

THE PUBLIC IN ACTION: THE POTENTIAL FOR PUBLIC INQUIRIES TO REALIZE DELIBERATIVE DEMOCRACY A CASE STUDY OF THE MASS CASUALTY COMMISSION

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ABSTRACT

Public inquiries have the potential to promote deliberative democracy. However, the current structure and procedures employed in public inquiries do not promote this goal. Rather, the procedures are based in adversarial methods that do not align with the diverse functions of public inquiries. This paper addresses these procedural shortcomings and seeks to encourage more fulsome public participation. Using the Mass Casualty Commission in Nova Scotia as a case study, this paper proposes procedural changes that could enhance the role of the public in future inquiries to lead to transformative and beneficial policy change.

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Introduction

Public inquiries have the potential to be flourishing sites of deliberative democracy. However, in their current form, public inquiries fail to promote meaningful public participation; they rely on shallow forms of participation that neither challenge the status quo nor prompt radical policy change. In this paper, I argue that public inquiries are well-suited to become spaces of meaningful engagement and deliberative democracy. To accomplish this, public inquiry procedures must be purposefully crafted to be inclusive of the public they seek to engage. Without meaningful public participation, public inquiries become merely another state-created policymaking centre, lacking citizen input. If the purpose of public inquiries is to investigate tragedies and propose recommendations that will be supported in their implementation, the public must be involved. The goal of this paper is to advance the argument that public inquiries have the potential to be forums of deliberative democracy and to propose procedural changes to reach this potential.

In Part I, I explore the role of public participation in public inquiries and the concept of deliberative democracy. This framing supports the argument that public inquiries could be centres for deliberative democracy. Currently, participation is stifled by adherence to procedures that mimic adversarial processes, limiting the expression of a broad diversity of views and the inclusion of all people. To address this problem, I focus on specific procedural elements like the breadth of the mandate, participant standing and funding, and the reliance on adversarial features to determine how public inquiries could be shaped to give the public a more meaningful role. Procedural choices are crucial, as the power of public inquiries lies in how they conduct themselves, not just in the recommendations they propose. Procedures employed in previous public inquiries will be referenced throughout the paper as instances of success (The Berger Inquiry) or failure (The BC Missing Women Commission) of deliberative democracy.

In Part II, I examine the Joint Public Inquiry into the Nova Scotia April 2020 tragedy (also known as the Mass Casualty Commission). Using the criteria developed in Part I, I explain how the Mass Casualty Commission stifled public participation and lacked features of deliberative democracy. Although positive policy change may result from the recommendations, I highlight areas for improvement for future inquiries in developing their procedure to create a more inclusive space that encourages broader diversity of participation.

Finally, in Part III, I make general observations arising from the case study and identify who is best suited to implement these changes. There is no ideal set of

procedures that will work for each public inquiry due to the breadth and range of issues that inquiries address. Therefore, I chose not to recommend a set of procedures, but rather identified changes that could be made to encourage public participation.

I. The Potential for Deliberative Democracy in Public Inquiries

1. Introduction to Public Inquiries

i. Basic Features of Public Inquiries

Public inquiries are independent, temporary bodies convened by governments to examine a particular event or policy issue; they play the role of making recommendations but do not involve themselves in implementing these recommendations. Public inquiries exist outside of traditional policymaking bodies and are established to address issues that the existing branches of government are incapable of handling.¹

As creatures of statute, public inquiries are convened by either the federal or provincial governments. This separation is based on the constitutional division of powers, but governments can come together to convene joint federal-provincial public inquiries. Enabling legislation is similar across jurisdictions and gives wide scope to the Commissioners to tailor the process based on the issue at hand.² The *ad hoc* nature of public inquiries has been credited for their ability to encourage independence and creativity.³

The federal government and all provinces and territories have public inquiry legislation. These statutes give the Governor in Council authority to convene inquiries but leave most procedural decisions up to the appointed Commissioners. For example, the federal *Inquiries Act* only prescribes when an inquiry can be convened, the power to compel evidence, who can be employed by the Commission, and the requirement to provide notice of alleged misconduct.⁴ Notably, prescriptions about public participation are excluded.

¹ Gregory J Inwood & Carolyn M Johns, *Commissions of Inquiry and Policy Change: A Comparative Analysis* (Toronto: University of Toronto Press, 2014) at 8.

² *Ibid* at 12.

³ Stephen Goudge & Heather MacIvor, *Commissions of Inquiry* (Toronto: LexisNexis Canada, 2019) at 10.

⁴ *Inquiries Act*, RSC 1985, c I-11.

