix F-3 in Oppal, *Report*, *Vol. IV*, *supra* note 11 at 61-65.

[48] See Appendix G-4, *Ruling on Vulnerable Witness Protection Application* (16 November 2011) in Oppal, *Report*, *Vol. IV*, *supra* note 11 at 105-111.

[49] *Ibid* at 110.

[50] *Ibid.*

[51] *Ibid* at 111.

testimony of disputed facts.[52] Even where panels may be conducive to non-expert witnesses establishing an accurate account of facts – for example, concerning "sequential causation issues, multi-disciplinary issues, the evolution of policies, practice and procedures, and interactions among different branches of government or institutions"[53] – this would surely require application on a case-by-case basis, not a blanket approach as the Commissioner adopted.

Moreover, despite the Commissioner's stated desire to facilitate broader participation, the vast majority of remaining witnesses called at the inquiry were police officials. As hearings ran into the spring of 2012, with the Commissioner facing a reporting deadline in July, the panel system significantly constrained the scope of cross-examination. Brian Hutchison reported on 11 March 2012:

> The inquiry's hearing process has … been compromised, fast-tracked. Witnesses are appearing in clusters. Their recollections are rushed, made incomplete. On Monday, a panel of four former Vancouver Police Department officers appears before Mr. Oppal; these are crucial witnesses, men and women who made decisions about the VPD's botched missing women investigation. Mr. Oppal has been hearing about them since hearings began in October. …
>
> One of this week's panel witnesses, VPD Inspector Fred Biddlecombe was responsible for solving major crimes in Vancouver's Downtown Eastside when Pickton was plucking sex trade workers from the same neighbourhood … The inquiry has heard from previous witnesses that Mr. Biddlecombe became aggressively hostile at the theory a serial killer was at work. In 1998, he kiboshed a suggestion to warn the public that a serial killer might be responsible for Vancouver's missing women and he also failed to throw adequate resources at the VPD investigation, Mr. Oppal has heard.[54]

It is typical for inquiries to reserve calling witnesses whose conduct has been heavily criticized by others until late in the inquiry, thus affording those witnesses a full opportunity of reply and establishing clear factual questions on which to focus their examination. It is thus troubling that the *MWCI* may have subjected such witnesses to less probing treatment than it did earlier witnesses whose testimony identified the latter as "key players". In other words, the conversion

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[52] See Oppal, *Report*, *Vol. IV*, *supra* note 11 at 20-21.

[53] Freya Kristjanson, "Hot Tubs and Concurrent Evidence: Improving Administrative Proceedings" (2012) 25 Can J Admin L & Prac 79 at 82, cited by the Commissioner in support of the panel approach, *ibid* at 20-21.

[54] Brian Hutchison, "Rushed inquiry, biased toward police, set to fail Pickton victims" (11 March 2012) *National Post*, online: www.nationalpost.com.

to a panel system partway through the inquiry may have inverted the investigative process, allowing a less thorough review of the most important witnesses and vice versa.

In addition to implementing the panel system, Commissioner Oppal declined motions by counsel for the family members of the missing women to require the production of additional evidence, and to summon additional witnesses. In some cases, the denial of counsel's requests was made without reasons, or with reasons only delivered after the close of hearings.[55] Counsel, in turn, claimed that the inquiry was enabling the police to conceal the true scope of their wrongdoing; this included the possibility that police failed to detect the role of accomplices to Pickton's serial murders or an alleged connection between certain police officers, Pickton, and the Hell's Angels. These allegations would ultimately culminate in outright hostility between the Commissioner and counsel for the families:

> Reporters covering the Missing Women Commission of Inquiry in Vancouver were exposed to an Al Pacino-like moment Monday morning.
>
> Cameron Ward, lawyer for families of 25 missing and murdered women, had a mini-meltdown, accusing inquiry commissioner Wally Oppal of enabling a police cover-up[.]
>
> … The two have clashed bitterly since the inquiry hearings began in October. After his noisy outbursts Monday, Mr. Ward left the inquiry room and didn't return for the rest of the morning session.
>
> Outside, he repeated his allegation that a police cover-up is being perpetrated. 'The commission is reluctant to press the police interests on all sorts of things that should be compelled from them,' he said. …
>
> Mr. Ward makes some solid points. Police disclosure of relevant documents has been uneven; certain records, notes, and other contemporaneous documents compiled during police investigations of Pickton himself have not been produced. Some have been shredded. Some have simply vanished, the inquiry has heard. Is Mr. Ward supposed to just shrug that off? Should Mr. Oppal? Should the rest of us?

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[55] In a Process Management Directive dated 25 April 2012, the Commissioner directed his counsel to "provide [him] with evidence" from 13 additional witnesses proposed by participants (see Oppal, *Report*, *Vol. IV*, *supra* note 11 at Appendix F-5, 65-69). He also declined to call an additional 12 witnesses, reserving his reasons for a future date. These reasons were eventually released in a document entitled "Process Management Directive #6." Unlike all other Process Managements Directives released by the Commission, the latter document is undated and was never publicized on the inquiry's website. It is included as Appendix F-6 to Oppal, *Report*, *Vol. IV*, *supra* note 11 at 70-75. It is clear from references to events within the document that it was released no earlier than July, 2012, after the close of evidentiary hearings. While the Commissioner's reasons for declining the additional witnesses are generally persuasive, it is troubling that a document purporting to address participants' claims and "manage" the inquiry process would be released retroactively, and not a time when the issues addressed were live and relevant. Perhaps the Commissioner felt that adequate reasons for declining the witnesses had already been conveyed in oral exchanges with the participants, and that the Directive was supplementary to those exchanges. If this were the case, however, it begs the question of why the "Directive" is framed as such, and not simply as a formal reiteration of oral reasons, delivered after-the-fact.

> Civilians who interacted with the police during their investigations from 1997 to 2002 haven't been called to testify, even though many are on a confidential inquiry witness list. Time is running out on the inquiry … [.][56]

The same damning narrative would be adopted by the civil society groups who had been granted limited participant status. In their letter of mass withdrawal from the inquiry, the groups commented:

> The arbitrary and unworkable timeframe has meant that the Commission has not and will not hear evidence from many important witnesses. Key witnesses requested by counsel for the families have not been added to the witness list more than four months after the request was made. The Commission has refused to hear possible evidence about possible connections between the Pickton brothers and Hell's Angels, or to look into allegations of corruption and connections with organized crime. The purpose of the inquiry is to get to the bottom of why police failed to stop the killings of vulnerable women. The question of whether women were prevented from coming forward to police with information about Pickton because they were intimidated by organized crime connections is highly relevant to this purpose and should be fully explored. Instead, this line of inquiry has been explicitly shut down by the Commissioner.[57]

With such severe criticism afflicting the inquiry before its hearings were even complete, the Commissioner faced a nearly impossible task in preparing a report that would truly restore confidence in the public institutions and officials he was intended to review.

(c) Standing and Fidelity to Adjudication

The point of this account is not to suggest that Mr Ward's criticisms of the inquiry, or even those of Ms Gervais, were necessarily accurate. In Chapter 3 I defended Commissioner Oppal against the accusation that his findings were defective in failing to individualize blame. Moreover, the types of witness heard by an inquiry, and the degree to which different perspectives are represented, are functions of how the terms of reference are properly interpreted, combined with the exigencies of time and the reality that no process can be perfectly exhaustive. The mere fact that one type of witness is called to a greater degree than another does not, in itself, signify an unbalanced investigation, and it certainly does not signify bias or "cover-up" in the absence of further corroborating evidence. However, the examples above do signify the degree to which an inquiry can be hampered by failing to properly

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[56] Brian Hutchison, "Questions fester about Pickton inquiry" (7 February 2012) *National Post*, online: www.nationalpost.com.

[57] *Supra* note 6.

instantiate rights of standing for participants; and in this respect, the *MWCI* can be criticized for more than simply failing to ensure adequate legal funding for participants.

The core problem illustrated by these examples is that the groups represented by Ms Gervais and Mr Ward perceived that they were not being treated with equality by the Commissioner. Crucially, that perception led to a further and more damaging one, which was that the Commission itself was not independent and impartial: that it was either biased toward the police, or worse, enabled their protection at the expense of uncovering the truth. The negative example of the *MWCI* may thus help to discern those elements of standing essential to ensuring confidence in the integrity and impartiality of an inquiry.

Recall that the basic value of adjudication consists in participants being afforded a high assurance of justice via an equal opportunity to present proofs and reasoned arguments to an impartial decision-maker. Indeed, it is this equality, combined with the adjudicator's obligation to rationally address the claims of participants, that intrinsically reinforces independence by filtering out extraneous and arbitrary bases for a decision. An inquiry commissioner will inevitably account for factors beyond the proofs and reasoned arguments of participants in reaching findings and recommendations. Yet the obligation to hear the perspectives of participants on adjudicative terms will remain an important safeguard of impartiality, because it will oblige the commissioner to rationally account for participants' claims on matters of greatest concern to *them*.

By hearing from participants in these terms, the commissioner necessarily cedes a measure of control over his investigative process: the evidentiary hearings will not be driven exclusively by his suspicions and instincts, and will assume the character of a joint enterprise in which the investigative theories and suspicions of those with a demonstrable interest in the outcome are given due consideration. But this ceding of control is essential to the public character of the inquiry and to its status as an institution worthy of confidence. Moreover, it is a ceding of control within limits: the proofs and reasoned arguments of participants must still relate to the inquiry's terms of reference. The significance of these observations can be clarified by reconsidering the basic character of the complaints raised by participants in the *MWCI*.

The complaints underlying Ms Gervais' resignation as Independent Counsel and Mr Ward's accusation that the Commission was enabling a cover-up were of two essential types. The first concerned a failure to be heard. These complaints were: (a) that the inquiry failed to hear important, relevant evidence because it failed to give participants due opportunity to call witnesses;[58] and (b) that the inquiry failed to hear important, relevant evidence because participants were unduly restricted in their opportunities to cross-examine those witnesses who were heard.[59]

The second type of complaint was that the Commissioner adhered to an unduly restrictive interpretation of his terms of reference, one that favoured the interests of certain participants over others. For example, Ms Gervais' contention that the inquiry heard inadequately from Aboriginal witnesses was premised on the belief that the inquiry's terms properly required the Commissioner to scrutinize racial and cultural dimensions to community interactions with the police, and that doing so necessitated hearing directly from Aboriginal community members. Mr Ward's intention to explore whether Pickton acted alone, and whether his serial killing of women was facilitated in part by collusion between police and organized crime, reflected a conviction that such matters properly fell within the ambit of the inquiry.

Framing these complaints in adjudicative terms involves recognizing that they effectively state the denial of an opportunity to participate in the inquiry via presentation of proofs and reasoned arguments to a neutral decision-maker. The opportunity to call witnesses giving first hand testimony of their contact with police represents a form of "proof" intended to substantiate reasoned arguments about the nature of police conduct toward women in the downtown eastside. The opportunity to adequately cross-examine police witnesses similarly represents an opportunity to adequately elicit proofs intended to sustain reasoned arguments about the findings the Commissioner should have reached. The claim that the Commissioner's mandate

[58] This was evident in Ms Gervais' criticism that a dearth of Aboriginal witnesses had been called, and that the Commission rejected her attempts to give voice to Aboriginal concerns through a focused panel of witnesses. It was also evident in Mr Ward's criticism of the inquiry for failing to call witnesses and evidence to speak to the possible association between Robert Pickton, organized crime, and the police.

[59] Mr Ward was the principal source of this criticism, although he was not the only lawyer at the inquiry to suggest that the panel hearings unduly restricted cross-examination. The Commission was also criticized for declining certain evidence that Ward and others sought to adduce, which would have enabled additional lines of cross-examination.

properly included consideration of whether Pickton acted alone, and whether any evidence existed of collusion between Pickton, organized criminals and the police, was a form of reasoned argument concerning the correct legal interpretation of the terms of reference. It was also an argument that, depending on whether or not it was adopted by the Commission, would beget a different sequence of proofs sought by participants in order to frame and substantiate their claims before the Commissioner.

The purpose of framing the complaints in these terms is to refocus attention from their substantive content and onto what they say about the procedural status of participants at the inquiry. The duty to "hear the other side" is, of course, one of the most elemental features of natural justice, and it does little to advance critical understanding of a commission like the *MWCI* to observe simply that the Commissioner owed participants a full and fair opportunity to be heard. Recognizing the participants' complaints as relating to the core value of adjudication allows a more specific insight: it leads to a precise statement about the manner of participation that should have been afforded to them; that is, a statement of *how* they should have been heard.

All groups granted full participant status at the *MWCI* were required to satisfy the same criteria. The implication is that they had equivalent (if not identical) interests in the subject-matter of the inquiry and equivalent potential to further its mandate. It should follow that they be treated with actual equality, meaning that their perspectives on such fundamental matters as the proper interpretation of the inquiry's terms of reference, and the substantive evidence they had to offer the inquiry within those terms, be heard and weighed by the Commissioner equally. Equality, in this sense, necessarily connotes that the Commissioner hear them impartially. Adjudication constitutes a procedural form calibrated precisely to ensure this type of equality.

The substantive features of such equality would include participants of equivalent standing being adequately financed to develop and present proofs and reasoned arguments and to critically address the positions of others through cross-examination. It would require that those participants have true relationships of solicitor-client confidence with their counsel, including the capacity to give instructions and use counsel as their mouthpiece. This underscores the defects of the "independent counsel" approach. Equality would only have been assured under this approach if *all* participants were obliged to participate via amici counsel appointed to

represent their interests, and thus if all participants were similarly encumbered by the limitations this model entailed. Of course, such an approach would be unlikely to afford procedural fairness to those facing possible findings of misconduct; indeed, many public inquiry statutes require that such witnesses be afforded individual legal representation.

Given the virtually unprecedented character of the denial of funding in the *MWCI*, it would be unfair to criticize Commissioner Oppal in hindsight for failing to account for these factors. Nevertheless, applying the value of hindsight he himself articulated in his inquiry – that is, as an aid to forward-looking, organizational improvements – it can be observed that fidelity to adjudication requires the following of judicial commissioners:

- Prior to accepting an inquiry appointment, a judicial commissioner must satisfy him- or herself that requests for the financing of legal counsel, when judged by the commissioner to be necessary to allow the participation of individuals or groups granted standing at the inquiry, will be satisfied by the appointing government.
- This assurance should be given as a formal undertaking in the appointing Order in Council. The following language would be appropriate: "The Commissioner may request, and the Governor in Council will grant, funding to enable the legal representation of any person or group granted standing at the inquiry, should the Commissioner deem such funding necessary to ensure appropriate participation by that individual or group. Funding shall be appropriate to the scope of each recipient's interest in the inquiry, as determined by the Commissioner, and subject to applicable Treasury Board guidelines."
- Moreover, in order to avoid this assurance being undermined by external manipulation of the standing criteria, the prospective commissioner should require that the Order in Council safeguard his or her independent discretion in making standing determinations. This would be achieved, for example, by terms of reference that state: "The Commissioner may allow for participation in the inquiry by any individual or group, according to any means, that she considers appropriate to the fulfillment of these terms."

Should an appointing government wish to curtail the scope and cost of a judicial inquiry in the face of these undertakings, it would be obliged to state terms of reference with a high level of

specificity such that the scope of participatory interests in the inquiry can be clearly defined. Requiring this of the appointing government would likely have a laudable effect: as noted in Chapter 3, judicial commissioners sometimes bear the burden of vague terms of reference that defer contentious matters of interpretation to the inquiry proceedings, inviting conflict among participants and challenges on judicial review. Thus a measure taken to avoid excessive cost could, by lending precision to an inquiry's terms, have the added benefit of simplifying the commissioner's interpretive tasks.

Adequate representation by counsel only partly fulfills the procedural equality commanded by adjudication, however. The commissioner must still ensure that in the actual conduct of hearings participants are heard before the inquiry on equal terms. While the exigencies of time will demand limits on cross-examinations, for example, those limits should be applied equally amongst participants within the same categories of standing. Where exceptions are made – either allowing extended opportunities for examination or truncating those opportunities – they should be tailored to the relative importance of given evidentiary subjects, assessed in light of a clear and credible interpretation of a commission's mandate. On this basis, it would not violate the equality of inquiry participants to allow an extended opportunity for re-examination by counsel for a participant who has faced allegations of misconduct. Both that participant's particular interest in fairness, and the interest of the commission in assessing misconduct findings on a high standard of proof, provide a principled basis for variation of this sort. Nor would it violate the equality of participants to hear from a large number of witnesses belonging to a particular organization, such as the police, where this reflected a reasoned interpretation of an inquiry's terms of reference, accounting for the views of all participants.

It would, however, violate the equality of inquiry participants were the commissioner to introduce absolute limits on the scrutiny of evidence that had no basis in a clear, credible interpretation of the terms of reference. This was the perception created by Commissioner Oppal's conversion of his hearings into a panel format without consulting inquiry participants. Regardless of its motivation – whether genuinely intended to diminish adversarialism, or simply to manage the reality that the inquiry was running out of time and unlikely to receive an extension from its appointing government – the introduction of this measure augmented the

dominance of inquiry hearings by police witnesses, and curtailed both the scope of cross-examination and the calling of additional witnesses.

Such a measure should have required justification to the individuals whose interests it directly impacted – chiefly, the participants granted full standing at the inquiry – which would have included rationally hearing and addressing their objections or proposals for procedural alternatives. By not doing so, the Commissioner invited the criticism that the inquiry was biased to police interests; not because he demonstrated overt partiality, but because the procedure he adopted appeared to give greater voice to one group at the expense of others. Greater voice in this sense meant greater opportunity give an account of key disputed facts, without conflicting testimonial evidence being called and without thorough opportunity for cross-examination.

Commissioner Oppal did not display any true bias to police interests, and the suggestion that he enabled a police "cover-up" is outlandish. Yet the fact that these criticisms were repeatedly raised, that they received purchase in the media and within communities immediately affected by the inquiry, illustrates the devastating collapse in confidence that can occur when standing does not equate to genuine equality before a commission. In the Commissioner's final report, under the heading "Whether all material witnesses were called", he makes the following statement:

> This was a lengthy and comprehensive inquiry. The Commission called 86 witnesses over 93 days of hearings between October 11, 2011 and June 6, 2012. I want to reiterate that this is an inquiry and *not* a trial. In any inquiry, it is for the Commissioner to determine whether he or she has heard all the relevant evidence to answer the questions set out in the terms of reference. I am satisfied, beyond any doubt, that all relevant evidence was called and met the mandate set out in the terms of reference.[60]

Fidelity to adjudication would force a commissioner to temper the observation underlined in the above passage. It is true that the commissioner's role is to finally determine the evidence that he or she will hear, and to decide whether sufficient evidence has been called to answer the questions posed in his or her terms of reference. Yet he or she should make such determinations having heard, fully and impartiality, the reasoned positions of participants on the same issues. That is, the commissioner has authority to declare certain lines of investigation relevant or irrelevant, or to declare the investigation itself to be at an end, but adjudication demands that such decisions be made in a way that demonstrably addresses participants' reasoned claims.

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[60] Oppal, *Report*, *Volume IV*, *supra* note 11 at 17 (emphasis added).

To put the matter differently, the formal status of the commissioner as an appointee of the executive branch gives him or her authority to determine whether and how the terms of reference are satisfied. But fidelity to adjudication, flowing from the commissioner's judicial status, vests him or her with responsibility to do so in a particular way. Standing at an inquiry connotes procedural and substantive equality amongst participants afforded standing according to the same terms, meaning equal opportunity to present proofs and reasoned arguments to the commissioner. This equality reinforces the independence of the commissioner by mitigating the influence of extraneous factors on his decision-making. The circumstances are different than in a court, where the submissions of the parties form a near-exclusive basis for a judge's decision. In the commissioner's case, certain findings and recommendations may be informed by a synergy between evidence gathered in the formal hearings and other information attained through parallel processes, such as the study phase of the *MWCI.*[61] The duty for the commissioner to reasonably address participants' claims, however – which, crucially, is a responsibility to address matters the participants themselves define as important – will instill assurance of the commissioner's impartiality and integrity concerning those matters.

The inquiry is thus treated as a social enterprise led by the commissioner, and standing as a right to contribute to the nature and focus of that enterprise. This differs from a utilitarian view in which the commissioner is merely a formal delegate assigned to fulfill a task. A judicial commissioner is a particular type of delegate; his or her fidelity to adjudication demands a particular relationship with participants, through which they are treated with a particular form of equality. Standing is a critical aspect of a commissioner's fidelity to adjudication as it represents the formal embodiment of this relationship.

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[61] Commissioner Oppal uses the term "synergy" to describe the relationship between his evidentiary findings of fact and the conclusions and recommendations flowing from the study phase of his inquiry. The Commissioner's success in humanizing the missing and murdered women is one of the outstanding accomplishments of his final report. In addition to his primary evidentiary findings, Commissioner Oppal paints a rich and compelling portrait of the circumstances facing women in the downtown eastside, including widespread societal indifference to their vulnerability, and common personal histories of drug abuse, family and community dysfunction, negative interactions with police, and violence. While the Commissioner's attentiveness to broader circumstances affecting the women is evident throughout the final report, *supra* note 11, see especially *Volume III: Gone, but not Forgotten: Building the Women's Legacy of Safety Together*.