Although they span numerous issues, public inquiries can be grouped into two broad categories: investigative and policy advisory.⁵ Investigative inquiries are concerned with a specific event that reveals the need for policy reform. For example, the Walkerton Inquiry investigated Ontario's drinking water system following *Escherichia coli* contamination in the town of Walkerton's drinking water, which resulted in seven deaths.⁶

Policy advisory inquiries often have broader mandates and focus on areas of policy failure whether “economic, social, environmental, or other”.⁷ For example, the National Inquiry into Missing and Murdered Indigenous Women and Girls (the “MMIWG Inquiry”) was a policy advisory inquiry. The MMIWG Inquiry examined the systemic causes of violence against Indigenous women and girls across Canada, investigated cases of women or girls who were murdered or went missing, and considered widespread policy reform to increase their safety and security.⁸ Purely prospective policy advisory inquiries are becoming less common after a tide of commissions in the twentieth century.⁹

The majority of public inquiries combine aspects of both policy advisory and investigative inquiries.¹⁰ As Trebilcock and Austin noted, the Law Reform Commission of Canada, in its Working Paper in 1977 and Report of 1979, advocated for a clear dichotomy between investigative and policy advisory inquiries.¹¹ However, this call never materialized because most inquiries incorporate both functions. This is because isolated incidents leading to public inquiries are often linked to structural causes in need of policy reform.¹² These hybrid inquiries pose a challenge for

⁵ Inwood & Johns, *supra* note 1 at 13.

⁶ Carolyn M Johns, “The Walkerton Inquiry and Policy Change” in Gregory J Inwood & Carolyn M Johns, *Commissions of Inquiry and Policy Change: A Comparative Analysis* (Toronto: University of Toronto Press, 2014) at 214.

⁷ Inwood & Johns, *supra* note 1 at 15.

⁸ “The Mandate of the National Inquiry”, online: *National Inquiry into Missing and Murdered Indigenous Women and Girls* <www.mmiwg-ffada.ca/mandate/> [perma.cc/Q8DY-PY5T].

⁹ Examples of federal policy advisory inquiries are the Royal Commission on Taxation (1962), the Royal Commission on Security (1966), the Royal Commission on Electrical Reform and Party Financing (1989), the Royal commission on Aboriginal Peoples (1991), and Royal Commission on the Future of Health Care in Canada (2001): Michael J Trebilcock, *Public Inquiries: A Scholar's Engagements with the Policy-making Process* (Toronto: University of Toronto Press, 2022) at 28.

¹⁰ Trebilcock, *supra* note 9 at 26.

¹¹ Michael J Trebilcock & Lisa Austin, “The Limits of the Full Court Press: Of Blood and Mergers” (1998) 48:1 U Toronto LJ 1 at 8.

¹² *Ibid.*

designing appropriate processes as they involve both retrospective fault-finding and prospective policymaking. Due to their prevalence, the hybrid inquiries will be the focus of this paper along with the major challenges they pose on the design of procedures.

ii. Convening Public Inquiries

It is “the limitations of the legislative, executive, and judicial branches of government that are often cited as the reasons” for convening public inquiries.¹³ Public inquiries can be convened for any large-scale policy issue that the government is not able to address within existing policymaking bodies:

“The creation of a public inquiry may be considered when the government is facing a difficult and large-scale event, situation or problem that has serious or wide-ranging legal, policy or political consequences and that may detrimentally affect public confidence in public institutions”.¹⁴

Politics also play a role in the decision to convene a public inquiry, which is discretionary rather than mandated by statute.¹⁵ If a government wants to delay its response or shift blame, calling a public inquiry can be a tactical move that takes the heat off the government following a tragedy or failure of public policy. In contrast, governments may be reluctant to convene a public inquiry and public outcry may be required to spur action. For example, the British Columbia Missing Women Commission of Inquiry (the “BC Missing Women Commission”) was called following decades of demonstrations and protests by grassroots women’s organizations, aiming to bring attention to the alarming rate of violence against women in Vancouver’s Downtown Eastside.¹⁶

Some governments seem to favour public inquiries, perhaps to shift blame or because they see the utility of public participation in policymaking. Whatever their rationale, governments that call inquiries choose to open up policy deliberations to

¹³ Inwood & Johns, *supra* note 1 at 15.

¹⁴ Simon Ruel, “The Use of Public Inquiries in Rooting Out Corruption and Collusion – the Canadian Experience” (2020) 31:4 Crim LF 553 at 555.

¹⁵ Goudge & MacIvor, *supra* note 3 at 4.

¹⁶ BC Civil Liberties Association, West Coast Women’s Legal Education and Action Fund & Pivot Legal Society, *Blueprint for an Inquiry: Learning from the Failures of the Missing Women Commission of Inquiry* (Vancouver: BC Civil Liberties Association, 2012) at 5 [BC Recommendations].

the public sphere since an inquiry presumptively holds hearings in public.¹⁷ They are creating the possibility of deliberative democracy, whether that is their goal or not.

iii. Importance of Procedures

In this paper, I focus on the procedures used in public inquiries to determine whether they promote deliberative democracy, rather than focusing on the policy changes following an inquiry. This is because many scholars have argued that the process of a public inquiry can be more meaningful than the recommendations it develops.¹⁸ The government that calls an inquiry ultimately chooses whether to implement the recommendations. Although failing to implement the recommendations may weaken public support for the government, there have been several instances where the recommendations have sat on a shelf for years following an inquiry. The MMIWG Inquiry is a prime example, as scholars have pointed out that the recommendations are “far from being implemented anytime soon”.¹⁹

Although we should be concerned about this lack of implementation, public inquiries can still be effective through their process alone. The process must be rooted in values that meaningfully address the policy issue and are responsive to the concerns of the public. The Commissioners and staff must translate these values into procedures. For example, the Walkerton Inquiry was successful not only because of what it discovered about Ontario’s drinking water system, but because its process was rooted in values of thoroughness, expediency, openness to the public, and fairness. The development of procedures from identified values is important because it sets the stage for more valuable and meaningful public participation that is responsive to the issues. As the 1992 Ontario Law Reform Commission explained, public inquiries:

“... must want to create meaningful change, irrespective of whether its recommendations are adopted or not – it can accomplish such a goal by having a process that becomes the message”.²⁰

¹⁷ Goudge & MacIvor, *supra* note 3 at 5.

¹⁸ Nathalie Des Rosier, “Public Inquiries and Law Reform Institutions: Truth Funding and Truth Producing” (2016) 28:2 CJWL 374 at 376; Liora Salter, “The Two Contradictions in Public Inquiries” (1990) 12:3 DLJ 173 at 182 [Salter, “Two Contradictions”].

¹⁹ Sherry Pictou, “Decolonizing Decolonization: An Indigenous Feminist Perspective on the Recognition and Rights Framework” (2020) 119:1 South Atl Q 371 at 379.

²⁰ Ontario Law Reform Commission, *Report on Public Inquiries* (Toronto: Law Reform Commission, 1992).

The Supreme Court of Canada reinforced this view in *Phillips v. Nova Scotia*:

“A commission has certain things to say to government but it also has an effect on perceptions, attitudes and behaviour. Its general way of looking at things is probably more important in the long run than its specific recommendations”.²¹

Therefore, it is through the selection of procedures that an inquiry can choose to invite deliberative democracy.

2. The Role of Deliberative Democracy

i. The Importance of Deliberative Democracy

Deliberative democracy is a form of public participation that aims to limit the amount of state intervention and emphasizes the role of citizens not typically engaged in policymaking. It advances the idea that “the best policy decisions emerge after careful and thoughtful” dialogue and engagement with affected parties.²² The theory recognizes that laws and policies “are legitimate only to the extent that they are the result of a deliberation among free and equals”.²³ It also recognizes the shortcomings in our current practice of democracy:

“Although a democracy is supposed to offer its citizens opportunities to participate, most citizens are cut off from a meaningful role in ongoing political activities”.²⁴

To address these shortcomings, deliberative democracy aims to increase the perspectives and ideas expressed in public forums so that citizens have an opportunity to participate, beyond just voting.²⁵ As Landmore argues, the concept of deliberative democracy recognizes that voting is not enough to render a decision legitimate. Rather, citizens must have an opportunity to voice their opinions prior to the vote.²⁶

²¹ *Phillips v Nova Scotia* (Commission of Inquiry into the Westray Mine Tragedy, [1995] 2 SCR 97, 124 DLR (4th) 129 at para 64 [*Phillips*]).

²² Leah RE Levac & Sarah Marie Wiebe, *Creating Spaces of Engagement: Policy Justice and the Practical Craft of Deliberative Democracy* (Toronto: University of Toronto Press, 2020) at 7.

²³ Helene Landmore, *Open Democracy: Reinventing Popular Rule for the Twenty-First Century* (Princeton: Princeton University Press, 2020) at 6.

²⁴ Frank Fischer, *Democracy and Expertise: Reorienting Policy Inquiry* (Oxford: Oxford University Press, 2009) at 52.

²⁵ *Ibid.*

²⁶ Landmore, *supra* note 23 at 6.