2. Interpreting the Terms of Reference

This dissertation has already dealt indirectly with some of the challenges that confront judicial commissioners in interpreting ambiguous terms of reference. In Chapter 3, it was suggested that ambiguity in the case law concerning the scope of commissioners' ability to reach findings of misconduct may sometimes be exacerbated by deliberate obscurity in their terms of reference; that is, by governments issuing terms that avoid clear definition of the factual findings sought from commissioners, leaving to them the thorny task of deciphering whether they are obliged to opine on matters approximating findings of legal wrong. The preceding discussion of the *MWCI* also concerned a dispute surrounding its terms of reference: specifically, whether responsibility to scrutinize police investigations should include considering the possibility that Pickton acted with accomplices. Without opining on the substance of this dispute, I suggested that it illustrates the importance of a commissioner hearing participants equally and impartially on the interpretation of his terms of reference, and that he adopt an interpretation that reasonably addresses their claims. Indeed, this is a critical means by which a judicial commissioner assures participants of his independence.

A further challenge attending a commissioner's interpretation of his or her terms of reference concerns the relevance of a government's political motives in appointing an inquiry. I have previously illustrated this challenge with the hypothetical example of a judge asked to conduct a public inquiry into Ontario's gas plant controversy. Remaining mindful of a judge's role under the separation of powers, a prospective judicial appointee might consider two different approaches. Under the first approach, the judge scrutinizes the background and context of the proposed appointment, attempting specifically to ascertain its political motivations, in order to determine whether his service might involve improper engagement of the judiciary in a highly politicized task. This could be the case, for example, where the judge considers it likely that the proposed inquiry is motivated by a government's desire to punish a political rival. The judge wishes to avoid such an appointment so that public confidence in the integrity and independence of the judiciary is not exploited to further a government's political fortunes.

Yet a credible alternative argument can be made – namely, that the very scrutiny of "political motives" behind a prima facie valid inquiry appointment engages the judge in questions that fall outside the proper scope of his consideration. Under this second approach, the separation of

powers is best honoured by the judge respecting a duly enacted expression of legislative intent constituted by the Order in Council. In other words, the judge confines himself to considering the formal validity of the appointment, but does not presume to usurp the judgment of elected officials in gauging its political motives or merit.

These approaches reflect a different balancing of basic constitutional principles. The former approach is directed principally at safeguarding judicial independence, a purposive goal of the separation of powers, and considers the scrutiny of an appointing government's political motives to be essential to that end, while the latter approach treats the separation of powers as commanding judicial deference to duly enacted laws, a form of respect for the democratic legitimacy of lawmakers. Which of these approaches best honours the judicial role under the Constitution is an open debate. A judge considering acceptance of an inquiry commission nevertheless confronts it on a very practical level.

So too does a judicial commissioner who has already commenced an inquiry, and who is forced to address ambiguities in his or her terms of reference in determining how to structure and focus the inquiry. Should such a commissioner look to the "political history" of his or her appointment – statements recorded in Hansard, for example, or official statements made by government ministers upon the announcement of the inquiry – in order to interpret the terms? If so, should these sources be afforded greater weight in discerning the inquiry's purpose than the statements of non-governmental actors, such as advocacy groups who pressured the appointing government for an inquiry to begin with?

In this section, I consider how fidelity to adjudication guides the resolution of these challenges. This involves deepening the concept that judicial commissioners are not ordinary executive delegates, but delegates whose judicial status commands a particular structural relationship with inquiry participants, one in which those granted standing on equivalent terms are genuinely treated as equals. It follows that their voices command equal weight in interpreting an inquiry's terms of reference, meaning that while an authoritative final interpretation is left to the commissioner, she is nevertheless obliged to address the participants' reasoned claims.

(a) Interpreting Ambiguous Terms in the Conduct of an Inquiry

The *Cornwall Public Inquiry*[62] provides an excellent illustration of interpretive challenges that can arise in the conduct of an inquiry, and how those challenges relate to the commissioner's independence. The inquiry was appointed by the Ontario government in 2005 to investigate the response of public institutions to historic allegations of child sexual abuse in the municipality of Cornwall, Ontario. In 1992, a former alter boy reported to the Cornwall Police Service (CPS) that he had been sexually abused as a child by a priest in the local Roman Catholic Diocese. This allegation eventually gained coverage in local media. Although the allegation itself did not proceed to a criminal prosecution, further allegations began to surface of children being abused by Diocesan officials, and of earlier reports to police, the local Children's Aid Society (CAS), and even local prosecutorial authorities being ignored or suppressed. These allegations culminated in a 1997 investigation by the Ontario Provincial Police, codenamed "Project Truth", which considered the allegations of at least 69 potential victims of sexual assault whose claims dated as far back as the 1950s. Despite the scope and volume of complaints, the investigation resulted in only one conviction. Widespread suspicions lingered "that there was a serious problem of sexual abuse in the community, and more particularly, a problem with the way the public institutions handled, investigated, and prosecuted complaints of abuse. Stories began to circulate attributing these problems to a massive criminal conspiracy."[63] The terms of reference appointing Commissioner Normand Glaude, a judge of the Ontario Court of Justice, directed him to inquire, inter alia,

> … into … the institutional response of the justice system and other public institutions, including the interaction of that response with other public and community sectors, in relation to:
>
> (a) allegations of historical abuse of young people in the Cornwall area, including the policies and practices then in place to respond to such allegations, and
> (b) the creation and development of policies and practices that were designed to improve the response to allegations of abuse[.][64]

Commissioner Glaude's inquiry proved to be among the most procedurally fraught in recent history. Its original Order in Council specified no reporting deadline. The inquiry proceeded to

[62] Ontario, Cornwall Public Inquiry, *Report of the Cornwall Inquiry* (Cornwall: Cornwall Public Inquiry, 2009) (Commissioner: the Honourable G Normand Glaude) [Glaude, *Report*].

[63] *Ibid*, Volume 1, Chapter 16: "The Process of Phase 1 of the Cornwall Public Inquiry" at 1569.

[64] OC 558/2005 (Ont), available on the Commission's archived website, Ontario, Cornwall Public Inquiry, online: www.attorneygeneral.jus.gov.on.ca/inquiries/cornwall/en/index.htm.

take place over four years, hearing from over 170 witnesses in more than 300 days of hearings, and costing over $53 million[65] (the *MWCI*, by way of contrast, was completed in little over two years at a cost of approximately $10 million).[66] A significant portion of this time and cost was attributable to interlocutory disputes: Commissioner Glaude ruled on 41 motions in the course of his inquiry, and was subjected to 10 separate challenges on judicial review.[67] The inquiry was rife with challenges to his authority owing to its highly volatile and stigmatizing subject-matter, with several participants objecting to the public identification of alleged perpetrators whose guilt had never been established in a criminal court. This occasioned protracted deliberation not just about the calling of particular witnesses, but about the propriety of witnesses being allowed to state individualized allegations before the Commissioner, and the extent to which the Commissioner should employ in camera hearings.

The Commissioner also took a large and liberal approach to his terms of reference, both in defining the scope of his investigation, and concerning his duty to "inquire into and recommend" measures for community healing and reconciliation.[68] To this end, he convened a parallel hearing process – "Phase 2" of his inquiry – which included "community meetings and educational workshops, … witness and counselling support programs, and … the opportunity for individuals to give informal testimony as part of the process of healing."[69] He also allowed many alleged victims of sexual abuse to give formal testimony before the inquiry.[70] In 2008, the Attorney General intervened to amend the appointing Order in Council and require the Commissioner to report by 31 July 2009.[71] The Commissioner would subsequently receive two further extensions, ultimately tendering his report on 15 December 2009.

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[65] "Cornwall sex-abuse scandal spawns hearings, healing", *CBC News* (14 December 2009) online: www.cbc.ca/news/canada/ottawa/cornwall-sex-abuse-scandal-spawns-hearings-healing-1.789067.

[66] "Missing Women Inquiry Facts" *Canadian Press* (16 February 2013).

[67] A complete record of the Commissioner's rulings and of related courts decisions is available on the Commission's archived website, *supra* note 64.

[68] *Supra* note 64 at para 3.

[69] Glaude, *Report*, *supra* note 62 at 1571.

[70] For criticism of Commissioner Glaude's approach, see Ratushny, *supra* note 26 at 200-202.

[71] OC 1787/2008 (Ont), available on the Commission's website, *supra* note 64.

The lengthy duration of the *Cornwall Inquiry*, and its cost and procedural obstacles, provide important context for an interpretive issue that confronted the Commissioner in executing his mandate. In mid-2007, commission counsel sought to lead the evidence of two witnesses, identified anonymously as C12 and C13. The witnesses were a woman who alleged that she had been sexually assaulted in 1997 at the age of sixteen, and her mother. The witnesses were intended to testify concerning the assault, which was allegedly committed by two teenaged boys, and the conduct of OPP officers when the assault was reported. The OPP objected to calling the witnesses, claiming that their evidence was outside the Commissioner's jurisdiction, which they felt should be confined to reports of sexual abuse allegedly perpetrated by persons in positions of authority and only reported to police or other authorities at a significantly later date. The Commissioner issued a ruling accepting the witnesses and rejecting the OPP's characterization of his terms of reference, which he considered unduly narrow.[72] The OPP subsequently initiated stated case proceedings before the Divisional Court, which upheld the Commissioner's decision,[73] leading to an appeal before the Court of Appeal for Ontario.

The Court of Appeal overturned the Commissioner and directed that the witnesses not be called.[74] Justice Moldaver (as he then was) commenced his decision with the somewhat incredulous observation that "… it is hard to believe that the Commissioner, his counsel and the parties would, at this late stage, be involved in a debate about the subject-matter of the Inquiry and the breadth of the Commissioner's mandate. And yet that is precisely the issue that lies at the core of this appeal."[75] As Commissioner Glaude had based his admission of the witnesses on a liberal construction of his terms of reference, the decision was characterized as one of jurisdiction, and thus reviewable on the strict standard of correctness.[76] Moldaver JA found that in interpreting the terms, Commissioner Glaude had failed to properly account for: (1) the

[72] Ontario, Cornwall Public Inquiry, *Ruling on a Request to State a Case* (6 June 2007), available on the Commission's website, *supra* note 64 [Glaude, *Ruling*].

[73] *Ontario Provincial Police v Cornwall Public Inquiry Commissioner* (2007), 229 OAC 238.

[74] *Ontario Provincial Police v Cornwall Public Inquiry Commissioner*, 2008 ONCA 33, 289 DLR (4th) 14 [*Cornwall*, cited to ONCA].

[75] *Ibid* at para 3.

[76] *Ibid* at paras 19-23.

"context and circumstances in which the Commission was established"; (2) the "relevant wording in the preamble to the OIC …"; and (3) the "harmonious" meaning of certain terminology when read with the document as a whole.[77] These factors pointed to a narrow interpretation of the sort advocated by the OPP: that is, one in which the words "historical allegations" in the terms of reference confined the Commissioner to reviewing complaints of the type included in the Project Truth investigation.[78] As Justice Moldaver observed:

> By defining the words [sic] "historical" as he did, the Commissioner gave himself jurisdiction to assess the response of various institutions (past, present and future), including the justice system, the police, Children's Aid Societies and the like, to any and all allegations of sexual abuse made by young people in the Cornwall area, including historical allegations of abuse such as those investigated by Project Truth and allegations of sexual assault, such as those reported by C12, presumably from the date of Cornwall's inception in 1834 to April 14, 2005, the date on which the Commission was formed.
>
> Such a wide-ranging mandate is inconsistent with the Commissioner's acknowledgment that the "main focus of Parliament was to highlight the cases that had been in the spotlight in the community at the time of the decision to convene this inquiry …".[79]

Acknowledging that the ambit of the terms of reference was not "plain and obvious",[80] Justice Moldaver observed that the Commissioner "was entitled to and should have looked beyond the four corners of the document for assistance in interpreting its meaning."[81] To this end, the court considered an affidavit by an OPP officer prepared for the judicial review proceedings, several Hansard extracts pre-dating the inquiry, and one extract of official statements made shortly after the inquiry's appointment. These materials collectively suggested that the inquiry was intended to focus on the specific controversies embraced by Project Truth. For example, the court quoted the following Hansard extracts of statements made by Cornwall's then MPP:

> … *On November 2, 2004, the Premier stood before this House and committed to the people of my riding that a full public inquiry would be called in the Project Truth investigations once all criminal proceedings were concluded.*
>
> I'm happy to announce today that on Monday, November 15, 2004, the last of the criminal proceedings were concluded, and yesterday the Premier, myself and the

[77] *Ibid* at para 24.

[78] *Ibid* at para 62.

[79] *Ibid* at para 60.

[80] *Ibid* at para 26.

[81] *Ibid* at para 27.

> Attorney General, Michael Bryant, committed to holding a full public inquiry in this case …
>
> *The Project Truth investigations and subsequent criminal proceedings have clouded over the Cornwall area for the past decade. With the announcement of this public inquiry, the truth of allegations of misconduct and alleged cover-ups will be able to come to light. The people of Cornwall and area will be able to lift this cloud of allegations and have these investigations come to a conclusion.*[82]

The court also quoted the following statement of the Attorney General upon appointing the inquiry:

> Yes, with the public inquiry, under the *Public Inquiries Act*, he [the Commissioner] has all the tools at his disposal to leave no stone unturned and to provide recommendations that ultimately, we hope, will lead to some reconciliation and healing for the people of Cornwall. … *Ultimately, with this public inquiry, we will finally get to the bottom of what happened and will get recommendations so we can proceed better in the future, in a way that not only can everyone have confidence in the system, but victims can feel that justice has been done.*[83]

As a matter of statutory interpretation, the approach advocated by the Court of Appeal is not unorthodox. Although Canadian courts historically observed an exclusionary rule against statements of individual legislators being used to interpret the purpose and meaning of statutes – legislatures being incorporeal bodies whose statutes must be taken to speak for themselves – this rule has been eroded to the point that such official statements are now routinely consulted by courts, with argumentation going to their relative weight in context.[84] It does not follow, however, that Commissioner Glaude should have sought out the statements of elected officials or of his appointing cabinet minister in ascertaining the meaning of his terms. As an appointee of the executive branch, but one striving to protect his independence and public confidence in an inquiry, the judicial commissioner faces different considerations than a judge in court.

In reaching his decision on the admission of witnesses C12 and C13, Commissioner Glaude had the benefit of an adjudicative hearing in which contrary views were argued by commission counsel and by counsel for the OPP. Those views were augmented by the submissions of other inquiry participants, including the CPS, the Ministry of Community Safety and Corrections, the Ontario Provincial Police Association, Citizens for Community Renewal, and the Victims

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[82] *Ibid* at para 39 [emphasis in court extract].

[83] *Ibid* at para 41 [emphasis in court extract].

[84] See Ruth Sullivan, *Statutory Interpretation* (Toronto: Irwin Law, 2007) at 282-90, esp. 288-89.

Group. Notably, the Ministry of the Attorney General, through its legal representative at the inquiry, also participated in the hearing. It supported an interpretation denying the admissibility of the witnesses, but nevertheless advocated a "compromise" by which their evidence could be heard provided "the officers not be named, … the institutions not be required to respond … [and] the evidence not form part of any notice of misconduct."[85]

The affidavit evidence relied upon by the Court of Appeal was not placed before Commissioner Glaude on this motion. Nor does it appear that any of the participants – including those representing two ministries of the provincial government – placed Hansard extracts before the Commissioner, or referred to records of official statements forming the political and legislative background to the inquiry. Rather, the participants focused their arguments on reasoned interpretations of the terms of reference applied in context. In the face of ambiguous statutory language, and accounting for participants' reasoned claims, the Commissioner adopted an interpretation that he felt consistent with legislative intent and with a liberal construction of his mandate, consistent with the public interest.

This was an interpretation adopted from a demonstrable position of independence. In the manner of an adjudicative decision, arbitrary or extraneous influences on the Commissioner's reasoning were eliminated by his obligation to afford equal hearing to participants and to issue a decision that meaningfully addressed their claims. Had the participants (including commission counsel) raised Hansard or other official statements of legislative intent, the Commissioner could have considered these as part of his decision. For that matter, he might also have considered the recorded statements of public advocacy groups who pressured government for the creation of the inquiry.

There would have been no obvious reason, however, why the statements of an elected member of government, or of the Minister appointing the inquiry, should be given special persuasive force. Although the Hansard extracts quoted above do imply that the inquiry was intended to focus on the same subject-matter as the Project Truth investigation, it was open to the provincial government to adopt terms making this intention express. That is, rather than referring obliquely to "historical" claims of abuse, the Order in Council might have directed the

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[85] Glaude, *Ruling*, *supra* note 72 at 2.

Commissioner to review "Those allegations of sexual abuse that were the subject of the OPP investigation code-named 'Project Truth', together with factually similar allegations that may not have been included in that investigation. For the sake of clarity, 'factually similar allegations' are allegations of sexual abuse committed against a minor by a person in a position of trust or authority, and which were never reported to authorities or which were only reported once the victim became an adult."

Such clear terms would likely have obviated the interpretive dispute that arose in the inquiry. Where the appointing government does not impose clear terms, however, a commissioner must be wary that adopting an interpretation suggested by official statements either substitutes, or appears to substitute, a political objective of government for a truly independent interpretation that accounts for the perspectives of those most affected. As discussed in the preceding section, standing connotes a right to be heard by a commissioner on equal terms with those possessing an equivalent interest in the substance of an inquiry. This structural equality extends to the interpretation and application of the terms of reference, a principle embodied in the preliminary adjudicative hearing model advocated in Chapter 3. It intrinsically reinforces the independence of the commissioner by filtering out exactly the type of undue influence that might otherwise be accorded to political actors in defining the scope and focus of the inquiry. The government has an opportunity to clearly state the mandate of an inquiry in issuing its appointing Order in Council. Once it has done so, it is a participant in the inquiry like any other, with the past statements of its officials or elected members being no more or less probative than a host of other extrinsic evidence in guiding interpretation of the terms. Reflecting the status of inquiry participants as equals, and as stakeholders and not just means to the inquiry's investigative ends, interpretation of the terms should be guided by a reasoned adjudication of their perspectives. This is what Commissioner Glaude did in his ruling.

The point of these observations is not to suggest that the Court of Appeal was wrong in failing to accord Commissioner Glaude's ruling deference, or even that the court erred in its construal of the terms. It is to suggest that the court was misguided in suggesting that Commissioner Glaude should have consulted statements made by elected officials when those materials were never placed before him on the motion. There is good reason for the Commissioner not to have sought out such materials: they deserved no special weight relative to other extrinsic evidence,

and by relying on them the Commissioner might have favoured an interpretation advantageous to the government as opposed to one accounting for the reasoned perspectives of participants. This is especially the case when one considers that one of the statements cited by the Court of Appeal was made *after* the appointment of the inquiry. Clearly, reliance on statements made by a government minister or elected official during the course of an inquiry could be construed as the commissioner taking direction from those officials, rather exercising his own independent judgment. The process observed by Commissioner Glaude in reaching his interpretation of the terms of reference was the correct one, and the court's criticism fails to recognize that the approach itself was constitutive of the Commissioner's independence. Ironically, while the court noted the potential for Commissioner Glaude's decision to prolong the excessive duration of his inquiry, the court's decision itself contributed to further delays. Following the decision, several participants in the inquiry claimed that the Commissioner had already heard evidence contravening the scope of his terms of reference as defined by the court. The Commissioner accordingly had to issue a further, lengthy interlocutory ruling satisfying participants that all evidence he would rely on in reaching factual conclusions, including findings of misconduct, was properly within the ambit of the inquiry.[86]

(b) Assessing Political Motives Before Accepting a Commission

An intriguing contrast to the Court of Appeal's decision in *Cornwall* is provided by the Supreme Court of Canada in *Consortium Developments (Clearwater) Ltd v Sarnia (City)*.[87] *Consortium* concerned an inquiry appointed under s 100 of Ontario's then *Municipal Act*,[88] which empowered municipalities to act by majority resolution to appoint a judge of the Ontario Court (General Division) (now the Superior Court) to inquire into any "supposed malfeasance, breach of trust or other misconduct" in the affairs of a municipality, or into "any matter connected with the

[86] See the Commissioner's discussion in Glaude, *Report*, *supra* note 62 at 1578-80, under the heading "The Effect of the Court of Appeal Decision."

[87] [1998] 3 SCR 3 [*Consortium*].