To be effective, deliberative democracy must also be guided by a commitment to policy justice and anti-oppressive practices, since the opinions of equity-seeking groups are often left out of policy discussions.²⁷

The objectives of deliberative democracy include offering citizens an opportunity to learn, giving citizens a chance to develop their own communication and reflection abilities, seeking to address the limits of the current government structure, and bringing forward new issues and actors into the policymaking arena.²⁸ The ultimate goal of deliberative democracy is arriving at a common, mutual understanding that has collective weight – something that government-made policies lack.²⁹

In their current structure, public inquiries are limited in how transformative and meaningful they can be. As a state-made forum, public inquiries can serve to reinforce existing forms of oppression and colonialism that are “entrenched by broader systems of governance”.³⁰ This is due to the inherent power imbalance and non-neutrality of state-created spaces for public participation. Despite these limitations, public inquiries should not be thrown out altogether. Their potential to incorporate marginalized views through participation can be realized through procedures that are purposely crafted to encourage deliberative democracy.

Why is incorporating deliberative democracy into public inquiries of value? Because democracy is valuable, both intrinsically and in the outcomes it produces. Intrinsically, democracy treats and respects citizens as equals. This is bolstered by the reality that democracy delivers good outcomes.³¹ Bringing democracy into public inquiries in a meaningfully way could turn this somewhat antiquated forum into a policymaking institution that produces valuable and desirable outcomes. As Landemore argues, empowering all citizens equally and giving them a right to inform

²⁷ Levac & Wiebe, *supra* note 22 at 6.

²⁸ Fischer, *supra* note 24 at 8.

²⁹ Liora Salter, “The Public in Public Inquiries” in Laurent Dobuzinskis, Michael Howlett & David Laycock, *Policy Analysis in Canada* (Toronto: University of Toronto Press, 2007) at 293 [Salter, “The Public”].

³⁰ Genevieve Fuji Johnson, “Revelatory Protest, Deliberative Exclusion, and the BC Missing Women Commission of Inquiry: Bridging the Micro/Macro Divide” in Leah RE Levac & Sarah Marie Wiebe, *Creating Spaces of Engagement: Policy Justice and the Practical Craft of Deliberative Democracy* (Toronto: University of Toronto Press, 2020) at 28.

³¹ Landemore, *supra* note 23 at 6.

decision-making is the “best method we have to figure out solutions to common problems”.³²

ii. Public Participation in Public Inquiries

In their current form, inquiries already bring people to the table who otherwise would not have a role in policymaking.³³ However, it is often only corporate groups, formal lobby groups, and government officials who participate.³⁴ This raises the question: How can public participation be increased beyond these groups to ensure true deliberative democracy?

Most commonly, the public can participate in public inquiries through public interest groups or community meetings. Virtually every public inquiry includes the role of public consultation.³⁵ There has been a trend in recent years to go into the affected communities before the start of formal hearings. This was done in the Walkerton Inquiry: Commissioner O'Connor started the inquiry by conducting hearings with residents of the town of Walkerton either publicly or in private. Commissioner O'Connor credited this initial building of trust with the community as a key aspect of the inquiry's success.³⁶ Despite the positive experience of the Walkerton Inquiry, community hearings and consultation can often be shallow and less meaningful to participants, as they are not afforded the same credibility as formal “Participants” in the inquiry.

The objectives and independence of public inquiries demand public participation. Governments convene public inquiries when existing policymaking forums are incapable or unequipped to deal with certain issues. Because of the nature of the events or issues under investigation (often of national or regional significance), public participation must be a cornerstone of the process. This is reinforced by the non-binding nature of the recommendations. Ultimately, the public is responsible for holding the government accountable for implementing the recommendations. If the

³² *Ibid* at 8.

³³ Salter, “The Public”, *supra* note 29.

³⁴ Salter, “Two Contradictions”, *supra* note 18 at 195.

³⁵ Inwood & Johns, *supra* note 1 at 8.

³⁶ Dennis R O'Connor, “Some Observations on Public Inquiries” (Delivered at the Canadian Institute for the Administration of Justice Annual Conference, Halifax, 10 October 2007) [unpublished], online: *Ontario Courts* <www.ontariocourts.ca/coa/about-the-court/archives/publicinquiries/> [perma.cc/3HDT-WJMW].

recommendations fail to reflect public opinion and input, there is no incentive to hold governments accountable. Again, the role of the public was affirmed in *Phillips*:

“Inquiries can and do fulfil an important function in Canadian society. In times of public questioning, stress and concern they provide the means for Canadians to be apprised of the conditions pertaining to a worrisome community problem and to be a part of the recommendations that are aimed at resolving the problem. Both the status and high public respect for the commissioner and the open and public nature of the hearing help to restore public confidence not only in the institution or situation investigated but also in the process of government as a whole”.³⁷

The potential for participation in inquiries is significant. Bessner and Lightstone developed a list of what public inquiries can accomplish: they can provide a forum for concerned citizens to participate in the resolution of issues; they can give the public information upon which to form opinions; they can result in significant impacts on those affected by tragedies through their participation in the inquiry; they can provide healing to affected individuals and communities; and they can divert people from assigning blame to a more constructive role that can lead to reform.³⁸ If realized, each of these accomplishments can increase participatory democracy because people can have their voices heard and contribute to discussions in a thoughtful and productive way. Increasing democratic participation in inquiries could also add to the political legitimacy of the recommendations they produce,³⁹ addressing the common critique that inquiries lack teeth.

The Canadian Commission on Democratic Expression recently used citizens’ assemblies to draft recommendations on combatting disinformation spread online.⁴⁰ The goals of citizens’ assemblies are similar to those advocated for in this paper. They bring together a demographically representative sample of citizens, chosen through sortition, to draft policy recommendations in an effort to overcome political stagnancy in policymaking. Lessons learned from this process could be implemented into public inquiries to encourage democracy while being mindful of the limitations of such a forum.

³⁷ *Phillips*, *supra* note 21 at para 62.

³⁸ Ronda Bessner & Susan Lightstone, *Public Inquiries in Canada: Law and Practice* (Toronto: Thomson Reuters, 2017) at 319.

³⁹ Landemore, *supra* note 23 at 11.

⁴⁰ Doug Beazley, “Breaking the democratic deadlock” (3 July 2023), online: *National Magazine, Canadian Bar Association* <nationalmagazine.ca/en-ca/articles/law/in-depth/2023/breaking-the-democratic-deadlock> [perma.cc/QN3E-8GBG].

iii. Conceptions of the Public

Each public inquiry is unique. It responds to a different set of challenges and seeks to engage different actors. Given this reality, the procedures employed in public inquiries must also be unique. To be responsive, the inquiry needs a clear conception of the “public” it seeks to engage. However, a common problem in public inquiries is not knowing why the public is participating or who constitutes the public.⁴¹

To address this issue, Salter proposed six conceptions of the “public” in public inquiries.⁴² She explained that inquiries should strive to engage multiple conceptions, but one inquiry is unlikely to engage all of them. Early on, an inquiry should consider which conception of the public is best suited to address the issues being examined, with the knowledge that each conception has both advantages and disadvantages.

The first conception is the “public as interest groups” – the most common conception.⁴³ When the public is comprised of interest groups, the policy discussions become negotiations with a compromise of interests. This is a strength because the ultimate negotiated position represents conclusions that multiple groups agree to. However, the downside is that these interest groups are often well-established and frequent participants in the policy discussion. As a result, there is a lack of new perspectives and dialogue from individuals not associated with interest groups.

The second conception is the “public as the disaffected”.⁴⁴ This conception is often seen where a public inquiry aims to be a healing process following a tragedy. The emphasis is on individuals who have been directly impacted and the public inquiry makes space for them to participate. However, this can lead to a one-sided discussion where those not harmed have no voice and are left out of policy discussions.

The third conception is the “public as about discourse”.⁴⁵ When discourse is at the centre of an inquiry, there is a greater potential for new ideas and opinions to emerge. It is through dialogue that deliberative democracy can flourish. The downside of this conception is that those who participate might not be interested or affected parties, but rather busybodies, and discussions can easily veer off course. Additionally,

⁴¹ Salter, “The Public”, *supra* note 29 at 294.

⁴² Salter, “The Public”, *supra* note 29 at 298.

⁴³ *Ibid.*

⁴⁴ *Ibid* at 299.

⁴⁵ *Ibid.*

if radical ideas emerge and are reflected in the recommendations, the government may not welcome or implement them.

The fourth conception is the “public as expert”, an oft-forgotten conception.⁴⁶ When expertise lies with the public, an inquiry must translate public experiences and opinions into policy recommendations. The potential downside with this conception is that the public may be unaccustomed to participating in this manner and be reluctant to engage. This conception was a key feature of the 1974 Mackenzie Valley Pipeline Inquiry (the “Berger Inquiry”) which was established to evaluate the Canadian Arctic gas pipeline proposal from the Yukon through the Mackenzie Valley in Alberta. The Berger Inquiry has been praised as a citizen-focused inquiry that welcomed Indigenous peoples from northern communities into the policy arena.⁴⁷ By framing the public as experts, Commissioner Berger recognized the affected Indigenous communities as knowledge-holders.