[88] RSO 1990, c M.45.

good government of the municipality".[89] Such an appointee was vested with the same powers as a commissioner under the province's then *Public Inquiries Act*.[90]

The inquiry in *Consortium* arose after residents of Sarnia petitioned their municipal council to investigate a suspicious land transaction inherited by the city when it amalgamated with the former municipality of Clearwater. Consortium, a developer, had purchased municipal land at an unusually low price and without obligation to begin payments until Clearwater built services for the area. The directors and shareholders of Consortium were anonymous, prompting suspicion of conflict of interest on the part of Clearwater's municipal officials. Two Law Society of Upper Canada investigations found no evidence of professional misconduct on the part of Consortium's solicitors.[91] The Anti-Rackets Branch of the Ontario Provincial Police also investigated the transaction but found no evidence of criminal wrongdoing.[92] While the latter investigation was ongoing, Sarnia City Council passed a resolution seeking "the appointment of a Judge under the appropriate legislation to carry out an inquiry for the City concerning the sale of City lands to Consortium …".[93] Consortium succeeded in having this resolution judicially quashed for vagueness.

One month later, the Council passed a lengthy and detailed resolution outlining specific investigative terms.[94] Consortium challenged the vires of the appointment alleging, inter alia, that the inquiry was constituted as a substitute police investigation. In support of this claim, Consortium referred to statements by several municipal politicians evincing an intention that the inquiry be used to expose individual wrongdoing. Upholding a lower court decision to quash summons seeking testimony from these officials, Justice Binnie reasoned for a unanimous Supreme Court:

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[89] *Ibid* at s 100. An equivalent provision enabling the appointment of a judicial commission exists in Ontario's current *Municipal Act, 2001*, SO 2001, c 25, s 274.

[90] RSO 1990, c P.41.

[91] As recounted in *Consortium*, *supra* note 87 at para 7.

[92] *Ibid*.

[93] Cited in *ibid* at para 10.

[94] The second Sarnia resolution is reproduced in its entirety at para 13 of the Supreme Court's judgment, *ibid*.

> The motives of a legislative body composed of numerous persons are "unknowable" except by what it enacts. Here the municipal Council possessed the s 100 power and exercised it in the form of a resolution which speaks for itself. While some members of the present or previous Sarnia Council may have made statements which suggest a desire to unmask alleged misconduct, the inquiry will not be run by city councilors but by Commissioner Killeen, a Superior Court judge, who will take his direction from the s 100 Resolution, not from press reports of some of the comments of some of the city politicians. Accordingly the courts below were correct to quash the summonses and strike from the record certain other evidence.[95]

The Court acknowledged that extrinsic evidence could be admitted to substantiate a claim of colourability, but nevertheless implied that such cases would be limited to those where a resolution or Order in Council itself was prima facie suspect. In *Starr*, for example, the Court referred to statements by the then Premier and to Hansard extracts in identifying an invalid purpose behind the inquiry, but it also found that the terms of reference had an invalid effect. Justice Binnie accordingly reasoned:

> … [W]ishful thinking on the part of municipal councilors, even if established, could not turn a s 100 inquiry into a substitute police investigation. The reason why the jurisdictional challenge succeeded in *Starr* was not that the framers of the provincial Order in Council hoped that the Commissioner would be able to conduct a substitute police investigation, but because this Court concluded that in fact that was what the Order in Council directed the Commissioner to undertake. Extrinsic evidence was admitted to support the finding of *ultra vires* but such evidence corroborated what was already evident in the text of the Order in Council. … Even if some members of the City Council were motivated to vote for the Resolution by an erroneous view of what it accomplishes, this motive cannot turn an *intra vires* resolution into an *ultra vires* resolution.[96]

These reasons suggest that extrinsic evidence of legislative history should have relatively narrow relevance in assessing the validity of an Order in Council: a valid Order will speak for itself, and its meaning cannot be assimilated to the statements of individual politicians whose views may be little more than their own "wishful thinking." While *Cornwall* concerned a matter of interpretation and not the validity of the entire Order in Council, it is not clear that similar reasoning could not be applied in response to the Court of Appeal's criticism of Commissioner Glaude. Even if Commissioner Glaude had been presented with the past statements of elected officials in interpreting his terms of reference, he might have replied: "these officials say one thing, but I interpret the terms to say another; a single politician does not speak for the legislature." In fairness, the impugned terms of reference in *Consortium* were much clearer than

[95] *Ibid* at para 45.

[96] *Ibid* at para 49.

those in *Cornwall*, and the Court of Appeal's decision in the latter case was based on further interpretive grounds that were corroborated by the extrinsic evidence.

The more intriguing significance of *Consortium* lies in what we might infer from the case about a judge who has not yet accepted a proposed inquiry appointment. In this respect, it is worthwhile to revisit the hypothetical example of a proposed inquiry into Ontario's gas plant controversy. As outlined in Chapter 2, the background to such an inquiry would be highly suggestive of punitive political motives: the inquiry would focus exclusively on the conduct of a recently defeated government, with little or no risk of "exposure" to the politicians responsible for its appointment. Yet the inquiry would also follow the completion of standing processes, including reports by the provincial Auditor General and Privacy Commissioner, that were indicative of maladministration but that lacked jurisdiction to comprehensively investigate all aspects of the controversy. A judge considering such an appointment would thus face a tension: while wishing to avoid the use of his or her judicial office to confer symbolic independence on a politically calculated task, he or she may also recognize the legitimacy of answering public concerns democratically expressed through an Order in Council authorized by an elected government.

Consortium presents similar facts. The statements of elected officials preceding the inquiry suggested an intent to expose and punish individuals. Had an inquiry been enacted in terms matching the content of those statements, it would have almost certainly violated *Starr*. Indeed, it is possible that the vagueness of the original, invalid municipal resolution was strategic: that is, its drafters avoided a more precise statement of investigative terms so as to avoid the allegation that the inquiry was duplicative of a criminal investigation. The second resolution was nevertheless valid, clear, and specific. Genuine public support for an inquiry was evidenced by a civic petition. Moreover, alternate investigations by the Law Society and OPP had run their course and failed to mitigate public concern. A judge considering this appointment would thus face a similar dilemma to the judge in our hypothetical scenario – namely, between suspicion of the government's underlying motives, and respect for its democratic authority and accountability to the public.

Consortium introduces the further dimension that, pursuant to the *Municipal Act*, a municipal council which passes a valid resolution requesting the appointment of a judicial commissioner is

entitled to receive such an appointment as of right; that is, the statute appears to leave no leeway for such appointments to be declined. As such, while an individual judge might resist appointment to a s 100 commission, the Superior Court bench is obliged to locate a willing member from among its ranks.

Putting aside for the moment the legitimacy of a legislative provision *requiring* the appointment of a commissioner from the Superior Court, *Consortium* provides valuable guidance to a judge facing the above dilemma. The case would seem to suggest that analytic attention should be focused on the formal validity of the terms, not on evidence of the intentions of elected officials. In fact, the Court in *Consortium* emphasizes the judicial status of the commissioner as a factor that should instill confidence that the inquiry will be conducted fairly and free of the punitive motives signaled by the appellant. Justice Binnie observed:

> Counsel for Consortium expressed his client's opposition to the apparent sweep of s. 100 with the comment that it gives every municipality in the province the power to compel a private citizen "to come to the town square and be interrogated". … The interrogation of Consortium's shareholders or principals (if and when they are identified) will be under the direction of a Commissioner who is (as he must be) a judge of the Ontario Court (General Division). The fact that a s. 100 inquiry is a judicial inquiry clearly seeks to balance the municipality's desire to have accurate information and useful recommendations from an independent Commissioner against the right of private citizens and others to have their legitimate interests recognized and protected. A good deal of confidence is inevitably and properly placed in the ability of the Commissioner to ensure the fairness of the inquiry.[97]

I would add that the confidence rightly placed in a judicial commissioner to observe high standards of fairness flows from the association of that official with the procedural and substantive features of courts (that is, with adjudication).

Adjudicative procedures are not the only ones that are fair, but they have special value in insulating a commissioner against the specific type of unfairness alleged in *Consortium* – namely, the accusation that the inquiry is a sham exercise intended simply to expose criminality or to exact political costs against an opponent. Even supposing such an intention lies behind formally valid terms of reference, a judge conducting an inquiry can be trusted to apply those terms as if motivated by a valid intent, because adjudication directs him to an interpretation of the terms that reasonably addresses the views of participants and not the stated motives of individual

[97] *Ibid* at para 27.

politicians. To reiterate, adjudication intrinsically reinforces the judicial commissioner's independence, since the duty to address the reasoned claims of participants prohibits arbitrary influences on the commissioner's discretion. This laudable effect will apply in respect of any decision made on adjudicative terms; accordingly, should a commissioner convene a preliminary adjudicative hearing on the terms of reference, inquiry participants can be assured that subsequent conduct of the inquiry will be responsive to their reasoned claims and not to the arbitrary whim of a political master. Indeed, fidelity to adjudication would serve as a corrective against governments enacting formally valid terms premised on an improper underlying intent, by redirecting influence over interpretation and application of the terms to participants and thus denying fulfillment of that intent.

Consortium also points to an important caveat to this approach, however. As noted above, the terms of reference in *Consortium* were clear. While all terms of reference will be subject to some interpretive latitude applied in context – indeed, it will be in the nature of an inquiry to account for the application of the terms to novel information and perspectives raised by participants – clear terms will nevertheless allow a judicial commissioner to satisfy herself of their prima facie validity. They will also provide her with an intelligible basis to assess whether the subject-matter of the inquiry is conducive to observing fidelity to adjudication – in particular, by satisfying her that it will be possible to ascertain and apply rights of standing for those who seek participation, and justificatory grounds for those whose participation is compelled. Accordingly, a judge facing unclear terms of reference, even if they are not obviously invalid, must be wary of whether that lack of clarity will hamper her subsequent conduct of the inquiry, and more specifically her ability to execute the inquiry successfully while observing fidelity to adjudication.

In this context, it is appropriate that the judge apprise herself of extrinsic background information indicative of the political motivations behind an inquiry. This is so because the government may perceive political advantage to the appointment of an inquiry whose terms are deliberately unclear, either disregarding interpretive challenges likely to confront the commissioner, or worse, anticipating those challenges but preferring that they be left to the commissioner for strategic reasons. This would be the case, for example, were an inquiry motivated to expose possible criminality, but with terms strategically drafted to avoid obvious contravention of the principle from *Starr*. The commissioning government might be indifferent

to the challenge a judicial commissioner will face answering the terms of reference without pronouncing on criminal conduct, because a political objective – quelling public outrage, or exposing a political rival – is achieved by the very appointment of the inquiry to begin with. The commissioner faces a lose-lose situation: if the ambiguity of the terms leads her to jurisdictional errors in the conduct of her inquiry, she will be subjected to criticism while the government's underlying political aim remains satisfied. Conversely, should the commissioner scrupulously avoid unfairness or procedural excess, and thus curtail the scope of the inquiry, the government can diffuse blame for any public perception of the inquiry's investigative inadequacy.

There is a principled and substantive difference between a government that enacts terms of reference that are valid, clear, and precise and one that enacts terms that are deliberately ambiguous, even if individual members of each government share common motives. In the first case, the government seizes responsibility to present the commissioner with a feasible interpretive task; it accepts that its terms must withstand challenges to their validity, and thus that the inquiry must account for basic requirements of legality and fairness. In the second case, the government may be either remiss in accounting for such considerations, or dismissive of them, considering its political objectives to be satisfied regardless of the frailties of an appointing Order in Council. The latter government is not owed deference to its democratic authority in the same manner as the former, because it hasn't acted with the legislative precision consistent with a valid intent.

A judge confronted with ambiguous terms of reference is thus justified in consulting extrinsic evidence of the government's political motives in order to corroborate or dispel the impression that the appointment is directed at a colourable political goal. She does so not to question the legitimacy or wisdom of the political branches, but as a check against recourse to the status and symbolism of the judiciary for an improper purpose. In doing so, the judge mirrors the methodology of the Supreme Court in *Starr*, which invalidated the impugned terms of reference after ascertaining both an improper purpose and an improper effect. Should the judge's review of such evidence tend to confirm suspicion of colourability, she should decline the appointment. Should her concerns be dispelled, she must suggest changes to the terms that address the original basis for her concern. Acceptance of the inquiry should be conditional on appropriate, clarifying changes to the draft Order in Council.

A final observation is warranted. It will be recalled that the *Municipal Act* requires appointment of a judge-led inquiry provided an Ontario municipality passes a valid resolution under s 100. Although it appears that the validity of this provision has never been challenged, in my view its constitutionality is suspect. While legislatures may expand the jurisdiction of courts by assigning them new statutory duties (provided those duties themselves do not offend judicial independence) it is implausible that the separation of powers would tolerate the legislative branch requiring and individual judge to assume a non-judicial task. To deny the judge, and the judiciary as a whole, voluntariness in accepting an extra-judicial assignment clearly diminishes the security of their tenure, so vigorously defended in cases such as *Valente*[98] and *Reference re Provincial Judges*.[99] Under Australian constitutional law, it would clearly violate the doctrine of incompatibility.[100] The preceding recommendations concerning a judge's ability to decline an inquiry appointment, particularly in the context of an inquiry under s 100 of the *Municipal Act*, assume that such a statutory requirement cannot be enforced absolutely. If it were, it would warrant a constitutional challenge to the provision.

3. Confronting Government Claims to Secrecy

The distinct challenges presented by government claims to secrecy in an inquiry were outlined in Chapter 2. These challenges are illustrated most clearly by the *Arar*[101] and *Iacobucci*[102] inquiries, both commissioned to investigate the conduct of Canadian officials relating to citizens formerly suspected of terrorist associations, who suffered detention and torture in foreign countries. The scope of government claims to National Security Confidentiality (NSC) under the

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[98] *Supra* note 4.

[99] [1997] 3 SCR 3.

[100] Recall that *Grollo v Palmer*, (1995) 184 CLR 348 (HC) requires that extra-judicial appointments be voluntary in order to comply with Australia's federal separation of powers (*ibid* at 365).

[101] Canada, Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, *Report of the Events Relating to Maher Arar: Analysis and Recommendations* (Ottawa: Public Works and Government Services Canada, 2006) (Commissioner: the Honourable Dennis O'Connor).

[102] Canada, Internal Inquiry into the Actions of Canadian Officials in Relation to Abdullah Almalki, Ahmad Abou-Elmaati and Muayyed Nureddin, *Report of the Internal Inquiry into the Actions Canadian Officials in Relation to Abdullah Almalki, Ahmad Abou-Elmaati and Muayyed Nureddin* (Ottawa: Minister of Public Works and Government Services, 2008) (Commissioner: the Honourable Frank Iacobucci) [Iacobucci, *Report*].

Canada Evidence Act[103] forced the *Arar Inquiry* to be conducted mostly in camera, sparking conflict between Commissioner O'Connor and his appointing government as to the scope of summary material he could disclose and the inclusion of certain information in his final report.[104] The *Iacobucci Internal Inquiry*, which was formed pursuant to a recommendation of the *Arar* report, was uniquely conceived as a "private" commission, with its investigative stages occurring exclusively behind closed doors. Despite the extreme confidentiality of this process, conflict still arose between Commissioner Iacobucci and the federal government concerning information the Commissioner wished to disclose in his public report.[105]

Claims to government secrecy should be especially concerning to judicial commissioners. Public confidence in the judiciary rests in large part on the characteristic openness with which judges conduct their work. To repeat a now familiar point, adjudicative procedure inherently reinforces the independence of the judge by forcing him or her to derive a decision from the rationally-asserted claims of participants. Openness is key both to the nature of this decision-making process being publicly conveyed, and to participants having confidence that the adjudicator has actually based a decision on their reasoned claims and not on some private, extrinsic consideration. Adapted to the inquiry context, where the judicial commissioner is informed both by formal evidentiary hearings and by alternate methods of gathering and considering information, adjudication still plays a pivotal role in satisfying participants that the commissioner has acted independently in relation to matters of greatest concern to them, the participants.

In this Part, I consider how fidelity to adjudication should guide a judicial commissioner in confronting government claims to secrecy. My analysis will focus for the most part on the most extreme example of such claims – that offered by the *Iacobucci Inquiry*. The *Iacobucci Inquiry* is intriguing not just because of the immediate question it raises of whether a judge should conduct an entirely private investigation at the behest of the executive, but because of Commissioner Iacobucci's efforts to build publicity into the process, in part through the use of an adjudicative hearing on the proper application of his terms of reference. A nuanced appraisal of

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[103] RSC 1985, c C-5.

[104] See discussion in Chapter 2.

[105] See discussion in Chapter 2.

Commissioner Iacobucci's experience lends valuable insight to the work of future inquiries confronting government claims to secrecy, even where those claims are asserted to a lesser degree.

(a) The Iacobucci Internal Inquiry: Terms of Reference and Hearing on Procedure

Commissioner Iacobucci's inquiry, having been appointed under Part I of the federal *Inquiries Act*[106] but tasked to conduct its investigative work in private, was without institutional precedent.[107] Despite its private character, the inquiry's terms of reference directed Commissioner Iacobucci to afford standing to individuals and organizations that demonstrated a direct and substantial interest in its subject-matter.[108] In other words, the Commissioner was tasked with facilitating participation by private citizens and non-state groups in a confidential government investigation into its own affairs. He was also asked to take the unusual step of tendering two reports: one for the government's private use, and a separate version suitable for public release.[109]

It is necessary to begin a review of the *Iacobucci Inquiry* with a fairly detailed overview of its terms of reference, which directed Commissioner Iacobucci to investigate and ascertain:

> (i) whether the detention of Abdullah Almalki, Ahmad Abou-Elmaati and Muayyed Nureddin in Syria or Egypt resulted, directly or indirectly, from actions of Canadian officials, particularly in relation to the sharing of information with foreign countries and, if so, whether those actions were deficient in the circumstances;
> (ii) whether there were deficiencies in the actions taken by Canadian officials to provide consular services to Abdullah Almalki, Ahmad Abou-Elmaati and Muayyed Nureddin while they were detained in Syria or Egypt; and
> (iii) whether any mistreatment of Abdullah Almalki, Ahmad Abou-Elmaati and Muayyed Nureddin in Syria or Egypt resulted, directly or indirectly, from actions of Canadian officials, particularly in relation to the sharing of information with foreign countries and, if so, whether those actions were deficient in the circumstances.[110]

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[106] RSC 1985, c I-11.

[107] Iacobucci, *Report*, *supra* note 102 at 30: "There was no template for pursuing an inquiry of this kind."

[108] PC 2006-1526 (Can), included as Appendix A to Iacobucci, *Report*, *supra* note 102, 459-63 at para (f).

[109] *Ibid* at para (m).

[110] *Ibid* at para (a).

The terms specified that while the Commissioner could "adopt any procedures and methods he considers expedient for the proper conduct of the Inquiry", he was nevertheless obliged to "[take] all steps necessary to ensure that the Inquiry is conducted in private."[111] This condition was supplemented by the requirement that the Commissioner not disclose any information "injurious to international relations, national defence, national security, or the conduct of any investigation or proceeding"[112] (information traditionally the subject of NSC claims). Should the Commissioner disagree with the government's assertion of NSC, this would constitute notice under s 38.01 of the *Canada Evidence Act*.[113] Accordingly, disclosure of the information would be subject either to consent of the Attorney General or to an order of the Federal Court. The Commissioner was specifically prohibited from adjudicating the merit of NSC claims himself.[114]

At the outset of his report, the Commissioner attempted to explain the basis of his inquiry's secrecy: in recommending further investigation into the experiences of Messrs. Almalki, Elmaati, and Nureddin, Commissioner O'Connor had suggested that the process stop short of a "full scale inquiry" so as to avoid the NSC disputes he experienced in the *Arar Inquiry*.[115] Commissioner Iacobucci thus equated the private nature of the inquiry not just with the goal of protecting legitimately secret or sensitive information, but with the goals of efficacy and timeliness, anticipating that private proceedings would mitigate conflict over the disclosure of allegedly confidential information and allow the inquiry to focus on the investigative questions at hand.

The Commissioner also took pains to note that the inquiry was focused on the conduct of Canadian officials, not that of Messrs. Amalki, Elmaati, and Nureddin.[116] He pointed out that

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[111] *Ibid* at para (b).

[112] *Ibid* at para (k).

[113] *Ibid* at para (l).

[114] *Ibid*.

[115] Iacobucci, *Report*, *supra* note 102 at 30.

[116] *Ibid*.

they had never been charged with any crimes and had no "case to meet" before the inquiry.[117] Thus, while the Commissioner might be required to reference allegations against the individuals in stating his findings, he did not have jurisdiction to assess the legitimacy of those allegations, and "nothing in [the] report should be taken as an indication that those allegations are founded."[118] Finally, he stressed that the inquiry was "inquisitorial and investigative" in character, not "judicial or adversarial".[119] Accordingly, "many of the features of an adversarial proceeding … [do] not apply".[120]

While the Commissioner appears to have based these observations on a personal appraisal of his terms of reference, other aspects of the inquiry were informed by the submissions of participants. After admitting those parties granted standing at the inquiry, Commissioner Iacobucci convened a public hearing seeking submissions from participants[121] on several aspects of the terms.[122] Specifically, the Commissioner sought submissions on the following questions:

> 1. What is the meaning of "any mistreatment" as it appears in … the Terms of Reference?
> 2. Is it necessary … to decide whether, and the extent to which, Mr. Amalki, Mr. Elmaati and Mr. Nureddin were tortured in Syria and Egypt?
> 3. What does paragraph (d) of the Terms of Reference mean in requiring the Commissioner, subject to paragraph (e), to take all steps necessary to ensure that the Inquiry is conducted in private? In particular, who should be entitled to attend any hearing conducted in private?
> 4. If the Commissioner decides that some participants are not entitled to attend a hearing conducted in private, what if any steps should be taken

[117] *Ibid.*

[118] *Ibid.*

[119] *Ibid* at 29.