The fifth conception is the “public in need of information and education”.⁴⁸ By transmitting information through experts, the idea is that the “newly-educated public will then be in a better position to vote, join pressure groups, and otherwise participate in politics”.⁴⁹ The problem with this conception is that people are inherently skeptical of expert opinion and likely will not be “lining up for this education”.⁵⁰ The struggle lies in delivering the information in a digestible manner and in a place where people are open to hearing it.

The sixth conception is the “public as public opinion”, which relies on public opinion to build recommendations.⁵¹ However, “public opinion” often comes from those who attend hearings and are deemed to represent the public. This pitfall means that perspectives may be one-sided and not truly representative of the public.

While each conception of the public has a unique role in public inquiries, those who create the inquiry often have a predefined image of the public they want to engage and may tend to ignore other useful conceptions. However, the public conception imagined is not always well-suited to the issues. Inquiries can easily replicate procedures from previous inquiries without recognizing that participation

⁴⁶ Salter, “The Public”, *supra* note 29 at 300.

⁴⁷ Stephen Goudge, “The Berger Inquiry in Retrospect: Its Legacy” (2016) 28:2 CJWL 393 at 395.

⁴⁸ Salter, “The Public”, *supra* note 29 at 300.

⁴⁹ *Ibid* at 301.

⁵⁰ *Ibid* at 307.

⁵¹ *Ibid* at 301.

can, and arguably must, look different between inquiries. In the following discussion of procedural elements, the initial framing of the conceptions of the public will influence what procedures are most appropriate and likely to enhance deliberative democracy.

3. Incorporating Deliberative Democracy into Public Inquiries

i. Problems with the Current Procedures in Public Inquiries

If we imagine a public inquiry process that is responsive to and engaged with the public, what procedures would we choose? What would the role of the public be? How would current processes need to change to bring inquiries closer to being forums of deliberative democracy?

These questions will guide the following examination of procedural elements that influence public participation. What follows is a discussion of an ideal system where deliberative democracy is the main goal to be realized from public inquiries. But this will not always be the reality. Sometimes, public participation will take a back seat to issues of privacy, investigative purposes, or other goals. Nevertheless, if a public inquiry is convened, it should presumptively be committed to advancing deliberative democracy.

Currently, public inquiries fail to meaningfully engage with the public because of their top-down power structure that requires participation in a predetermined way.⁵² This rigidity means that inquiries fail to accommodate and welcome diverse groups, resulting in the persistent exclusion of marginalized groups from civic engagement. These problems contribute to the lack of trust between the government convening the inquiry and the participants. Therefore, procedural elements must be based on trust and include key stakeholders from the outset, including in the development of procedures. Ensuring that participants have a meaningful voice in the creation of procedures will move public inquiries toward deliberative democracy.

Several procedural features were discussed following the BC Missing Women Commission. The Commission was called in 2010 and faced immense public criticism, leading to the publication of recommendations for future public inquiries, known as

⁵² Alana Cattapan et al, "Power, Privilege and Policy Making: Reflections on Changing Public Engagement from the Ground Up" in Leah RE Levac & Sarah Marie Wiebe, *Creating Spaces of Engagement: Policy Justice and the Practical Craft of Deliberative Democracy* (Toronto: University of Toronto Press, 2020) at 226.

the “BC Recommendations”.⁵³ As previously discussed, the inquiry was convened after decades of peaceful demonstrations and protests by grassroots women’s organizations and Indigenous groups that called on the government to investigate the prolonged violence. The inquiry’s mandate was to inquire into the investigations of the disappearance of women from 1997-2002 in the Downtown Eastside.⁵⁴ Despite the inquiry emerging from grassroots organizations, these groups had no involvement in the development of procedures. As a result, the inquiry reinforced existing forms of marginalization and oppression that “contributed to the forsaking of so many missing and murdered women”.⁵⁵ A key criticism was about the procedures used in the inquiry, further emphasizing the need to consider deliberative democracy at the outset:

“The design of the process, its management, and its oversight were made by those disengaged from the context in which the Commission’s work took place”.⁵⁶

Similar complaints have been echoed across the country in other public inquiries. During the MMIWG Inquiry, the process was subject to critiques about its narrow engagement and lack of communication with affected groups. Once again, criticism centered around the procedures:

“These critiques not only pointed to insufficient inclusion of key stakeholders in the design of the inquiry and a breakdown in communications throughout the process, but also the state’s failure to build and maintain relationships of trust”.⁵⁷

These excerpts emphasize the failings of public inquiry procedures that neglect the public and represent shallow forms of engagement. For public inquiries to contribute to deliberative democracy, certain procedural elements must be changed. The following analysis examines three procedural elements and their ability to enhance deliberative democracy. These elements were chosen because of their current function of limiting participation and their potential to shift the focus of inquiries to deliberative democracy. This is not an exhaustive list of elements and further research in this area could consider a larger variety of procedural features.

⁵³ BC Recommendations, *supra* note 16.

⁵⁴ *Ibid* at 5.

⁵⁵ Johnson, *supra* note 30 at 26.

⁵⁶ *Ibid* at 37.

⁵⁷ Cattapan et al, *supra* note 52 at 232.

ii. Mandate and Terms of Reference

The convening government sets the inquiry's terms of reference (including their mandate) in an Order in Council made under the enabling legislation.⁵⁸ The terms of reference are legally binding and the mandate prescribes the scope of an inquiry. If an inquiry acts outside their terms, it is acting without jurisdiction.⁵⁹ The government creates the mandate, so "mandates of inquiries by nature are fundamentally reformist" and "the words used in drafting them are not taken lightly by the executive".⁶⁰ As a result, public participation can be stifled early on by a mandate that fails to encourage expansive deliberation of the issues. This is worrisome because the inquiry's mandate is central to its potential to be a forum of deliberative democracy.

An ideal mandate should be sufficiently broad to capture systemic factors and should be developed in consultation with those who are most affected.⁶¹ There are two ways to ensure that the mandate is capable of encouraging meaningful participation. Firstly, through the wording and framing of the mandate itself. This can be accomplished if the government, which sets the mandate, is inclined to encourage participation. Looking at previous inquiries, governments have not often shown this willingness. In the MMIWG Inquiry, deliberative democracy was stifled by the mandate set by the federal government. The government gave specific directions to the Commissioners on how to construct the process, how to receive evidence, and what government action to consider.⁶² This limited the Commissioners' ability to be responsive and receptive to public proposals and perspectives. Another factor is the government's motive for convening the inquiry. If it calls the inquiry for political purposes, it may be less likely to craft a mandate that gives space for public determination of the issues while instead seeking to maintain control of the process.

If the convening government fails to create a mandate that encourages participation, the Commissioners can promote participation by pushing the bounds of the mandate. For example, during the Berger Inquiry, Commissioner Berger recognized how the language of the mandate "could expand or delimit the problem

⁵⁸ Ed Ratushny, *The Conduct of Public Inquiries: Law, Policy and Practice* (Toronto: Irwin Law, 2015) at 262.

⁵⁹ Gerald J Kennedy, "Public Inquiries' Terms of Reference: Lessons from the Past – and for the Future" (2018) 41:1 Man LJ 317 at 318.

⁶⁰ Johns, *supra* note 6 at 218.

⁶¹ BC Recommendations, *supra* note 16 at 6.

⁶² Kennedy, *supra* note 58 at 335.

to be addressed”.⁶³ This recognition prompted Commissioner Berger to strategically broaden the mandate and elicit proposals brought forward by Participants. The mandate itself never changed but Commissioner Berger found ways to work within the confines of the mandate by broadly interpreting it and capturing sub-issues that were relevant to the discussion. This allowed the public to take center stage and led to proposals that were defined by those most affected.

Pushing the bounds of a mandate has the potential to promote deliberative democracy, but it must be done carefully and within legal limits. In *Nova Scotia (Attorney General) v. Nova Scotia (Royal Commission in the Marshall Prosecution)*, the Supreme Court of Canada cautioned that public inquiries that act outside of their terms of reference could face consequences:

“A court may, therefore, confine the Commission to its terms of reference, including disallowing questions outside those terms of reference”.⁶⁴

Transformative ideas and re-imaginings of public policy will only emerge from bold approaches that emanate from those most affected. Therefore, while being cognizant of the legal limits, Commissioners can shape the trajectory of an inquiry and transform an otherwise restrictive mandate into one that fosters deliberations.

iii. Participant Standing, Funding and Support

Over the years, public inquiries have expanded their view of standing so that more parties are granted standing as Participants. For example, a feature that led to the success of the Walkerton Inquiry was the Commission’s expansive view of standing.⁶⁵ However, despite these advances, only parties with pecuniary or legal interests are considered credible in public inquiries.⁶⁶ Not only should standing be more expansive, but the degree of weight and credibility given to Participants should mirror this expansiveness. A criticism of expansive standing is that it leads to increased duration and costs, both of which can diminish public confidence in the

⁶³ Slater, “Two Contradictions”, *supra* note 14 at 181.

⁶⁴ *Nova Scotia (Attorney General) v. Nova Scotia (Royal Commission in the Marshall Prosecution)*, [1989] 2 SCR 788, 62 DLR (4th) 354.