[120] *Ibid.*

[121] I use the term "participants" in a generic sense to refer to all individuals and groups who had standing before the inquiry, whether as full participants or (in the Commissioner's terminology) as intervenors. Full participant status was granted to Messrs. Almalki, Elmaati, and Nureddin, the Attorney General of Canada, the Ontario Provincial Police, and the Ottawa Police Service. Intervenor status was granted to Amnesty International, Human Rights Watch, the Canadian Council for American Islamic Relations and Canadian Muslim Civil Liberties Association, the British Columbia Civil Liberties Association (which later withdrew), the International Civil Liberties Monitoring Group, the Canadian Arab Federation, and the Canadian Coalition for Democracies. See the Commissioner's *Ruling on Participation and Funding* (2 April 2007), included as Appendix B in Iacobucci, *Report*, *supra* note 102 at 466-75.

[122] See discussion in Iacobucci, *Report*, *ibid* at 52-53.

to ensure that those participants can participate appropriately in the Inquiry's process?

5. What considerations should the Commissioner take into account in determining … whether he is satisfied that it is essential to ensure the effective conduct of the inquiry that specific portions of the inquiry be conducted in public?[123]

Participants were also invited to make submissions on the inquiry's draft rules of procedure.[124]After hearing from the participants, the Commissioner issued a ruling addressing their submissions and detailing important aspects of how the inquiry was to be conducted.[125]

The Commissioner's ruling generally favoured the submissions of counsel for Messrs. Almalki, Elmaati, and Nureddin on the first two questions. He adopted a broad definition of mistreatment, meaning "any treatment that is arbitrary or discriminatory or resulted in physical or psychological harm, as well as denial of properly entitled assistance and other forms of treatment that would normally be included in the meaning of mistreatment."[126] He also found that his inquiry should investigate whether the three men were tortured. This meant rejecting the Attorney General's claim that use of the term "mistreatment" in the terms of reference, together with the government's concession that the men had suffered mistreatment in a general sense, negated the relevance of inquiring into whether they were tortured.[127] Commissioner Iacobucci reasoned that the particular type of mistreatment suffered by Canadian citizens abroad was relevant to assessing the conduct of Canadian officials with respect to it.[128] Moreover, he considered it in the public interest to opine on the subject of torture: "… Canada is a party to the UN Convention Against Torture and the Canadian public no doubt has an interest not just in knowing whether a mistreatment has occurred but also whether that mistreatment amounted

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[123] *Ibid.*

[124] *Ibid* at 52.

[125] See the Commissioner's *Ruling on Terms of Reference and Procedure* (31 May 2007), included as Appendix C to Iacobucci, *Report*, *ibid* at 476-507 [Iacobucci, *Ruling*].

[126] Iacobucci, *Ruling*, *ibid* at para 64.

[127] *Ibid* at para 17.

[128] *Ibid* at para 66.

to torture. If the conduct of Canadian officials was deficient in this connection, they would wish to be apprised of what actually occurred."[129]

The Commissioner's determination of the procedural questions was more nuanced. The Attorney General contended that the private nature of the inquiry required all hearings to be held in camera and ex parte, with only the Commissioner and commission counsel, counsel for the Attorney General, and (at the Commissioner's discretion) counsel for the applicable witnesses present.[130] The Ontario Provincial Police and Ottawa Police Service agreed with this submission, but also sought the right for their own security-cleared counsel to attend the in camera hearings.[131] The Attorney General further claimed that public hearings should only be held where "essential and necessary" to the proper conduct of the inquiry, not merely "possible" or "desirable."[132]

Counsel for Messrs. Almalki, Elmaati, and Nureddin, supported by most of the intervenor groups, contended that as much of the inquiry as possible should take place in public.[133] They argued that private hearings should only be held in respect of information that was properly the subject of NSC claims, with such claims first being tested and verified.[134] They sought the right to be security-cleared in order to attend the in camera hearings on behalf of Messrs. Almalki, Elmaati, and Nurredin; to conduct cross-examinations; and to share information with their clients subject to an undertaking not to disclose material properly subject to NSC.[135] They also suggested that the Commissioner make summaries of the in camera evidence available for public scrutiny.[136] Finally, they outlined several broad topics that they felt should be addressed by the

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[129] *Ibid* at para 67.

[130] *Ibid* at para 21.

[131] *Ibid* at para 24.

[132] *Ibid* at para 23.

[133] *Ibid* at para 25.

[134] *Ibid* at para 26.

[135] *Ibid*.

[136] *Ibid*.

inquiry publicly. These included "embassy and consular conduct", "information sharing with foreign regimes", and "requests by Canadian officials to secure information from the three men while they were in detention."[137]

Commissioner Iacobucci adopted the position that all hearings at the inquiry should be presumptively private, meaning they should be conducted in camera and ex parte,[138] but rejected the Attorney General's claim that public hearings be limited to circumstances of necessity.[139] He held rather that the holding of public hearings would be discretionary, decided on a case-by-case basis balancing the needs of efficiency and transparency.[140] He denied the request that security-cleared counsel be allowed to participate in private hearings on behalf of Messrs. Almalki, Elmaati, and Nureddin, finding that their participation would support the type of disputation over NSC claims that had hampered the *Arar Inquiry*.[141] The Commissioner also stressed that the use of counsel in this manner would, in any case, be of limited utility, since they would be restricted against advising their clients of the information garnered during the private hearings, and thus do little to advance the scope of their clients' participation.[142] Instead, he encouraged participants to "suggest questions and lines of inquiry" to commission counsel, having instructed the latter to "maintain regular contact with counsel for the participants, and especially counsel for the three individuals, so that [commission] counsel are apprised of information that is relevant and helpful from the participants' perspective."[143]

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[137] *Ibid* at para 27.

[138] *Ibid* at para 72(2).

[139] *Ibid* at para 72(3).

[140] *Ibid.*

[141] *Ibid* at paras 72(6).

[142] *Ibid* at paras 57-58: "… Indeed, given the extraordinary sensitivity of the matters pertaining to national security confidentiality under discussion, the security-cleared counsel would as a practical matter be unable to communicate *at all* with his or her colleagues and clients about the matters at issue in this inquiry. Even something as innocuous as a request for a document or for clarification of a fact could trigger questions from colleagues and clients that might result in disclosure of information subject to national security confidentiality. In these circumstances, given the mandate of Inquiry counsel to vigorously test the evidence of all the witnesses that will be interviewed or examined in private, I do not see how the presence of a security-cleared counsel for Messrs. Amalki, Elmaati, and Nureddin will as a practical matter assist the inquiry or these individuals."

[143] *Ibid* at para 76(4).

In addition to defining important aspects of how the inquiry was to be conducted, the Commissioner's ruling outlined several "informing principles and contextual factors."[144] Citing language from the Supreme Court's decision in *Charkaoui v Canada (Citizenship and Immigration)*,[145] the Commissioner observed that he was mandated to "[take] charge of gathering the evidence in an independent and impartial way."[146] It thus fell to him and not the participants to exercise control over the investigation, given the inquisitorial status of the commission. Second, he emphasized that both his role and that of commission counsel were directed at protecting the public interest. This underscored the confidence that could be placed in commission counsel to conduct thorough witness interviews and examinations, and to do so impartially.[147] Finally, the Commissioner introduced a principle of "workability." Referring again to the experiences of the *Arar Inquiry*, he quoted from the Attorney General's submission:

> This should not become an exercise in redaction, redaction for national security confidentiality and other privileges. This should not become a process in which hearings are held in private and then recreated in public.
>
> This should not be a process – and I think this is perhaps the most important point – that takes two and a half years to complete. That is in no one's interest, certainly not at this stage.[148]

The Commissioner noted that the federal agencies under review had agreed to the full and unredacted production of relevant documents, based on the confidentiality of the inquiry.[149] He analogized the inquiry to other proceedings, such as investigative board hearings under the *National Defence Act*,[150] which rely on privacy to protect sensitive information and ensure procedural efficacy by avoiding debate on the confidentiality of their subject-matter.[151] By

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[144] *Ibid* at para 35ff.

[145] 2007 SCC 9, [2007] 1 SCR 350 [*Charkaoui*].

[146] Iacobucci, *Ruling*, *supra* note 125 at paras 36-37.

[147] *Ibid* at paras 39-43.

[148] *Ibid* at para 48.

[149] *Ibid* at para 46.

[150] RSC 1985, c N-5.

[151] Iacobucci, *Ruling*, *supra* note 125 at paras 50-56.

implication, the Commissioner rejected the characterization of his inquiry as a judicial or quasi-judicial proceeding to which the open court principle would apply.[152]

Following the Commissioner's ruling, the General Rules of Procedure and Practice adopted by the Commission provided that "the review of documents and the taking of oral evidence, shall be conducted in private", subject to the Commissioner's ability to order public sessions.[153] Commission counsel was empowered to interview witnesses in private, with only the witnesses' counsel present, and directed to prepare statements of the witnesses' anticipated evidence (expurgated for NSC information) for distribution amongst counsel for the remaining participants should the witnesses be called in hearings.[154] Commission counsel was also empowered to prepare draft findings for review and adoption by the Commissioner.[155] The Rules anticipated that evidentiary hearings would be conducted in which different participants might be entitled, subject to the Commissioner's discretion, to attend and conduct cross-examinations.[156] In the ordinary course, Commission counsel was to lead evidence, with other participants then being permitted to conduct cross-examinations "to the extent of their interest".[157] Advance disclosure of relevant documents would be made to counsel, subject to NSC limitations.[158] Finally, the Rules included a prefatory statement to the effect that "The Commissioner may amend or dispense with compliance with these Rules as he considers necessary to ensure that the Inquiry is thorough, expeditious and fair."[159]

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[152] *Ibid* at para 56.

[153] See the inquiry's *General Rules of Procedure and Practice*, included as Appendix D to Iacobucci, *Report*, *supra* note 102, 508-13, at para 11.

[154] *Ibid* at paras 18-21.

[155] *Ibid* at paras 22-24.

[156] See generally *ibid* at paras 25-33, esp. para 28.

[157] *Ibid* at para 33.

[158] *Ibid* at para 29.

[159] *Ibid* at para 2.

(b) Abandonment of Formal Evidentiary Hearings

This prefatory statement would turn out to be prescient. Commissioner Iacobucci ultimately decided not to hold *any* formal evidentiary hearings, thus limiting his investigative review to the in camera, ex parte witness interviews and to scrutiny of documentary evidence. As the Commissioner explained in his report:

> In light of the internal and private nature of the inquiry, I determined that obtaining oral evidence though *in camera* interviews instead of more formal hearings would be the most practical means to obtain information in an efficient and timely manner.
>
> …
>
> In my view the interview process served the inquiry well. The private interview format encouraged candour on the part of those interviewed. Taken together with other elements of the Inquiry's procedures, the interviews contributed in my view to an information-gathering and fact-finding process that was practical, efficient and fair.[160]

The process thus adopted by the Commissioner attributed remarkable investigative responsibility to commission counsel, who conducted the vast majority of the interviews themselves. Although the interviews took place under oath or affirmation, and the Commissioner reviewed a transcript of each interview, he did not personally participate (or even attend) unless he considered it necessary to address further areas not covered by counsel.[161] The sole exception to this approach concerned Messrs. Almalki, Elmaati, and Nureddin, whom the Commissioner interviewed himself, aided by commission counsel and by an expert retained to inform the Commissioner on the subject of torture.[162]

The entire fact-gathering process of the inquiry thus occurred in the absence of counsel for the various participants, excepting the Attorney General's legal representative, who stood as counsel for witnesses employed by the different federal agencies under review.[163] Moreover, the process occurred largely in the absence of the Commissioner, who (with some exceptions) relied on

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[160] Iacobucci, *Report*, *supra* note 102 at 56.

[161] *Ibid.*

[162] *Ibid.*

[163] It should be noted that the Rules only allowed counsel for a witness to be present upon the witness' request; this included circumstances where the witness was represented by counsel for his or her employer. It is unclear from the Commissioner's report and other aspects of the public record of the inquiry whether a legal representative of the Attorney General actually attended the witness interviews as counsel for the federal government employees. My assessment of the *Iacobucci Inquiry* is based on the assumption that this was the case.

transcripts and factual narratives rather than a primary, in-person appraisal of the credibility of various witnesses. Given the confidentiality of the inquiry and the fact that access to interview transcripts was severely curtailed, it is impossible to assess the probity with which the interviews were conducted – in particular, whether commission counsel conducted something akin to cross-examinations where the testimony of various witnesses conflicted.

The limited access of counsel for the participants in this process was controversial. Approximately four months following the Commissioner's ruling on his terms of reference, counsel for Messrs. Almalki, Elmaati, and Nureddin, supported by several of the intervenors, applied to the Commissioner expressing concern over the secrecy of the inquiry and requesting that certain hearings take place in public. At the time of this application, the Commissioner had apparently not yet decided to forgo formal evidentiary hearings. Given that the Rules had anticipated eventual evidentiary hearings, the dearth of documentary disclosure or access to inquiry witnesses was no doubt perplexing to the participants. An affidavit accompanying their Notice of Application stated in part:

> Both the Non-Government Participants and the Intervenors have repeatedly stressed that their ability to engage with and contribute to the Inquiry process in a meaningful manner is virtually impossible given the secret nature of this process. To date, we have been given:
>
> (a) no disclosure of any documents filed with this inquiry;
> (b) no summaries of documents;
> (c) no opportunities to attend any interviews of any Canadian officials;
> (d) no meaningful summaries of the substance of the interviews themselves;
> (e) no list of the documents filed in the Inquiry;
> (f) no opportunity to test any of the government's evidence;
> (g) no dates or information on the nature of hearings or other sessions that might be open to the public;
> (h) no indication that the Commissioner himself will participate in any interviews of Canadian officials;
> (i) no confirmation that any interviewees will be witnesses in a hearing at which counsel for the Non-Government Participants and/or the Intervenors would be permitted to attend.[164]

The participants accordingly sought disclosure of the names of all persons interviewed by the inquiry (excepting those CSIS agents involved in covert operations); disclosure of all documentary evidence gathered by the inquiry (redacted if necessary for valid NSC claims); and

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[164] Affidavit of Hadayt Nazami (2 October 2007) at para 17, available on the Commission's archived website: http://epe.lac-bac.gc.ca/100/206/301/pco-bcp/commissions/internal_inquiry/2010-03-09/www.iacobucciinquiry.ca/pdfs/documents/2007-10-02-2nd-Redacted-Application-Record.pdf.

a direction that a public hearing be held summoning interviewees with knowledge of non-confidential subjects previously identified in the participants' submissions on the terms of reference.[165] The participants signaled concern for a loss of public confidence in the inquiry, appending media coverage and past correspondence between participants' counsel and the Commission to this effect, and concluding: "In substance, although granted standing as Non-Government Participants and Intervernors, we have not truly participated in any meaningful way[.]"[166]

In response to this application, Commissioner Iacobucci issued a ruling clarifying the inquiry's progress and future direction, but declining to address the specific measures sought by the applicants. In his words,

> … I am of the view that it is unnecessary either to grant or to deny the application at this time. I arrive at this conclusion because I have ruled on the Terms of Reference and their interpretation, and the Inquiry is proceeding with a view to fulfilling the mandate along the lines described in the Ruling of May 31, 2007. That Ruling contemplates public hearings and disclosure of information under appropriate circumstances. The application was made, understandably … without a full appreciation of the steps that the Inquiry will follow and the further opportunities that these steps will give the Individuals and Applicants for meaningful participation.[167]

The Commissioner accordingly listed the federal agencies whose employees had been interviewed to date, advised participants of the total number of interviews conducted and the total number of evidentiary documents produced, and outlined his intention to personally interview Messrs. Almalki, Elmaati, and Nureddin.[168] He also noted that Commission counsel would draft factual narratives and proposed findings. At the Commissioner's direction, these materials – once expurgated of information subject to NSC claims – would be shared with participants for their input.[169] Only after commission counsel made amendments in response to

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[165] Notice of Application (2 October 2007) at paras 2-3, available on the Commission's website, *ibid.*

[166] Affidavit Hadayt Nazami, *supra* note 163 at para 18.

[167] See the Commissioner's *Ruling on Application made by Notice of Application (Dated October 2, 2007), Dated November 6, 2007*, included as Appendix J to Iacobucci, *Report*, *supra* note 102 at 535.

[168] *Ibid* at 540.

[169] *Ibid.*

this input would the materials be placed before the Commissioner to consider in preparing his report.[170]

Several weeks following this ruling, the Commissioner also gave participants notice of a public hearing, inviting them to make submissions on standards by which individual and organizational conduct should be assessed.[171] Submissions were to be guided by specific questions posed by the Commissioner in five areas, namely: information sharing with foreign authorities; the questioning of Canadians detained abroad; the provision of consular services to such Canadians; the disclosure of information obtained by consular officials; and the involvement of consular officials in national security and law enforcement.[172] These areas closely paralleled the subjects on which the participants had sought public hearings, although focusing on evaluative standards as opposed to findings of fact as the participants had intended.

As it would turn out, this hearing was the final public forum convened by the inquiry. Although commission counsel did prepare draft narratives from the witness interviews and shared these with counsel for all participants, counsel were obliged to undertake not to share the drafts with their clients, despite the drafts having already been expunged of NSC information. In the period between the hearing on standards of conduct and the Commissioner's reporting deadline, counsel for Messrs. Almalki, Elmaati, and Nureddin pressed the Commissioner for permission to share the draft narratives with their clients. Counsel also reiterated their dissatisfaction at limited opportunities to contribute the inquiry's investigative review. In a letter to the Commissioner dated 20 May 2008, counsel characterized the inquiry's conduct as unfair, observing that participants were not given clear notice that the draft narratives could not be shared with the three men, who faced the possible prejudice of personal allegations being reproduced, unchallenged, in the report.[173] The letter concluded with the statement:

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[170] *Ibid.*

[171] See the Commissioner's *Amended Notice of Hearing on Standards of Conduct, Dated November 26, 2007*, included as Appendix I to Iacobucci, *Report*, *supra* note 102, 529-32.

[172] *Ibid.*

[173] See "Counsel for Messrs. Almalki, Elmaati and Nureddin's request for reconsideration of Commissioner's decision to access draft factual narratives" (20 May 2008), available on the Commission's archived website:

> … the lack of transparency, unwarranted secrecy, and unfounded speculation about tailoring evidence or breaching undertakings [suggested as reasons for denying disclosure to the men] all lead to the inescapable impression that our clients are seen to be untrustworthy and inferior. What has already been a very distressing process has become untenable. Respectfully, you cannot underestimate the human toll these past several months have taken on our clients.[174]

Commissioner Iacobucci nevertheless declined to allow the three men to access the drafts, noting that counsel were in a position to give professional undertakings of confidentiality whereas their clients were not.[175] He did suggest that accommodations could be made to allow Messrs. Almalki, Elmaati, and Nureddin to review the finalized narratives just prior to the release of the report, so that they might process any emotional reactions and prepare themselves to comment publicly on the material.[176]

(c) The Iacobucci Inquiry and Adjudication

The *Iacobucci Inquiry* presents a challenging case for the application of fidelity to adjudication. The concerns raised by counsel for Messrs. Almalki, Elmaati, and Nureddin neatly map onto a claim that the men were denied the structural equality demanded of adjudication. The Attorney General, who might reasonably have been viewed by the individuals as a party adverse in interest to them, had unfettered access to all documents produced in evidence, the opportunity to observe most private interviews as counsel for the government witnesses, and access to unredacted draft factual narratives and inquiry findings, all in addition to the inquiry's common procedural rights. Moreover, the denial of an opportunity for the participants' counsel to attend the interviews, review transcripts, or review unredacted draft narratives (even on a security-cleared basis, subject to undertakings not to discuss confidential material with their clients) could have only been advantageous to the government in insulating its agencies from additional review and criticism. The same is true of the Commissioner's denial of any public evidentiary hearings. Messrs. Almalki, Elmaati, and Nureddin were left to rely on commission counsel to conduct a probing examination of the government witnesses – although they shared

http://epe.lac-bac.gc.ca/100/206/301/pco-bcp/commissions/internal_inquiry/2010-03-09/www.iacobucciinquiry.ca/en/documents/2008-07-31.htm.

[174] *Ibid.*

[175] See "Commissioner's decision on request for reconsideration of the Commissioner's decision on access to draft factual narratives" (23 May 2008), available on the Commission's archived website, *ibid.*

[176] See the Commissioner's *Ruling on Application made by Notice of Application Dated September 26, 2008*, included as Appendix K to Iacobucci, *Report*, *supra* note 102, 543-44.

no obvious identity of interest with commission counsel, nothing in the record of the inquiry speaks to the actual probity of the interviews, and the men were themselves subject to examination by the inquiry. Whereas an unredacted transcript of their interviews was shared with counsel for the Attorney General, an equivalent disclosure of the witness interviews was not made to counsel for the men.

Commissioner Iacobucci would almost certainly accept a characterization of his inquiry as non-adjudicative, even while rejecting the allegation that it was unfair. It will be recalled that in stressing the "inquisitorial" nature of the inquiry, the Commissioner drew from the Supreme Court's reasoning in *Charkaoui*.[177] In the latter case, the Court made a comparison between adjudicative and inquisitorial judicial regimes in order to demonstrate that Canada's then process for approving security certificates[178] failed under either model. That process was defective under the adversary system characteristic of Canadian judicial practice because the subjects of security certificates were denied an opportunity for disclosure of the evidence against them, and thus the ability to mount an answer in defence.[179] But it was also defective under an alternate inquisitorial model (such as those adopted in European, Civilian judicial proceedings), because the judge did not possess "the full and independent powers to gather evidence" needed to satisfy him- or herself of a complete evidentiary record.[180] Commissioner Iacobucci's citation of *Charkaoui* was intended to show that he *did* have such power: he was able to observe a fair inquisitorial process because the production of evidence was controlled and directed by him, undergirded by the compulsory powers of the *Inquiries Act*.

There is good reason for the Commissioner to have stressed the inquisitorial character of his proceeding. While the non-government participants in the *Iacobucci Inquiry* lauded Commissioner

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[177] *Supra* note 145.

[178] Security certificates are issued concurrently by the federal Minister of Public Safety and Minister of Citizenship and Immigration, and designate specified permanent residents or foreign nationals as inadmissible to Canada on grounds of security, past violations of human rights, or past criminality. The certificates are referred to designated judges of the Federal Court for review; once approved as "reasonable" by a judge, a certificate becomes a removal order and may result in the deportation of the named person. See the *Immigration and Refugee Protection Act*, SC 2001, c 27, ss 77-80.

[179] *Ibid* at 50-51.

[180] *Ibid* at para 50.

O'Connor's efforts in *Arar* to mitigate secrecy, it is also clear that the persistent conflict these efforts engendered was the reason for adopting a different approach in the cases of Messrs. Almalki, Elmaati, and Nureddin. The participants' request that security-cleared counsel be permitted to attend the in camera portions of the inquiry also risked reproducing the adversarialism of Canada's current security certificate process, from which the concept of such "special advocates" is derived. One need only consult the Supreme Court's recent decision in *Canada (Citizenship and Immigration) v Harkat*[181] to understand that special advocates in the security certificate regime are responsible, in part, for vigorously challenging the scope of government claims to secrecy, and thus maximizing evidentiary disclosure to the subjects of security certificates. While it is understandable and appropriate that counsel would have sought a similar opportunity to advocate for Messrs. Almalki, Elmaati, and Nureddin, it is also foreseeable that the Commissioner would resist such an approach given the likelihood of interlocutory disputes over the scope of confidentiality. As noted above, the Commissioner observed at several points that, in his estimation, the federal agencies under investigation complied fully with document production requests and did so without redacting documents for NSC. Moreover, the Commissioner considered the testimonial evidence received by the inquiry to be candid and forthright. It is reasonable to infer that the high level of secrecy afforded by Commissioner Iacobucci was aimed at sustaining the government's high level of evidentiary compliance.

Yet despite criticism of the *Iacobucci Inquiry* and the Commissioner's own emphasis on the inquisitorial nature of his proceeding, it cannot be said categorically that he failed to honour fidelity to adjudication. The reason is that while Commissioner Iacobucci severely limited the access of non-government participants to the evidentiary record in his inquiry, he also afforded them a robust opportunity to be heard on the interpretation and application of his terms of reference. In fact, of the inquiries considered in this dissertation, the *Iacobucci Inquiry* comes closest to having afforded participants a fully adjudicative preliminary hearing on its terms of reference and procedure.

It is important to recall that the Commissioner twice sought the input of all participants on the standards to be applied in evaluating the conduct of those under scrutiny at the inquiry. He did so both in asking participants to help him interpret the word "mistreatment" in his terms of

[181] 2014 SCC 37 [*Harkat*].

reference, and in asking detailed and extensive questions concerning appropriate standards of conduct across five topical areas related to the activities of government agencies. Moreover, the Commissioner heard fully and equally from participants on how he should procedurally structure his inquiry. His ruling is exemplary of an adjudicative method: it summarizes the respective submissions of participants, and draws from those submissions in constructing a decision that balances and addresses the parties' claims. This is a critical observation: it means that while the private evidentiary process itself excluded broad participation, the participants were nevertheless heard on the constitution of that process before it was effected. In Chapter 3, I queried whether an adjudicative hearing on an inquiry's terms of reference and procedure might instill a less adversarial process by establishing a fair basis for alternatives to conventional, hearings-based means of testing evidence. In the present chapter, I have nevertheless stressed that a right to standing should connote a right to structural equality that runs throughout the inquiry – that is, a right to be heard by the commissioner equally and impartially to the extent of one's interest. The *Iacobucci Inquiry* invites us to consider how these propositions might be reconciled. Might the *Iacobucci Inquiry* illustrate a process that relied on an alternative to the adversarial testing of evidence, but that did so in a manner honouring fidelity to adjudication?

The answer to this question is regrettably "no", but the inquiry nevertheless sheds valuable insight on the possible characteristics of such a process, and in particular how it might effectively navigate government claims to secrecy. A lingering shortcoming of the *Iacobucci Inquiry* is that, despite affording a preliminary adjudicative hearing on the inquiry's terms and procedure, the subsequent conduct of the inquiry didn't truly align with the Commissioner's decision. This was not the result of any subterfuge on the part of the Commissioner or his counsel. The record suggests that the Commissioner and counsel adhered to a procedure envisaged by the Commissioner's original ruling, but then determined that the private interviews alone were sufficient for reaching informed evidentiary conclusions, and indeed preferable to evidentiary hearings that would invite adversarial conflict, particularly over NSC claims. The motion for public hearings raised mid-inquiry by the non-government participants likely preceded this determination. The Commissioner responded appropriately by clarifying the process to that point, and advising participants of his intent to conduct personal interviews with Messrs. Amalki, Elmaati, and Nureddin. Shortly thereafter, he afforded the further participatory opportunity of a hearing on standards to be applied in reaching his factual conclusions.

Nevertheless, the fact that the Commissioner would rely exclusively on private interviews and documentary review in reaching his findings remained obscure until shortly before the conclusion of the inquiry. Participants thus never had a true opportunity to address the Commissioner on the propriety of this approach – including, for example, the fact that it deferred such considerable investigative responsibility to commission counsel. In fairness, the Commissioner may have wished to reserve judgment on whether he would require formal hearings until all witnesses – including Messrs. Almalki, Elmaati, and Nureddin – had been interviewed, meaning the decision itself was not taken until late in the process. The inquiry's General Rules, adopted after the preliminary adjudicative hearing, also afforded the Commissioner flexibility to adjust inquiry procedure as he saw fit. Nevertheless, it is reasonable to assume that at some point the Commissioner formed a clear impression that he could reach evidentiary findings without formal hearings, even if that impression was qualified by the desire to complete all interviews before crystalizing the decision. It would have been preferable for him to have given notice to participants of his intention at this point, with the qualification that the decision was subject to satisfactory completion of the interviews, and sought their input on the propriety of this process. A decision giving equal and rational consideration to participants' claims would have helped ensure the justice of the Commissioner's approach (and possibly, would have resulted in its modification) even if not all participants agreed with the outcome.

A further defect is that despite the input Commissioner Iacobucci afforded participants on his terms of reference and procedure, the procedural advantages that secrecy enabled for the Attorney General did deny structural equality to Messrs. Almalki, Nureddin, and Elmaati. The Attorney General had complete knowledge of the evidentiary record of the inquiry, access to complete transcripts of the three individual's interviews, and knowledge of the testimony of all government witnesses for whom federal justice lawyers served as counsel. Even in the face of commission counsel acting in the public interest, and thus conducting presumably probing interviews of the government witnesses, it is impossible to deny that this procedure afforded the Attorney General a superior opportunity to place compelling, informed proofs and reasoned arguments before the Commissioner.

Accepting the legitimacy of the Commissioner's objective to deter the complexity and delay of NSC disputes, one option available to correct this inequality would have been a modified security-cleared counsel model. Counsel for Messrs. Almalki, Elmaati, and Nureddin – which included lawyers already security-cleared to act as special counsel in security certificate proceedings – could have been cleared to access unredacted transcripts of all witness interviews and to review all documents disclosed to the inquiry, thus gaining equal access to the evidentiary record. This access could have been granted subject to an undertaking not only to refrain from discussing information that was properly the subject of NSC claims, but to refrain from sharing any aspect of the private evidence with their clients – in other words, treating all of the evidence as subject to an absolute undertaking of confidentiality. This would have removed the potential for counsel to challenge the validity of secrecy claims on a case-by-case basis; rather, counsel's only option would have been to seek judicial review of the blanket confidentiality itself. Presumably, since counsel did not judicially challenge the process Commissioner Iacobucci actually adopted, there would have been little incentive to challenge the process advocated here, which despite its limitations would have afforded higher participatory rights.

As the Commissioner noted in rejecting a security-cleared counsel model, restricting a lawyer's communication with his or her client fundamentally tampers with the relationship of confidence that enables counsel to meaningfully serve as an advisor and advocate. It is not a limitation that should be imposed lightly. The fact that counsel for the Attorney General would not be similarly encumbered means that there would have been a remaining disparity in the inquiry's conduct. Nevertheless, in the circumstances that faced Commissioner Iacobucci, and in particular his mandate to avoid the NSC ordeal experienced in *Arar*, this measure would have effectively supplemented existing procedures to honour fidelity to adjudication.

It is worthwhile to briefly revisit the analogy to security certificate proceedings that Commissioner Iacobucci invited by citing the *Charkaoui* case. The use of special, security-cleared counsel in Canada's security certificate regime arose as a legislative response to *Charkaoui*, and the constitutionality of the present scheme was recently affirmed in *Harkat*. Special counsel under the security certificate regime can challenge the veracity of NSC claims and thus the scope of hearings that take place without participation by the subjects of certificates. Moreover, those subjects receive summary disclosure of non-NSC evidence by which they may inform

themselves of aspects of the case against them and give meaningful instruction to counsel. The security certificate regime thus accords stronger participatory rights than those I advocate for the *Iacobucci Inquiry*. But this is appropriate given that the security certificate regime very directly engages the liberty interests and personal security of its subjects: a certificate that is judicially approved may be converted into a deportation order, and result in an individual being removed to jurisdictions where they face detention or torture.

Messrs. Almalki, Elmaati, and Nureddin were legitimately concerned that Commissioner Iacobucci's report might repeat allegations against them. They also had an exceptional interest in the Commissioner's findings, which could either vindicate their claims of mistreatment by federal authorities or determine that those authorities behaved reasonably, an outcome that would likely be perceived (in spite of the Commissioner's statements to the contrary) as corroborating suspicion of the three men. These interests warranted a very high standard of procedural fairness – and the opportunity to be heard by the Commissioner on adjudicative terms – but were not equivalent to the interests at stake in a security certificate proceeding. A modified procedure, preserving fidelity to adjudication in the face of overriding confidentiality safeguards, was feasible and appropriate to the unusual circumstances of the inquiry.

In the model proposed above, security-cleared counsel would not have been able to disclose in camera testimony or documentary evidence to their clients, but they might still have interviewed their clients extensively to establish an alternate version of events on matters raised in the confidential evidence. This would have enabled them to ensure that their clients testimony appropriately countered adverse allegations from the other witnesses; or, alternatively, counsel might have made private submissions to the Commissioner where they felt unable to elicit contrary testimony from their clients without compromising their confidentiality undertakings. Crucially, this model would have brought Messrs. Almalki, Elmaati, and Nureddin much closer to the structural equality expected of an adjudicative hearing. The individual government officials interviewed by the Commission, who also faced the possibility of adverse findings, almost certainly did not have any greater access to the confidential evidentiary record of the inquiry than Messrs. Almalki, Elmaati, and Nureddin did. Rather, their knowledge would have been confined to the particular subjects on which they testified or produced documents. The procedural advantages secured by the confidential nature of the inquiry were enjoyed

predominantly by *counsel* for the government – that is, by lawyers appearing on behalf of the Attorney General. Security-cleared access for the three individuals' counsel would thus have significantly leveled the playing field.

It must be conceded that counsel for the government still would have enjoyed a full instructing relationship with the most senior government members from whom they took direction, and thus those members would have enjoyed stronger, indirect participatory rights at the inquiry than did the individuals. But a security-cleared counsel model, combined with the Commissioner and his counsel taking a vigorous, public interest role in the scrutiny of government evidence, and combined with the opportunity for participants to equally direct the Commissioner toward reasoned interpretations of his terms of reference, presents a reasonable compromise. It honours the core features of adjudicative decision-making by treating participants with structural equality, obliging the Commissioner to observe a process that rationally addresses their claims. It also affords nearly equal participation in the actual scrutiny of evidence, to the extent of the participants' respective interests. The admitted deviation from full equality in this area is justified by the need to secure candid and complete disclosure from the government – an area in which the public interest, that of the Commission, and that of the non-government participants aligned. The alternative of debating NSC claims on a case-by-case basis would lend not only procedural complexity and delay, it would present greater opportunity for government abuse through overreaching. In other words, it would not eliminate the government's advantage in having control and access to confidential evidence; rather, it would be conducive to litigious exploitation of that advantage as Commissioner O'Connor and the non-government participants in his inquiry experienced.

It is a reality of Canada's modern national security landscape that judges in court proceedings, let alone extra-judicial assignments, are tasked with conducting certain hearings outside of public scrutiny, sometimes even to the exclusion of those they most immediately affect. The case law in this area has stressed protection of the open-court principle to the extent possible while respecting valid NSC claims.[182] Crucially, it has also stressed the judge continuing to afford robust, adjudicative opportunities for individuals affected by official authority to challenge the

[182] See e.g. *Re Application under s. 83.28 of the Criminal Code*, 2004 SCC 42, [2004] 2 SCR 248, and *Re Vancouver Sun*, 2004 SCC 43, [2004] 2 SCR 332, both concerning judicial involvement in the oversight of investigation orders.

legitimacy and basis of those effects. Despite Commissioner Iacobucci's classification of his inquiry as an inquisitorial process, his own conduct betrayed the importance of adjudicative values to that process. That the Commissioner observed absolute confidentiality in the scrutiny of evidence at his inquiry, and still faced government resistance to the disclosure of a substantial portion of his public report, is a cautionary tale for future commissioners. So too is the fact that the non-government participants in the process, particularly the three individuals whose interests it engaged the most, were demonstrably dissatisfied with its fairness. Future judges should be very reluctant to involve themselves in inquiry commissions directed at subjects of national security, in which NSC claims or blanket assertions of confidentiality are likely to feature prominently. Capitulation to government secrecy risks casting judges as facilitators, or worse, collaborators in political objectives, as opposed to independent guardians of fundamental values. Yet challenging that secrecy invites the type of perpetual conflict and delay experienced in *Arar*.

While judicial inquiries into national security subject matter should accordingly be rare, there may nevertheless be circumstances where they are warranted. It must be borne in mind that the government has inherent authority to constitute a private inquiry into given subject-matter, provided it accords with basic principles of fairness. The concerns outlined above suggest that the judiciary should not liberally confer legitimacy on such processes. But where, as in the case of the *Iacobucci Inquiry*, such an inquiry is constituted pursuant to the recommendation of an independent process which itself observed scrupulous and judicial standards of fairness, the circumstances are distinct. The interests of Messrs. Amalki, Elmaati, and Nureddin in the justice of the *Iacobucci Inquiry* were equivalent to that of Mr Arar in Commissioner O'Connor's process. A non-judicial commissioner might not have afforded the hearings that Commissioner Iacobucci considered necessary to give participants equal input on the terms of reference and procedure. This was an expression of fidelity to adjudication, despite the Commissioner's classification of his inquiry as "inquisitorial." Combining this measure with the security-cleared counsel model described above would have rendered the process more adjudicative and more just, while preserving the Commissioner's legitimate priority to preserve confidentiality and mitigate conflict over NSC claims.

A further alternative also warrants mention. The disparity in participatory rights under Commissioner Iacobucci's model would have been eliminated completely had counsel for the

Attorney General not been allowed access to the evidentiary productions (other than as a facilitator of those productions), and not been allowed to attend the private interviews as counsel for the government witnesses. The denial of counsel to individual interviewees would have only been appropriate, as a matter of procedural fairness, if they had faced no possible prejudice as a result of the interviews. Ultimately, Commissioner Iacobucci decided not to issue any individualized findings of misconduct. He described all federal officials as carrying out their work in good faith, if sometimes affected by deficient policies or practices.[183] Had the Commissioner ruled preemptively, following his initial hearings on the terms of reference and procedure, that individual misconduct findings would not be included in his report, he might have proceeded in the manner outlined above. This would have meant abandoning a potential evidentiary finding in exchange for the candour instilled by a non-hostile inquiry. Obviating the need for interviewees to be represented by counsel, a process in which the interviews were conducted confidentially by commission counsel, and were not supplemented by formal hearings, would have maintained absolute equality amongst participants. The Commission would have accordingly maintained fidelity to adjudication through a structurally equal process, affording participants an adjudicative hearing on the terms of reference and procedure, while reaching evidentiary findings through an non-adversarial, confidential process of inquisition.

Conclusion

Fidelity to adjudication is not simply a principle that respects legitimate interests in the justice of a public inquiry. The internal relationships structured by adjudication – both between the commissioner and inquiry participants, and amongst participants themselves – instills confidence in the independence and integrity of the commission by instantiating a particular form of equality. Standing is the institutional expression of that equality: for participants granted access to the inquiry on equal grounds, it accords equal rights to place proofs and reasoned arguments before the commissioner on the interpretation of his or her terms of reference, on appropriate procedural means to fulfill those terms, and on evidentiary questions directed by the terms. When standing is fully realized, it instills confidence in the independence of the

[183] Iacobucci, *Report*, *supra* note 102 at 33: "The individual officials whose actions were material to my mandate were employed with these institutions, and were acting within the chain of command established by them. I found no evidence that these officials were seeking to do anything other than carry out conscientiously the duties and responsibilities of the institutions of which they were a part. My findings … are therefore directed to these institutions. It is neither necessary nor appropriate that I make findings concerning the actions of any Canadian official, and I have not done so."

commission because it obliges the commissioner to recognize and rationally address the interests of participants on matters of central concern to them. It thus mitigates recourse to extrinsic influences – including the influence of a political master – in respect of those matters.

The structural equality enforced by standing bears closely on a judicial commissioner's interpretation of his or her terms of reference, and even on the decision of whether a judge should accept a commission. All terms of reference demand interpretation in context, and it is important that commissioners hear fully and equally from participants on interpretive issues that arise, ideally via a thorough preliminary adjudicative hearing. Interpretations so informed will have been taken from a position of independence, one that treats participants as stakeholders and not just means to the inquiry's investigative ends. Extrinsic evidence of political intent is only one factor that a commissioner may consider in interpreting his or her terms, and it carries no special weight relative to other interpretive aids; in particular, there is no reason for commissioners to seek-out such evidence when it is not placed before them by participants. Indeed, doing so risks subverting the independence instilled by an adjudicative hearing, substituting the wishes of individual politicians for a rational interpretation of the terms applied in context. The situation is different, however, when a prospective judicial commissioner is considering the acceptance of terms of reference whose meaning (or worse, whose validity) is ambiguous. Ambiguity limits a commissioner's ability to properly ascertain rights of standing and thus instill the structural equality commanded by fidelity to adjudication. It also raises the possibility that the government is either remiss or knowingly ambivalent about challenges that may arise in relation to procedural fairness and the proper observance of jurisdiction. In such a context, the conferral of a judge's symbolic independence and impartiality on an inquiry is improper. The judge is justified in investigating the government's political motives in appointing the inquiry, and rejecting an appointment where ambiguous terms combine with suspicious motives.

Secrecy poses a special challenge to the conduct of judge-led inquiries, because fidelity to adjudication connotes not just a particular model of decision-making, but the visible reinforcement of that model. As the *Iacobucci Inquiry* illustrated, to include some participants in important aspects of an inquiry's investigative process while excluding others (in particular, others with equivalent rights of standing) will undermine an inquiry's perceived independence

and integrity. The difficulty of avoiding this outcome should caution against routine judicial service in inquiries where significant NSC claims are likely to arise. So too should the experience of each of Canada's recent judicial commissioners who faced conflict with their appointing governments over the scope of NSC claims, and the recent corroboration of the Supreme Court that governments have overstated such claims.[184] There is nevertheless a role for Canada's judiciary to play in exceptional instances, just as there is an important role for judges as gatekeepers and guardians of individual rights in Canada's new landscape of anti-terrorism laws. Where the need for a "private" inquiry and for the high assurance of justice instilled by a judicial commissioner are both credibly established, a judge may accept such a commission. What circumstances will be "credible" in this sense is difficult to articulate in the abstract, but the threshold should be a high one, equal to the recommendation of a truly public inquiry or other independent and thorough deliberative process. Even in this context, the judicial commissioner must observe fidelity to adjudication, connecting the conduct of his or her inquiry to the high standard of justice demanded of judicial service. Commissioner Iacobucci laudably fulfilled this role in convening adjudicative hearings on the interpretation of his terms of reference, inquiry procedure, and the standards to be applied in assessing the conduct of agencies under his review. His commission nevertheless fell short in failing to accord participants of equal standing equal opportunity to scrutinize evidence and place informed arguments before the Commissioner. A security-cleared counsel model could have corrected this defect while protecting the legitimately high level of confidentiality sought by the Commissioner.

The challenge of secrecy presents a further possibility for the conduct of inquiries. A judicial commissioner conducting a preliminary adjudicative hearing on his terms of reference might consider whether individualized findings of misconduct are necessary to fulfill his or her mandate. Should the commissioner relinquish authority to make such findings, and do so in a manner that reasonably addresses participants' claims, he might establish the basis for a less adversarial investigative process – and in particular, a process less reliant on the competing advocacy of lawyers.

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[184] See *Harkat*, *supra* note 181 at paras 24-27, in which the Court criticized the federal government for seeking excessive confidentiality in pleadings before the Court.

This observation provides an appropriate segue to the final subject considered in this dissertation. Fidelity to adjudication is premised on the need to afford inquiry participants with the high assurance of justice expected of a judge. If this is the premise of judicial service in public inquiries, it may also serve as a limit demarcating instances where that service is unwarranted or potentially problematic. The *Iacobucci Inquiry* legitimately demanded a high assurance of justice in its process because even if the Commissioner had preemptively ruled to exclude the possibility of individualized misconduct, participants would have still entered the inquiry with the same apprehensions as to how they would be impacted by its conduct and findings. The situation would be different if the inquiry was constituted with formally different aims – that is, if it was not directed to investigate and ascertain factually contested issues engaging high demands of justice for those affected. This might be the case, for example, where the findings sought from an inquiry do not affect human dignity in the same manner as the findings of inquiries tasked with ascertaining the truth of allegations connected with a trenchant community concern. In the next chapter, I consider the possibility of such inquiries, and the limits of judicial service therein.

Polycentricity

Introduction

This chapter considers the most encompassing challenge to judicial leadership of public inquiries, and to the notion that judges should observe fidelity to adjudication in conducting an inquiry commission. The idea of polycentricity is central to the categorical distinction often drawn between inquisitorial and adjudicative processes. On a pragmatic level, it suggests that adjudicative processes are ill-suited to exploring complex and multi-faceted phenomena and to crafting nuanced recommendations in policy. On a substantive level, it suggests that the values instilled by adjudication are distinct from the values demanded of other forms of "social ordering."[1] This chapter explores how the principle of fidelity to adjudication is affected by these claims. While past chapters have focused largely on inquiry conduct, the focus here is more directly on the question of whether a prospective judicial commissioner should accept an inquiry to begin with, given the nature or scope of its polycentric subject-matter. It will be helpful to begin by briefly recapitulating the basis of a judicial commissioner's fidelity to adjudication, before considering how that principle serves to establish limits to judicial service in inquiries.

1. Revisiting the Limits of Adjudication

I have referred throughout this dissertation to the "core value" of adjudication, meaning the special value that adjudication instills among participants to a decision-making process. Fuller defined that value as an assurance in the rationality of the decision, predicated on the manner of participation afforded to those affected – the presentation of proofs and reasoned arguments – and the adjudicator's duty to issue a decision accounting for and addressing their claims. This assurance of rationality connotes a particular form of justice. By affording control to participants over the basis on which an adjudicator reaches a decision, and obliging the adjudicator to demonstrably speak to those claims, extrinsic (and possibly arbitrary) influences on the decision are excluded.

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[1] Recall the discussion in Chapter 2 of Lon L Fuller, "The Forms and Limits of Adjudication" (1978-79) 92 Harv L Rev 353.

Although Fuller's theory has been critiqued as unduly formalistic, and in particular for failing to account for the role of judges in discerning and enforcing constitutional values,[2] there are two important considerations that temper this criticism. First, public law disputes often involve a significant imbalance of power between disputants. This is especially the case where individuals claim that elected governments, officials, or public institutions have violated their rights. Those individuals have no assurance that a complaint to the infracting official body will be heard 'fairly' in the sense that it will prompt genuine reconsideration of a decision in light of individual rights or other constitutional norms. Once an individual brings his or her claim to a court, however, the situation is different. Adjudication structures disputing parties as equals: it obliges the government to respond to the individual's claim in a manner recognizing him or her as a bearer of rights, and to offer justification for an impugned measure in terms recognizing that official powers are bounded by law.[3] Second, adjudicative procedure reinforces the judicial role under the separation of powers. The exclusion of extraneous and arbitrary influences on a judge's decision intrinsically corroborates his or her independence, but it also precludes unfettered access to political or public policy considerations, leaving the latter to the legislative and executive branches. The principle of judicial independence, on the one hand, and the principles of representative and responsible government, on the other, depend on boundaries that are mutually constitutive. The fact that judges base their decisions on adjudicative procedure is an essential way in which they respect those boundaries.

In arguing that adjudication plays an important role in some public inquiries, my point has been that participants to such inquiries may legitimately demand the particular assurance of justice characteristic of an adjudicative decision. This is the case with individuals whose involvement in an inquiry is compelled, and who may be subject to harsh scrutiny and commentary, and with individuals who legitimately seek to have a personal experience of injustice redressed. Moreover, I have argued that judicial service on public inquiries should be premised on fulfilling the core value of adjudication to the extent demanded by those participants' interests. In so doing, the judicial commissioner gains a principled basis for resolving common dilemmas that arise in the conduct of inquiries, and a procedural means of reinforcing his or her independence.

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[2] See Owen Fiss, "The Forms of Justice" (1979) 93 Harv L Rev 1, discussed in Chapter 2.

[3] See TRS Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law* (Oxford: Oxford University Press, 2001) at 8-9.

The role of adjudication in public inquiries is non-exclusive. Fuller envisaged the possibility of 'hybrid' institutions, and observed that adjudication could serve a meaningful role within such institutions provided the essential means of participation in an adjudicative decision were not undermined. Accordingly, institutions that consider polycentric issues – those that engage diffuse societal perspectives, concerns, and effects – may still include adjudicative components, provided polycentricity doesn't impinge on the adjudicative forms constituted for those components.

I argue that judicial inquiries are such hybrid institutions. Judicial commissioners necessarily engage with polycentric issues: they seek to define systemic problems, often scrutinizing the complex structure and interactions of entire government bureaucracies; they commission research, hold community roundtables, consult experts, and convene any number of other non-adjudicative processes intended to gather and analyze relevant and dependable information; and they are directed to making recommendations that, first, must account for diffuse societal interests and effects, and second, must account for pragmatism and feasibility if they are to be adopted by governments.

These considerations, and their related methodologies, can and should coexist with adjudication in a judge-led inquiry. Adjudication continues to play a vital role in determining questions of fact, and in determining questions of procedural and substantive justice within the inquiry itself, provided participants are legitimately impacted by the subject-matter of an inquiry in such a way as to warrant an adjudicative hearing. The relationship between the adjudicative and non-adjudicative features of an inquiry will be a synergistic one, with the commissioner's findings and recommendations informed by both forums. He or she will nevertheless observe an appropriately high standard of fairness, and the scrupulous impartiality appropriate to a judge, concerning those matters that engage the strongest interests of participants.

Even within hybrid institutions, adjudication must have limits. My effort to demonstrate the relevance of adjudication to inquiries rests on an alignment between the core value of adjudication and the needs of participants to certain types of inquiry. Those needs speak to the existence of actual or potential disputes capable of adjudicative resolution: different

interpretations of a commissioner's jurisdiction, for example, or different accounts of key facts or views on appropriate standards of conduct. Fuller's concern that polycentric issues not undermine the manner of participation demanded by adjudication is mitigated by recognizing that these concerns can be addressed on an adjudicative basis and still have a coherent relationship with other inquiry processes focused more directly on polycentric concerns. In other words, there is a harmony between the adjudicative components of an inquiry and its non-adjudicative components. But what if that harmony does not exist? What if an adjudicative hearing on some issues diminishes an inquiry's ability to meaningfully address other issues, or vice versa? Moreover, what if the introduction of adjudication at an inquiry is ill-founded, because the core value generated by adjudication is not legitimately sought? In the remainder of this chapter, I consider two scenarios that engage these risks.

The first scenario concerns inquiries directed to addressing questions of scientific fact, and the second concerns inquiries mandated to foster healing and reconciliation. These scenarios raise pragmatic concerns related to polycentricity in that the enforcement of adjudicative values could threaten the integrity of deliberation and decision-making on polycentric issues. Closely related, they raise concerns of substance, where the enforcement of adjudicative values could have deleterious effects on different values legitimately sought by an inquiry.

The argument presented here is a prudential one. I do not suggest that judges never serve on inquiries directed at questions of scientific fact or at fostering healing and reconciliation. But I do suggest that the absence of a clear, principled basis for fidelity to adjudication should give prospective judicial commissioners pause. Should a judicial commissioner adopt familiar adjudicative procedures in such inquiries, they may do a disservice to their true mandates. Yet disavowing such procedures will take most judges into unfamiliar terrain, testing substantive knowledge and skills that are not common features of the judicial repertoire. Moreover, it will deprive the judicial commissioner of the inherent safeguards of independence and impartiality enforced by adjudication, potentially making him or her more vulnerable to misuse of judicial status and symbolism. Appointments of this type thus raise an additional onus for prospective judicial commissioners to carefully consider their propriety, and in my view warrant a conservative approach by which most judges decline their service.

2. Public Inquiries and Questions of Scientific Fact

In 1981, Liora Salter and Debra Slaco published a report commissioned by the then Science Council of Canada to critically examine the role played by inquiries in investigating scientific subjects.[4] The authors completed an in-depth review of six 'inquiries', which included royal commissions focused on broad questions of public policy, judge-led public inquiries focused on very specific community concerns, and both standing and ad hoc administrative hearings that facilitated consultation on regulatory and developmental decisions.[5] The subject-matter of these processes ranged from the non-medical use of drugs, to the development of uranium mining in Saskatchewan, to the societal effects of satellite technology in telecommunications.[6] The authors sought to answer: "How effective is an inquiry in producing a scientific assessment? What combinations of science and policy making occur in an inquiry? And how effective is an inquiry in extending the public debate on scientific issues?"[7]

Several of their observations are germane to the present thesis. Salter and Slaco noted that the integration of scientific and policy questions within an inquiry necessarily involves a marriage between the methods and epistemologies of two disciplines. Scientific inquiry is by nature open-ended:

> Science is evaluative and oriented, for the most part, to the determination of what has occurred and what now exists. Except in the cases of highly theoretical studies, scientists generally base their predictions on an assessment of what is or has been the case. Scientific assessment is a continuing process. Theories and hypotheses are debated … and the issues are seldom resolved. Even the most well-established scientific 'laws' are subject to periodic reassessment. Indeed, where conflict between scientists is submerged, through an apparent resolution of issues, it may later re-emerge with greater intensity.[8]

Public policy, in contrast, is directed at bringing closure to issues. Policies may be revoked, updated, or reassessed, "but at some point, rightly or wrongly, definite decisions must be

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[4] Liora Salter and Debra Slaco, *Public Inquiries in Canada* (Ottawa: Science Council of Canada, 1981).

[5] *Ibid* at 23-24.

[6] *Ibid*.

[7] *Ibid* at 15.

[8] *Ibid* at 32.

made."[9] Thus, while scientific study begets tentative answers and observations, and invites deeper and ongoing questions, matters of public policy involve finite and pragmatic choices among defined alternatives. This is not to suggest a hierarchy between scientific and policy-centric methods, but to point out that those methods are informed by different norms and goals. To a certain extent, they connote different worldviews. Accordingly, the integration of scientific and policy questions within a common deliberative institution will be a challenging exercise.[10]

In the inquiries considered by Salter and Slaco, this integration tended to be resolved by the inquiries focusing on questions of risk.[11] Scientific research was employed by the commissions to attribute levels of risk (to health, safety, the environment, the economy, or other variables) amongst policy alternatives, thus orienting the inquiry process to reaching pragmatic and concrete recommendations.[12]

While focusing on risk has obvious pragmatic appeal, the authors note that it bears its own internal challenges, as multiple "yardsticks" can be employed to measure risk, and different inquiry participants may espouse different yardsticks aligning with their perspectives and interests. For example, community groups concerned with the effect of a given technological development might advocate measuring risk against "the maximum possible performance" (meaning the maximum possible mitigation of risk) "given the state of scientific and technical knowledge."[13] From this perspective, any performance below this "maximum" engages unacceptable risk and should prohibit introduction of a given technology or pursuit of a particular development. Subtly but substantially different is the yardstick that measures risk based on "best possible performance or protection *given the alternatives*."[14] This yardstick, which

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[9] *Ibid.*

[10] *Ibid* at 33: "The combination of science and policy in an inquiry … is unlikely to proceed smoothly."

[11] *Ibid* at 151.

[12] *Ibid.*

[13] *Ibid* at 156.

[14] *Ibid* at 157 [emphasis added].

the authors suggest is the most widely used by inquiry commissioners themselves, takes stock of pragmatic alternatives (assuming the legitimacy of a policy priority) and then balances their merits given the types and levels of risk associated with each. Under the first approach, a proposed oil and gas pipeline might be rejected on the basis that the relevant technology's "maximum possible performance" cannot mitigate environmental risk to a degree satisfying community concerns. Under the second, the pipeline is considered in light of other means of transporting oil, or meeting energy needs, or growing a resource-based economy, or reducing carbon emissions (whatever are the relevant concerns embraced by an inquiry's terms of reference) with respective risks determined for each alternative, and recommendations derived from balancing those risks. A difficulty arises in that these different means of measuring risk "combine science, policy, and values" in different ways; thus participants to an inquiry may be similarly speaking in the language of risk, but meaning very different things.[15]

Salter and Slaco also observe that commissioners confronting scientific questions tend to adopt one of two procedural approaches, either framing their inquiries as "research studies" or as a form of "arbitration."[16] Both options have strengths and weaknesses, and both deal with scientific data in different ways. An inquiry structured as a research study aligns more closely with the familiar methods of scientists: it commissions reviews of existing research, convenes panels in which experts can discuss and debate findings, consults with communities in a manner consistent with the disciplinary values of social science, and ideally commissions its own original empirical research. Importantly, an inquiry structured in this manner is more likely to allow scientific questions to be explored in a manner distinct from policy; that is, the research completed by the inquiry is more likely to cohere with scientific standards of integrity and accuracy. The body of data generated will have its own internal merit, judged from a scientific perspective, and can be interpreted relative to policy questions at a separate and distinct analytic stage.

In an inquiry structured as arbitration, on the other hand,

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[15] *Ibid* at 158.

[16] *Ibid* at 159.

> … the research conducted by the inquiry and presented by its participants, constitutes 'evidence' to be arbitrated. The hearings become an arena for arbitration where this evidence is weighed and tested through cross-examination.
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> …
>
> [P]olicy recommendations develop through the consideration of issues presented in testimony. Policy recommendations, therefore, constitute judgments about the relative merit of conflicting assessments and recommendations. With such an approach, research is considered only in light of its contribution to the development of policy.[17]

Under the arbitration model, the answers presented to scientific questions (and indeed, the questions themselves) are framed in reference to policy concerns from the outset. The authors thus suggest that the arbitration model is appropriate to inquiries where the relevant scientific knowledge is already well-developed or "available", and scientific uncertainty is not great.[18] Scientists may then be called to testify at an inquiry, and the inquiry may arbitrate relatively narrow claims about the 'state of the art' in a given field, without misapprehending the meaning and accuracy of the scientific data itself. This type of arbitration will not be appropriate or practical, however, where the relevant scientific knowledge is nebulous or underdeveloped.

Despite the limitations of the arbitration model, it is often favoured by inquiry commissioners due to its orientation to pragmatism and closure. [19]This tendency is corroborated by the fact that despite their formal distinctiveness from trials, most inquiries cannot avoid the impact of liability concerns on their proceedings. Salter's later commentary on this subject was considered in Chapter 2.[20] As she elaborates in that later work, regardless of the fact that inquiries do not engage immediate legal liability for participants, the potential for their findings to impact legal and pecuniary interests in the longer term motivates participants to act as though those interests are engaged by the inquiry forum.[21] This is true both of participants who may be subject to liability claims and those who have an interest in commencing them.

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[17] *Ibid* at 159-60.

[18] *Ibid* at 161.

[19] *Ibid* at 197.

[20] Liora Salter, "The Two Contradictions in Public Inquiries" in A Paul Pross et al., eds, *Commissions of Inquiry* (Toronto: Carswell, 1990) 173.

[21] *Ibid* at 174-75, and Salter and Slaco, *supra* note 4 at 191.

The introduction of court-like qualities to the inquiry process – by arbitration, the protection of liability interests, and other influences (including the norms of legal professional participants) – can have the effect of polarizing an inquiry, and polarization in turn influences the inquiry's results. Salter and Slaco observe:

> - [Polarization] leads to a clarification of issues, but also masks their complexity;
> - It ensures clarity in the representations of points of view, but sometimes forces coalitions that mask the differences between advocate groups;
> - It lends itself to easy arbitration of issues and, to the extent that a clear decision is required, it lends credibility to the inquiry process. At the same time, the conditions imposed on the recommendations and the uncertainties in the evidence tend to be masked or given less importance than they merit;
> - It forces an adversary debate rather than a discussion. Issues become stereotyped ("pro- or anti-development or progress") as do the attitudes of groups and individuals who participate[.][22]

In Chapter 2, I introduced the metaphor of a kaleidoscope to signify that public inquiries are viewed and valued differently by a range observers and participants. Salter and Slaco's study resonates both with the kaleidoscopic nature of inquiries, and with the manner in which the introduction of conventional legal procedure can impact them. Inquiries studying questions of science confront the interaction of scientific and policy methodologies, which are undergirded by different disciplinary worldviews. Their tendency to gravitate to questions of risk subsumes a range of perspectives on the nature of risk and the scientific yardsticks by which it can be assessed. The choice between the extremes of inquiry-as-research study and inquiry-as-arbitration, or of some point in between, constitutes an attempt to reconcile questions of science with questions of policy, and results in scientific data being assessed (and possibly developed) in different ways. This choice also reflects a tension between pragmatic objectives – reaching feasible recommendations, reconciling competing social pressures – and the objective of sound scientific research consistent with disciplinary standards.

The legal and pecuniary interests of inquiry participants add a further dimension to the kaleidoscope. So do the training and familiar methods of legal staff, including judicial commissioners. The varied knowledge, perspectives, professional values, and expectations of participants in an inquiry are themselves a form of polycentricity that a commissioner must

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[22] *Ibid* at 199-200.

confront. The difficulty is that in seeking to integrate or balance the contributions of different disciplines, an inquiry risks compromising the internal values of one in service of another.

The *Cohen Inquiry* into the decline of sockeye salmon in British Columbia's Fraser River, first discussed in Chapter 2, provides a useful case study for considering this problem. At the core of the Commissioner's mandate was a question of scientific fact: what is causing the decline of sockeye salmon in the Fraser River?[23] That question subsumes others – for example, what are relevant indicators by which the health and sustainability of salmon stock should be assessed? The Commissioner's terms of reference also directed him to consider, without limitation, specific factors that may be causing the decline, and to scrutinize the policies and practices of the federal Department of Fisheries and Oceans (DFO).[24] As a federal public inquiry appointed to address an environmental concern centered in British Columbia, the Commissioner was obliged to consider the interaction of federal and provincial laws and regulations while respecting the bounds of federal jurisdiction.

Given an inordinately complex mandate, Commissioner Cohen's inquiry was procedurally efficient, fair, and produced an impressively detailed and persuasive report.[25] It also instantiated a highly 'legalistic' procedure, however. When the Commissioner signaled his intention to appoint an expert advisory panel to guide the inquiry's research activities, several inquiry participants questioned this approach, expressing concern that the panel could influence the

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[23] The inquiry's Terms of Reference, discussed in Chapter 2, directed the Commissioner to "investigate and make independent findings of fact concerning … the causes for the decline of the Fraser River sockeye salmon including, but not limited to, the impact of environmental changes along the Fraser River, marine environmental conditions, aquaculture, predators, diseases, water temperature and other factors that may have affected the ability of sockeye salmon to reach traditional spawning grounds or reach the ocean …". See Canada, Commission of Inquiry into the Decline of Sockeye Salmon in the Fraser River, *Final Report - Volume 1: The Sockeye Fishery* (Ottawa: Public Works and Government Services Canada, 2012) (Commissioner: The Honourable Bruce I Cohen) at 579-84, Appendix 1, "Terms of Reference".

[24] Terms of Reference, *ibid* at paras B and D.

[25] All three volumes of Commissioner Cohen's final report are available on the inquiry's archived website: http://epe.lac-bac.gc.ca/100/206/301/pco-bcp/commissions/cohen/cohen_commission/LOCALHOS/EN/FINALREPORT/INDEX.HTM.

Commissioner's views "behind closed doors."[26] The Commissioner accordingly adopted a different process, whereby a preliminary discussion paper was circulated to participants eliciting proposals for research studies that could be undertaken for the Commission.[27] Based on participants' submissions, the Commissioner identified 15 research projects and selected expert contractors to complete them. With one exception, the contractors "were not asked to engage in primary research but rather to report on the best available existing research."[28] The reports of each contractor were peer-reviewed and discussed by their authors in a roundtable setting. They were then finalized, circulated to all inquiry participants, and entered formally into evidence as exhibits in the inquiry's hearings.[29] The examination and cross-examination of the reports' authors, and use of the reports to guide the submissions of various inquiry participants, served as one of the principal means by which the Commissioner investigated questions of fact. As the Commissioner observed, his evidentiary hearings "were the primary source of evidence … considered in the Report."[30] Witnesses were called to give evidence on oath or affirmation, with examinations being led by commission counsel and cross-examinations conducted by various participants' counsel afterward. In addition to the expert authors of the reports, witnesses included DFO employees, representatives of the fisheries industry, fish farmers, First Nations representatives, and environmental advocates. All of the in-hearing examinations and cross-examinations of witnesses took place in panels, while a limited number of witnesses gave evidence by written affidavit.[31]

The 21 participants granted standing at the inquiry included the Canadian and British Columbia governments; two coalitions of environmental advocacy and conservation groups; seven Aboriginal groups, most comprising internal coalitions; several groups representing different

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[26] Canada, Commission of Inquiry into the Decline of Sockeye Salmon in the Fraser River, *The Uncertain Future of Fraser River Sockeye*, Volume III: Recommendations – Summary – Process (Ottawa: Public Works and Government Services Canada, 2012) (Commissioner: the Honourable Bruce I Cohen) at 121 [Cohen, *Executive Summary*].

[27] *Ibid*. The Commissioner nevertheless retained the services of a "senior fisheries research consultant", who advised him on scientific and research matters throughout the inquiry (*ibid*).

[28] *Ibid*.

[29] *Ibid* at 121-22.

[30] *Ibid* at 127.

[31] *Ibid* at 129.

commercial fisheries and fish-farming operations; one mining company; and two public sector unions.[32] The inquiry engaged the pecuniary interests of almost all of these groups, whose activities as managers and harvesters of the salmon risked being implicated in the decline of the fishery or curtailed by the Commissioner's recommendations. This point was underscored by the Commissioner's decision, discussed in Chapter 2, that although his terms of reference forbade findings of misconduct, he could nevertheless attribute responsibility for harmful environmental activities to the participants.[33] In the course of the inquiry, the Commissioner issued 42 interlocutory rulings, concerned variously with disputes over the calling of specific witnesses and the scope of cross-examinations; the relative representation of government and non-government witnesses; the severance of a participant coalition following a divergence in interests; the re-opening of hearings in light of new evidentiary developments; and the production and review of government documents over which privilege was claimed.[34] While praising the professionalism and cooperation of counsel for the participants at his inquiry, Commissioner Cohen also stressed that they succeeded in "vigorously" advancing their clients' interests.[35]

The *Cohen Inquiry* thus bears several of the hallmarks of the arbitral model. While the Commission did solicit research, conduct site visits and community forums, and solicit open-ended submissions from the public, its primary evidentiary findings were driven by a legalistic hearing structure. The participants in those hearings were grouped in coalitions based on generalized interests they held in common. The scientific evidence considered at the hearings consisted largely of technical reports prepared in response to the participants' input, directed at subjects they deemed to be important. That evidence was then elicited and tested through cross-examination from the perspective of the participants' various knowledge and interests.

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[32] *Ibid* at 196, Appendix H, "List of Participants".

[33] See the Commissioner's "Ruling on Interpretation of Terms of Reference" (15 September 2010), available on the inquiry's archived website: http://epe.lac-bac.gc.ca/100/206/301/pco-bcp/commissions/cohen/cohen_commission/LOCALHOS/EN/RULINGS.HTM.

[34] A list of the Commissioner's rulings is included in Cohen, *Executive Summary*, *supra* note 26 at Appendix I. The rulings themselves can be found on the Commission's archived website, *ibid*.

[35] Cohen, *Executive Summary*, *ibid* at 88.

These observations are not meant to impugn the integrity of the inquiry. In fact, the *Cohen Inquiry* stands out among those considered in this dissertation as exemplifying many of the laudable qualities of fidelity to adjudication. The Commissioner afforded a generous opportunity for participants to inform the focus of the inquiry through submissions on the expert reports. Participants received equal and ample opportunity to call and cross-examine witnesses, within the confines of time and assiduous enforcement of the Commission's terms of reference. Commission counsel included both hearings and advisory staff, and although the Commissioner's relationship with each was not defined to the level of detail that I advocate, his report nevertheless contains the most precise articulation of counsel's role (and the extent of counsel's delegated authority) of any inquiry considered in this study. The interlocutory rulings issued by the Commissioner are detailed, balanced, and responsive to participants' claims. Finally, the inquiry is unique for having publicized the Commissioner's written exchanges with the Clerk of the Privy Council concerning funding recommendations for participants and modifications thereto as the inquiry evolved.[36] It is evident to any reader of his report that Commissioner Cohen observed the scrupulous standards of fairness, transparency, and impartiality expected of a judge.

It is also evident, however, that observance of an arbitral hearings structure may have influenced the Commissioner's findings. On the core questions of fact that drove the inquiry's mandate, those findings were indeterminate:

> Although the technical reports and the testimony of many witnesses revealed the current state of knowledge regarding the causes of the decline, this Commission has also demonstrated how much we still do not know. Key gaps in our knowledge remain.
>
> It is not, in my view, a matter of choosing one potential cause over another. The available evidence shows that stressors unique to the Fraser River (such as development along the river or contaminants in the water), as well as region-wide influences (such as marine conditions in the Strait of Georgia, Queen Charlotte Sound, or North Pacific Ocean), may have contributed to the long-term decline in productivity. Factors in the marine environment appear particularly implicated in the broad-based regional decline of salmon stocks. Regrettably, that is as far as the evidence takes me.
>
> Filling the gaps in our knowledge will be a major endeavour. In this Report, I make recommendations for specific scientific research that will, if undertaken, develop important baseline data, provide better information about the Fraser River sockeye

[36] This correspondence is included in the Commissioner's rulings, available on the Commission's archived website, *supra* note 34.

> and the stressors they face throughout their life stages, and increase DFO's capacity to identify cause-effect relationships.[37]

As these comments portend, most of the Commissioner's findings on questions of scientific fact concerned the necessity for further research, albeit on grounds that were narrowed and focused by the inquiry.[38] His more concrete and immediate findings reflected an adjudication of the competing interests and claims presented at his inquiry, and were centrally oriented to mitigating risk in light of the uncertain causes of sockeye decline. For example, the Commissioner recommended a moratorium on the expansion of salmon farming activities in the Discovery Islands until 2020, allowing DFO the time necessary to determine whether harmful pathogens transmitted from farmed to wild salmon could be implicated in the sockeye decline.[39] In reaching this conclusion, the Commissioner noted that while existing scientific evidence is inconclusive, the danger of "serious or irreversible" harm to the sockeye population warranted a conservative approach.[40] The Commissioner also recommended, inter alia, that promotion of fish farming be removed from DFO jurisdiction so as to eliminate a conflict with its conservation mandate;[41] that the DFO act to implement its existing Wild Salmon Policy, requiring the enforcement of conservation measures even where the risks they seek to mitigate cannot be verified with scientific certainty;[42] that a new oversight post be created within the DFO to ensure implementation of the Policy;[43] that the DFO consider implementing a commercial and recreational fishery licensing regime which equalizes fee structures between Aboriginal and non-Aboriginal fishers;[44] that DFO address a "crisis in confidence" surrounding

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[37] Cohen, *Executive Summary*, *supra* note 26 at 88.

[38] See the Commissioner's recommendations for further research in *ibid* at 101-02.

[39] *Ibid* at 92.

[40] *Ibid* at 91.

[41] *Ibid* at 90.

[42] *Ibid* at 91.

[43] *Ibid*.

[44] *Ibid* at 94.

the accuracy of its cast estimate regime, which governs the annual volume of sockeye harvests;[45] that DFO "encourage" the BC Ministry of the Environment to enforce stronger compliance with regulations protecting riparian habitat;[46] and that DFO receive adequate financing to restore earlier levels of enforcement against illegal harvesting of sockeye.[47]

These recommendations are no doubt valuable and responsive to concerns expressed at the inquiry. They have certainly been taken-up by environmental advocacy groups in criticizing the federal government's failure to protect the Fraser River sockeye.[48] For present purposes, however, the key point is that the *Cohen Inquiry* actually addressed subtly different questions than those posed in its terms of reference. While tasked with daunting but specific questions of scientific fact, it came to be structured as an inquiry into appropriate measures to mitigate risk in light of available information and the varied interests of those affected. The questions of science investigated by the inquiry were explicitly shaped by the inquiry's policy aims, because the scientific studies solicited from experts were guided by participants' concerns.

Salter and Slaco's study obliges us to recall that this methodology risks subverting the methods and values of science for those of public policy. This is especially the case when we consider that the cause of sockeye decline is not a subject concerning which scientific knowledge is well developed, or where disagreement as to the current 'state of the art' can be narrowly defined. If the government was serious about the scientific questions posed in the terms of reference, a more appropriate process may have been to separate scientific investigation from questions of policy altogether. Something akin to an independent advisory panel, with a long timeframe and resources to sponsor original empirical research in addition to the review of existing studies, could have been employed to substitute reliance on standing resources within the DFO. The pecuniary interests of different constituencies would have been irrelevant to the work of such a body, and there would have been no reason for it to require the leadership of a judge. Even

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[45] *Ibid* at 95.

[46] *Ibid* at 98. Recall that the *Cohen Inquiry* was a federal commission, and thus lacked jurisdiction to directly recommend actions by provincial authorities.

[47] *Ibid* at 99-100.

[48] See e.g. Crawford Killian, "The Cohen Report, One Year Later: Advocates wonder if pricey probe into 2009 Fraser River salmon collapse has been washed out", *The Tyee* (31 October 2003), online: www.thetyee.ca.

integrating the formulation of policy recommendations at a separate end stage in such a process, there is no obvious reason why the arbitration of different interests (necessitating the coalescence and polarization of different interest groups, as Salter and Slaco describe) would be suited to optimal policy formulation. Policy-makers routinely balance competing societal interests in fashioning public policy without affording those affected a pre-emptive, arbitral forum in which to advocate competing positions or safeguard their material interests. Recourse to an independent and external advisory body need not connote recourse to the particular deliberative model represented by arbitration, or adjudication for that matter.

Commissioner Cohen honoured fidelity to adjudication in the conduct of his inquiry, but it is reasonable to question whether the scientific and polycentric focus of his terms of reference should have cautioned against judicial service to begin with. Respectfully, I believe the answer to this question is yes. The purpose of fidelity to adjudication is to safeguard a judicial commissioner's independence while aligning inquiry procedure with the legitimate due process concerns of participants. In the *Cohen Inquiry*, it is not clear that participants had an interest in procedural justice that warranted recourse to adjudicative hearings. Their interests appear, for the most part, to have been pecuniary. Pecuniary interests are certainly important. But they are categorically different from the interests of family members of missing and murdered women, or of police officers implicated in the death of a person in custody, or of a community touched by an avoidable tragedy. The latter interests relate centrally to human dignity, and the notion that governments and officials be accountable to the persons whose lives their actions and inaction affect. They also concern dignity in the sense that they engage personalized accusations, warranting fairness for individuals who may be exposed to the stigma of public scrutiny and shaming.

The *Cohen* terms of reference had no bearing on dignity. The concern they sought to address had environmental, economic, cultural, and bureaucratic dimensions, and while adjudication might be one means of navigating those dimensions, there is no underlying justificatory basis warranting its adoption at the expense of alternatives. Moreover, there is good reason to strongly consider those alternatives, given the limitations of adjudication in exploring questions of science and polycentricity.

The situation might have been different if the terms had expressly directed the Commissioner to an arbitral mandate – that is, if they had defined a community concern marked by conflicting accounts and interests, and by a lapse of confidence in the government's ability to address that concern through standing processes. Even these circumstances would have warranted skepticism, however. It is one thing for there to be a loss of public confidence in the integrity of a government, its departments, or officials: the inquiry under review in *Consortium*,[49] for example, responded to community concerns that unknown officials had taken advantage of their positions for personal gain at the public's expense. It is another thing for there to be a loss of confidence in a government's competence. This would seem to have been the concern centered on the DFO in the *Cohen Inquiry*: not that its officials were behaving corruptly or in abuse of their positions, but that they simply weren't doing a good job in managing the Fraser salmon fishery. The judiciary has no authority to address concerns of this type, and for good reason: the separation of powers prohibits their engagement with such blatant political questions. This recalls the fact that the separation of powers safeguards not only judicial independence, but the principles of representative and responsible government, making political decision-makers accountable to an elected parliament and to the electorate.

A judge declining the type of inquiry appointment signified by *Cohen* is exhibiting respect for these principles. He or she is not denying the importance of the questions posed, or the legitimacy of different interests and concerns that weigh on them. Rather, the judge is indicating that such questions are best left to the political branches of government. He or she is also denying an opportunity for the political branches to abdicate their democratic responsibility by strategically exploiting the status and independence of the judiciary. Judge-led inquiries should be reserved for instances where the legitimate justice concerns of those affected actually require the scrupulous independence and impartiality of a judge. This approach protects the principles embodied in the separation of powers – both judicial independence and representative and responsible government – and allows the judge to avoid polycentric tasks that are ill-suited to judicial values and methods.

A concluding observation is warranted regarding the *Cohen Inquiry*. Five months after the completion of its evidentiary hearings, while Commissioner Cohen was in the midst of drafting

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[49] *Consortium Developments (Clearwater) Ltd v Sarnia (City)*, [1998] 3 SCR 3, discussed in Chapter 3.

his report, the federal government introduced Bill C-38,[50] a piece of omnibus legislation that would effect significant changes to the regulation of the sockeye fishery, including replacement of the then *Canadian Environmental Assessment Act*[51] and amendments to the *Fisheries Act*.[52] The Commissioner responded by inviting participants to make supplementary written submissions in light of the new legislation, and by supplementing portions of his report to account for the possible effects of the changes. This work was complicated by the fact that some of the legislative changes were enabling, and thus their practical significance would only crystalize upon the introduction of further regulations. As a general matter, the Commissioner observed that several of the legislative changes were inimical to the recommendations in his report, particularly as the latter concerned strengthening conservation activities.[53] The Commissioner noted that while the federal government had suspended international and Aboriginal treaty negotiations for the ostensive purpose of awaiting his report, it regrettably had not felt similarly encumbered in introducing new legislation.[54] He concluded:

> [T]he federal government's tabling of Bill C-38 is disappointing. The bill was introduced very late in this Commission's life … when my Final Report was in the late stages of drafting. I learned nothing of the impending amendments to the environmental assessment process or the *Fisheries Act* from any witness at the hearings and saw nothing in the exhibits. Based on the evidence, as well as the supplemental written submissions of participants, there were no consultations with First Nations or stakeholders about Bill C-38. Moreover, the introduction of the amendments long after the conclusion of this Inquiry's evidentiary hearings means that neither Commission counsel nor counsel for participants had the opportunity to explore the potential impact of these changes on DFO's fisheries and habitat management.[55]

The government's introduction of Bill C-38 showed indifference to the deliberative process it had tasked Commissioner Cohen with completing – a process which, it showed be noted, fulfilled a campaign promise of the Conservative Party from the 2008 federal election. More bluntly, it showed a lack of genuine interest in finding answers to the questions the Commissioner was asked to address. This suggests a cynical misuse of the inquiry for political

[50] Enacted as the *Jobs, Growth and Long-Term Prosperity Act*, SC 2012, c 19.

[51] SC 1992, c 37 (repealed). Now the *Canadian Environmental Assessment Act, 2012*, SC 2012, c 19, s 52.

[52] RSC 1985, c F-14.

[53] See generally Cohen, *Executive Summary*, *supra* note 26 at 75-80.

[54] *Ibid* at 72.

[55] *Ibid* at 82.

advantage, and exploitation of the integrity that Commissioner Cohen brought to the process. Prospective judicial commissioners should take note.

3. Public Inquiries and Reconciliation

It is often suggested that public inquiries help to instill healing and reconciliation within communities affected by an injustice or tragedy. Sometimes, as in the case of the *Cornwall Public Inquiry*,[56] commissioners are mandated by their terms of reference to propose measures that will help a community to heal. In other cases, participants themselves will impress the need for healing and reconciliation upon a commission, often treating the commission itself as a locus for these values. This was evident in public pressure to expand the mandate of the *Missing Women Commission of Inquiry*,[57] including calls for an alternate hearing format to facilitate participation by socially marginalized individuals and groups.

Healing and reconciliation have a valid place in the kaleidoscope of values attributed to public inquiries, and the suggestion that judicial commissioners observe fidelity to adjudication shouldn't diminish this fact. Identification of the truth in contested events, on fair terms and after hearing from those affected, is without doubt an important source of healing for those who have suffered a wrong. Belief that informed and effective recommendations will bring accountability to institutions that have neglected their obligations or abused their power will also help to restore public confidence, and reconcile citizens with the institutions on which they rely. Finally, at their best, public inquiries "inform and educate" the public:[58] they raise awareness and counter ignorance about the circumstances of individuals typically excluded from the public discourse – prisoners, the criminally accused, terrorism suspects, survival sex workers, drug addicts – and challenge the public, as well as government, to more fully realize foundational ideals of equality, dignity, and the rule of law. It is undeniable that in so doing, inquiries have healing and conciliatory effects on social ills.

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[56] Ontario, Cornwall Public Inquiry, *Report of the Cornwall Public Inquiry* (Cornwall: Cornwall Public Inquiry, 2009) (Commissioner: the Honourable G Normand Glaude).

[57] British Columbia, Missing Women Commission of Inquiry, *Forsaken: The Report of the Missing Women Commission of Inquiry* (Victoria: Government of British Columbia, 2012) (Commissioner: the Honourable Wally Oppal) [Oppal, *Report*].

[58] See *Phillips v Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)*, [1995] 2 SCR 97 per Cory J at para 62.

Fidelity to adjudication also connotes a particular view of justice, however. I have argued repeatedly in this dissertation that adjudication is called for when circumstances require the particular assurance of justice instilled by an adjudicative manner of participation in a decision. Adjudication, by requiring participants to state their claims as proofs and reasoned arguments, connotes the existence of standards and principles by which disputes can be resolved. Indeed, Chapter 3 was centrally concerned with how inquiries articulate and apply standards, including whether they can approximate findings of legal wrong; how they should account for the interaction of individual and institutional misconduct; and the necessity of avoiding hindsight bias. An adjudicative decision achieves justice when a fair standard exists, is known to those against whom it is applied, and is applied by a decision-maker who hears impartially from those affected. The resulting decision may be a source of healing for those concerned, or it may point the way to conciliatory measures, but it nevertheless flows from the airing of a dispute in which participants have assumed conflicting positions.

This idea of justice is not the only one. Nor is the type of healing and reconciliation it facilitates the only sense in which those terms can be employed. Justice may also connote the transformation of conflict into new relationships founded on the mutual recognition of dignity and respect. Rather than consisting in the application of existing standards to evaluate conduct, it may consist in dialogue, direct-dealing, and attempted understanding between discordant parties, leading to individual (and sometimes deeply personal) feelings of healing and reconciliation. In a 2003 report on alternatives to the adversarial system of justice – including consensus-based justice (such as community and court-ordered mediation) and restorative justice (such as victim-offender reconciliation and sentencing circles) – the Law Commission of Canada observed:

> … [A] consensus-based justice approach requires disputants to reconceive their conflict as one in which certain solutions other than a win-lose outcome are possible. To achieve even the possibility of such solutions, disputants must embrace some of the hallmarks of a consensus-based justice vision, including openness, direct-dealing and longer-term vision.
>
> …
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> Justice as it is conceptualized and practised in both restorative justice and consensus-based justice traditions is multidimensional. Both approaches reject the idea that a just outcome may only be consistent with pre-existing rules. Instead, the presumption goes the other way – that in almost every case the solution is integrative, rather than

> winner-take-all. For restorative justice advocates, notions of harm and responsibility are more complex than a simple determination of right and wrong.[59]

This shared conception of justice may not be feasible in circumstances where the very existence of a wrong, or its nature and extent, are vigorously contested. Formal alternatives to adversarial disputes are contingent on the motivation and goals of participants. And while public inquiries are certainly concerned with multidimensional issues that defy simplified, winner-take-all conceptions of right and wrong (consider, again, the nuance of organizational wrongs and their influence on individual conduct), they still involve the resolution of disputed facts, applying standards that were or should have been known by individuals or organizations whose conduct is under review. They may also engage disputes of principle relating to the content of those standards.

In 2012, the BC Civil Liberties Association, West Coast LEAF and Pivot Legal Society published a report entitled *Blueprint for an Inquiry: Learning from the Failures of the Missing Women Commission of Inquiry*.[60] Drawing from the shortcomings of the *MWCI*, the report contains a number of valuable recommendations for the improvement of future commissions. These include measures to facilitate testimony from vulnerable witnesses and to accord their experiences due evidentiary weight, and a requirement that commissioners and commission counsel be compensated at rates commensurate with service in the public sector so that greater budgetary resources might be available to support community participation. A further theme of the report is that inquiries such as the *MWCI* should serve as transitional justice instruments instilling truth and reconciliation among participants.[61] Referring to South Africa's Truth and Reconciliation Commission, the authors write:

> The Missing Women Inquiry, unlike the South African TRC, does not mark a transition into democracy. However … it could have helped to herald a transition from a relationship (between the governed and the governing) based on colonialism, criminalization, discrimination, mutual distrust and paternalism into a relationship of cooperation, reconciliation and collaboration. So, while the lessons of the TRC may

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[59] Law Commission of Canada, *Transforming Relationships through Participatory Justice* (Ottawa: Minister of Public Works and Government Services, 2003) at 121.

[60] British Columbia Civil Liberties Association (BCCLA) et al., *Blueprint for an Inquiry: Learning from the Failures of the Missing Women Commission of Inquiry* (Vancouver: British Columbia Civil Liberties Association, 2012).

[61] *Ibid* at 15. This argument is also made forcefully by Kim Stanton, "Intransigent Injustice: Truth, Reconciliation and the Missing Women Inquiry in Canada" (2013) 1 Transitional Justice Review 59.

not wholly apply to the Missing Women Inquiry, it serves as a useful example of how to balance the dual goals of reconciliation and credible fact finding.[62]

The latter portion of this statement is noteworthy, because it implies that the *MWCI* could have completed a credible factual investigation at the same time as it brokered societal reconciliation. The authors go on to observe that the *MWCI* was "an opportunity to create a public record and make findings of fact regarding the missing women investigations", and "to hold those who failed to ensure the safety of vulnerable women accountable."[63] Public inquiries, they argue, "must find a way to reconcile backward-looking, truth-seeking functions with forward-looking, policy-making functions, all while promoting healing and reconciliation among affected individuals and communities."[64]

This claim should be approached with diffidence. Despite the gravity of the issues investigated by the *MWCI* and their relationship to wider issues of discrimination and marginalization, an analogy to South Africa's truth and reconciliation process is inapt. An indispensable feature of that process was the conferral of amnesty on individuals who came forward to acknowledge participation in past wrongs.[65] This was necessitated by the scale of bigotry and social cleavage the Commission was tasked to address. In that context, individualized recrimination was not only impractical, it could have exacerbated divisiveness and undermined the basis of new, forward-looking societal relationships. Much of the truth-gathering conducted by the TRC relied upon amnesty as a means of insulating individuals against recrimination for admitting the truth, and reconciliation was fostered by the voluntariness with which those individuals admitted wrong and took responsibility for healing social divides. Notably, when the TRC did employ

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[62] BCCLA, *ibid* at 15.

[63] *Ibid* at 19.

[64] *Ibid.*

[65] See the amnesty provisions included in the South African TRC's constitutive statute, the *Promotion of National Unity Act 34 of 1995* (SA) at Chapter 4, ss 16-22, "Amnesty Recommendations and Procedures". These provisions flowed from the final clause of South Africa's interim Constitution, the *Constitution of the Republic of South Africa Act 200 of 1993* (SA), which specified in part: "In order to advance … reconciliation and reconstruction, amnesty shall be granted in respect of acts, omissions and offences committed in the course of the conflicts in the past. To this end, Parliament under this Constitution shall adopt a law determining a firm cut-off date … and providing for the mechanisms, criteria and procedures, including tribunals, if any, through which amnesty shall be dealt with at any time after the law has been passed."

coercive powers to summon recalcitrant witnesses, it observed procedural rights that equaled (and likely surpassed) those typically afforded to witnesses at Canadian commissions of inquiry.[66]

The police officers who participated in the *MWCI* were subject to serious allegations of bias, racism, sexism, cover-up, neglect, and incompetence. While the police collectively acknowledged fault in failing to stop Pickton's serial predation of women, the nature and scope of their errors were vigorously contested. Other than limits against the use of testimony in subsequent legal proceedings, there was never any suggestion that police witnesses at the inquiry receive "amnesty" in exchange for truthful testimony – nor would this measure have been appropriate if the worst allegations leveled against them had proven correct. The gravity of those allegations necessitated strong procedural rights for participants in the *MWCI*. It also underscored the importance of securing procedural equality for the individuals and groups who made them, and who were subjected to the indignity of being denied legal representation while their interlocutors were defended with public funds.

It will be recalled that Commissioner Oppal attributed the failure of police to protect women in Vancouver's downtown eastside largely to systemic bias reflecting broader societal prejudices and misconceptions. He criticized some individual officers – although deliberately focusing for the most part on organizational failures – and vindicated the conduct of others. While the adequacy of these conclusions has been questioned (in part, for the very reason that key participants were excluded) few would doubt that the questions they sought to address – what went wrong? why did this happen? – were important predicates to establishing a more trusting and conciliatory relationship between the affected communities and the police. They were also findings derived from the application of discernable standards. That is, the Commissioner articulated standards of conduct that should have been observed by the police, and based his evaluations on the reasoned application of those standards. Provided these issues were to be confronted in a public forum, with witnesses being called to account for their actions and

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[66] See the *Promotion of National Unity Act*, *ibid* at Chapter 6, ss 28-35, "Investigations and Hearings by Commissions." In addition to requiring that compelled witnesses be allowed financially accessible legal representation; that they receive a fair and impartial hearing; that their testimony not be used against them in subsequent proceedings; and that their testimony be kept private in the face of personal danger or other serious prejudice, the *Act* required that compulsion be "necessary and justifiable in an open and democratic society based on freedom and equality" (*ibid*). This language harkens that of s 1 of Canada's *Charter*, and the argument presented in Chapter 3 that adverse findings against inquiry witnesses be justified on a standard of necessity.

participants afforded the opportunity to conduct cross-examinations and make allegations, it is difficult to imagine how adversarialism could have been avoided. Commissioner Oppal recommended that further deliberative processes, with the exclusive goals of healing and reconciliation, should follow his inquiry.[67] One of the great misfortunes of the *MWCI* is that this and other recommendations were diminished by a flawed and unequal process. It is also regrettable that those aspects of the *MWCI* that did broker alternatives to the adversarial hearing of evidence lacked credibility and broad participation due to the shortcomings of the formal hearings.[68]

In weighing the potential for judge-led inquiries to instill healing and reconciliation, it is worthwhile to consider the example of Canada's Truth and Reconciliation Commission, which recently completed its last national event and will submit a final report in 2015. The TRC was established pursuant to a settlement agreement between Indian Residential School (IRS) survivors, the federal government and several churches that had been responsible for administering the schools. A non-adversarial, voluntary process of healing and reconciliation was considered a necessary counterpart to the formal acknowledgment of blame embodied in the settlement agreement. The TRC's mandate is thus markedly different from a commission of inquiry constituted to discern the truth in contested events, as Kim Stanton has observed: "In Canada, where the government and the churches have acknowledged that abuses occurred and that the IRS system was harmful, the evidence that is presented to the TRC is not for the purpose of convincing the Commissioners that the abuses occurred. The TRC is occurring separately from the reparations process and other elements of the Settlement Agreement."[69]

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[67] See Oppal, *Report*, *Executive Summary*, *supra* note 57 at 161.

[68] It should be stressed that Commissioner Oppal's report speaks at length to broader societal circumstances affecting women in the DTES, including the cycles of poverty, addiction, and violence that drive many Aboriginal women and girls to a seek refuge in urban centres where they are vulnerable to being preyed upon and exploited. Had the *MWCI* not denied equality to participants, it would likely have succeeded in providing a starting point for broader social healing and reconciliation. But the commission itself would have remained limited in instilling these values because of the disputed character of the facts it was tasked to ascertain and the standards it was obliged to apply. See Oppal, *Report*, *ibid*, especially *Volume I – The Women, Their Lives and the Framework of the Inquiry: Setting the Context for Understanding and Change*, and *Volume III – Gone, But Not Forgotten: Building the Women's Legacy of Safety Together*.

[69] Kim Stanton, "Canada's Truth and Reconciliation Commission: Settling the Past?" (2011) 2 International Indigenous Policy Journal 1 at 5.

This is reflected in the TRC's terms of reference, which are prefaced by a statement of guiding principles:

> The Truth and Reconciliation Commission will build upon the 'Statement of Reconciliation' dated January 7, 1998 and the principles developed by the Working Group on Truth and Reconciliation and of the Exploratory Dialogues (1998-1999). These principles are as follows: accessible; victim-centred; confidentiality (if required by the former student); do no harm; health and safety of participants; representative; public/transparent; accountable; open and honourable process; comprehensive; inclusive, educational, holistic, just and fair; respectful; voluntary; flexible; and forward looking in terms of rebuilding and renewing Aboriginal relationships and the relationship between Aboriginal and non-Aboriginal Canadians.[70]

Consistent with these principles, the TRC has no power to subpoena evidence or to compel the attendance of witnesses, and "shall not hold formal hearings, nor act as a public inquiry, nor conduct a formal legal process."[71] It is forbidden from "naming names" in its account of wrongdoing, and any proceedings in which allegations are made against identifiable persons must be conducted in camera.[72] In its 2012 Interim Report, the TRC emphasized the centrality of statement gathering, or "truth sharing" to its mandate: "The Commission is committed to providing every former residential student – and every person whose life was affected by the residential school system – with the opportunity to create a record of that experience. … Since there are estimated to be at least 80,000 living former students, the magnitude and complexity of the Commission's commitment are significant."[73] At the time of the Interim Report, through public sharing circles, commission hearings, and private sessions conducted by trained statement-gatherers, the TRC had collected over 1800 statements.[74] It had also hosted two national events reflecting the educative and holistic goals of the commission, including artistic installations, musical performances, the display of archival materials, children and youth programs, and a range of other activities in addition to the formal gathering of statements.[75]

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[70] Canada, Truth and Reconciliation Commission of Canada, "Our Mandate", online: www.trc.ca/websites/trcinstitution/index.php?p=7.

[71] *Ibid* at 2(b) and (c).

[72] *Ibid* at 2(h) and (i).

[73] Canada, Truth and Reconciliation Commission of Canada, *Interim Report* (Winnipeg: Truth and Reconciliation Commission of Canada, 2012) at 12.

[74] *Ibid* at 13.

[75] *Ibid* at 18-21.

The point of this example is to show that – at least in the context of Canada's TRC – healing and reconciliation have been treated as formally distinct from the identification of wrongdoing and allocation of blame. Indeed, healing and reconciliation command an altogether different procedure, and a different underlying notion of accountability that stresses voluntariness and collective responsibility to acknowledge wrongs and build new relationships. One can easily imagine how the introduction of adversarialism would be detrimental to this process.

A prudential approach is thus warranted for judges considering acceptance of inquiry commissions whose terms espouse goals of healing and reconciliation. An inquiry into contested events may be conducted in a manner that honours fidelity to adjudication, and by reaching principled and credible conclusions, establish a basis for healing and reconciliation. But a mandate to foster healing and reconciliation within an inquiry itself – that is, to facilitate parties in turning conflict into a constructive basis for forward-looking change – presents a different challenge. Alternate forums that parallel formally investigative hearings may establish opportunities for direct-dealing, awareness raising, and the mediation of perspectives in a manner that fosters trust and conciliation among participants. But where the same participants are vigorously at odds in the formal hearings, this potential will be curtailed. It will be difficult for participants to reconcile with one another when questions of fact and principle at the core of their conflict – did police officers provide inferior services to drug addicts and sex workers? did justice officials behave irresponsibly when presented with claims of child sexual abuse? – remain unresolved.

The inclusion of truth and reconciliation as inquiry goals forces a prospective judicial commissioner to consider whether fidelity to adjudication risks undermining those goals by structuring participants as adversaries. Conversely, he or she must consider whether abandoning adjudicative procedure for the sake of brokering conciliation may deny some participants' legitimate demands for due process, particularly where allegations of wrongdoing are unresolved. In either scenario, the claims of one concept of justice are likely to undermine fulfillment of another. This dilemma can only be resolved by prioritizing the claims: a process can either afford the due process standards of adjudicative decision-making and accept that the impact on healing and reconciliation will be collateral or longer-term, or it can prioritize healing

and reconciliation by requiring participants (both wrongdoers and those who have suffered wrong) to relinquish the due process expectations of an adjudicative hearing.

An inquiry oriented to the former priority legitimately calls for the service of a judicial commissioner, but the foundation for judicial service in the latter is weaker. Indeed, a judge who transposes familiar adjudicative procedure, including a hearing structure led by lawyers and featuring examinations and cross-examinations, is likely to injure conciliatory goals. If a different procedural approach is required, reinforcing different goals and expectations amongst participants from the outset, then the judge must ask whether he or she has the requisite skills and abilities *beyond* the traditional judicial role to complete the task effectively. Moreover, given that such an assignment will lack the intrinsic assurances of impartiality instilled by adjudication, the judge will be required to verify that acceptance does not impugn judicial independence and integrity. The guidelines of the Australian jurisprudence on incompatibility may prove helpful in this respect.

This dissertation stops short of suggesting that judges refrain from service in non-adjudicative, conciliatory processes. To do so would suggest willful blindness of those instances in which judges have served in such contexts admirably.[76] It would also neglect the growing role of cooperative and restorative proceedings within Canada's justice system, as judges and policy-makers themselves seek-out alternatives to the adversarial hearing of disputes where different notions of justice and conflict-resolution are apt.[77] Judges who have gained expertise in drug courts, unified family courts, or sentencing circles may be well-equipped to assume extra-judicial tasks that engage similar skills and social knowledge.

Fidelity to adjudication does demand a conservative approach, however. It suggests that most judges are normatively and methodologically grounded in the concept of justice instilled by adjudication, and that barring unconventional experience or expertise, judges should err on the side of caution and confine themselves to tasks that call for the enforcement of adjudicative

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[76] Most notably, Justice Murray Sinclair, a judge of Manitoba's Court of Queen's Bench, is the Chair of Canada's Truth and Reconciliation Commission.

[77] See e.g. Susan Goldberg (for the National Judicial Institute), *Problem-Solving in Canada's Courtrooms: A Guide to Therapeutic Jurisprudence* (Ottawa: National Judicial Institute, 2011).

values. A principled boundary to judicial service, and proper alignment of procedural forms and functions, is thus assured, guarding against the encroachment of legal epistemologies on improper terrain.

Conclusion

The examples of polycentricity considered in this chapter are intended to be illustrative, not exhaustive. The central idea they reinforce is that fidelity to adjudication connotes fidelity to the production of a substantive value: the particular assurance of justice derived from a particular manner of participation in a decision-making process. Adjudication may be used to address many different types of dispute, with varying efficacy. But it is justified on principled terms relating to the judicial role under the rule of law where disputes demand an adjudicative standard of justice because they touch specially on the dignity of individuals. The individual participants in the types of inquiry studied in this dissertation were victims of wrongs suffered as a result of serious failures in official accountability, or they were persons whose conduct was subject to scrutiny in a way that was potentially humiliating. The inquiries also involved disputes between participants, both concerning the accuracy of factual allegations and the appropriate standards by which to assess conduct. These characteristics justify and sustain the use of adjudicative procedure, even where adjudication must be integrated with broader inquiry goals focused on polycentric concerns. But where the central value sought from adjudication is absent, or worse, where it is misconstrued as the protection of pecuniary interests rather than pursuit of a legitimate interest in justice, judicial service in an inquiry can be misguided. A prudential approach is warranted so that judges do not impose judicial methodologies on problems demanding the production of entirely different values. I have suggested that this is the case with inquiries focused on questions of scientific fact or tasked with fostering healing and reconciliation.

This chapter has also hopefully reinforced a further important theme of this dissertation. Fidelity to adjudication is not just about protecting judicial independence. The separation of powers protects the integrity of the judicial and political branches of government against mutual encroachment. It accordingly protects the rights of citizens to demand different types of accountability from each branch. Honouring fidelity to adjudication fulfills that accountability as it is demanded of a judge in the execution of an official duty. Where it commands the judge to

decline a proposed duty, it protects the accountability of the political branches to the citizenry, denying them recourse to the judiciary to avoid direct engagement with complex or controversial tasks. Fidelity to adjudication is thus not a matter of amalgamating inquiry processes to the standards of courts. It is about aligning official institutions to appropriate purposive values reflecting ultimate accountability to the public.

Conclusion

There is a principled and important reason for judges to serve in many public inquiries. That reason relates not to a superficial account of the judicial skillset, or to the symbolic values of independence and integrity that judges presumptively bring to any task, but to an alignment between the standard of justice legitimately sought in certain inquiries and that sought in traditional judicial proceedings that touch fundamentally on the dignity of individuals.

Canada's rule of law protects individual dignity by demanding that it be accounted for in all expressions of official power. The right of individuals to seek justification for the individualized effects of official power signifies the central means by which dignity is recognized and protected. All branches of government are obliged to honour this principle, but each does so in a different way. The distinctness of the judicial role under the separation of powers is characterized both by institutional safeguards for independence and by adjudicative procedure. The participatory character of adjudicative decisions ensures a distinctly rational justification for the effects of official power upon individuals, one in which personal equality and dignity are expressly recognized and arbitrary considerations excluded. The same value is rightly demanded by participants in many public inquiries, particularly those that touch on personal experience of injustice and expose individuals to the stigma of serious allegations. This is the reason warranting judicial service in commissions of inquiry, and it should be the judicial commissioner's guide in crafting an inquiry procedure that accounts for the legitimate perspectives and interests of participants.

Commissions of inquiry work to protect the rule of law in investigating matters of pressing concern and restoring confidence in the integrity of public officials and institutions. They are simultaneously expressions of official power in their own right, bound by the rule of law's need for principled justification of their effects on people. Fidelity to adjudication responds to this need by stipulating that the authority of an inquiry is just when those affected by it are afforded equal opportunity to direct the commissioner to the proper interpretation of his or her mandate, and to appropriate evidentiary and procedural standards consequent to that interpretation. A commissioner's further duty to rationally address those claims ensures that inquiry conduct will

be fair and fundamentally just, appropriate to the gravity of interests it engages. Counter-intuitively, it may also diminish the potential for adversarialism by mitigating investigative focus on questions of individual wrong, limiting such questions to circumstances of genuine necessity.

Fidelity to adjudication also transforms the manner in which inquiry participants are viewed. It underscores the necessity of affording genuine procedural equality to participants granted standing on like terms. It treats the inquiry as a truly public enterprise, in which the commissioner cedes a measure of investigative control to participants in recognition of their valid interests and contributions, but does so within the bounds of a clear and credible interpretation of the terms of reference. In so doing, the commissioner not only affords participants appropriate status, but intrinsically reinforces his or her independence as it concerns issues of vital concern to the participants. By validating his or her obligation to hear equally from participants to the extent of their interests, on issues that they reasonably present as relevant to the commissioner's terms, the commissioner precludes the influence of extrinsic or arbitrary influences on the resolution of those issues. This reflects the judicial commissioner's status as an executive appointee bound by judicial ethics to conduct a delegated task in a way consonant with the judicial role under the Constitution.

A focus on the distinct value generated by adjudication also demarcates inquiries ill-suited to judicial service. These will be inquiries where observance of adjudicative procedure may limit institutional potential or inflict damage on alternate values legitimately sought. Judicial reluctance to accept such commissions does not devalue their specific goals and purposes. Rather, it recognizes that those goals and purposes are best left to alternate institutional custodians, and to the creativity and flexibility of the other branches of government. Fidelity to adjudication thus protects judicial independence, but it also corroborates the companion principles of representative and responsible government: it declines recourse to the judiciary where specific issues properly demand direct engagement by officials accountable to elected governments and to the citizenry. This is entirely appropriate under a rule of law that places paramount, coordinate responsibility on all branches of government to exercise authority in a manner responsive to the inherent dignity of individuals, and to the legitimate claims those individuals place on public institutions and officials who serve them.

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