⁶⁵ Allan Manson & David Mullan, “Lessons from Walkerton” in Allan Manson & David Mullan, eds, *Commissions of Inquiries: Praise or Reappraise?* (Toronto: Irwin Law, 2003) at 499.

⁶⁶ Slater, “Two Contradictions”, *supra* note 18 at 187.

inquiry. Therefore, expansive standing must be balanced against these concerns while seeking to promote wide participation.

Granting standing by itself does not guarantee full participation. During the BC Missing Women Commission, although all public interest organizations that applied were granted either full or partial standing, they were denied the right to counsel by the Attorney General.⁶⁷ For this reason, the organizations felt ill-equipped to cross-examine witnesses and address systemic issues. In an attempt to rectify the situation, the Commissioner appointed two independent lawyers, funded by the Commission, to represent all of these diverse organizations. This decision contributed to the unfairness of the process, as the lawyers could not possibly represent all of the distinct interests. As a result, several organizations withdrew.⁶⁸ If deliberative democracy is to be realized, expansive standing must be accompanied by adequate financial resources so that all participants can equally contribute to the discussions.

In addition to funding, there are inherent barriers to participation. Participation in deliberative forums correlates highly with financial resources, civic skills, and educational levels.⁶⁹ People with greater financial resources are often better positioned to influence the outcomes of political activity, while organizations with more civic skills and capacity to communicate their interests are more likely to become involved:

“Social privilege, in short, plays a basic role in determining who does and doesn’t participate in public affairs”.⁷⁰

To rectify this, more attention needs to be given to the question of how to involve people who would not otherwise participate in the policymaking process.

Beyond standing, funding, and wider involvement in public inquiries, participants require better support; this is especially crucial for marginalized participants to ensure their full participation:

“There is a compelling need to recognize that those participating in the Inquiry could face both a compromised reputation as well as a re-traumatization from having to tell their stories. This raises critical questions

⁶⁷ Johnson, *supra* note 30 at 33.

⁶⁸ *Ibid* at 34.

⁶⁹ Fischer, *supra* note 24 at 58.

⁷⁰ *Ibid*.

about the potential role for lawyers, counsellors, advocates and mental health support workers in an Inquiry process”.⁷¹

Standing, funding, and support can facilitate a greater degree of participation in public inquiries. Although these decisions may be subject to approval from the convening government, the Commissioner and their staff should make every effort to create an environment that encourages the exchange of ideas and productive debate.

iv. Adversarial Features

There is a growing concern that public inquiries are overusing adversarial and evidentiary processes traditionally found in legal proceedings. This stifles public participation and could hurt the policy-making goals of an inquiry.⁷² Public inquiries have been criticized for importing “lawyers’ values”, particularly in investigative and hybrid inquiries, where changes in procedures aimed at addressing concerns of civil liberties and due process fail to meet the needs of policymakers.⁷³ As Trebilcock and Austin questioned, “To what extent do lawyers’ concerns inhibit the proper discussion of public business by narrowly restricting the scope of a commission’s inquiry and by hemming in public input with elaborate procedural requirements?”⁷⁴

Public inquiries have different objectives than trials. They are also limited in their ability to make findings of liability and their recommendations are not binding. Given these differences, public inquiries should not be confined by adversarial features. In fact, it is the inquisitorial nature of public inquiries that allows them to uncover the truth more effectively than adversarial proceedings, even during the fact-finding phase of investigative and hybrid inquiries.⁷⁵ The following analysis considers four adversarial elements that, if altered, could encourage deliberative democracy.

First, the cross-examination of Participants does not align with the goals of deliberative democracy. The use of cross-examination encourages witnesses and their counsel to seek every means to protect themselves.⁷⁶ Deliberative democracy will not flourish where Participants are backed into corners during cross-examination or

⁷¹ BC Recommendations, *supra* note 16 at 33.

⁷² Nicholas D’Ombain, “Public Inquiries in Canada” (1997) 40:1 Can Public Adm 86 at 100.

⁷³ Trebilcock & Austin, *supra* note 11 at 9.

⁷⁴ *Ibid.*

⁷⁵ Goudge & MacIvor, *supra* note 3 at 7.

⁷⁶ D’Ombain, *supra* note 72 at 99.

restricted in how they participate. Relying on cross-examination during inquiries risks conflating the importance of small details or inconsistencies in a Participant's testimony. It serves as a way for lawyers to discredit lived experiences and credibility. However, people should be able to contribute to public policy and discuss issues regardless of their perceived credibility or perceived level of intelligence. To avoid the hostility that can arise during cross-examination, it is the responsibility of inquiry counsel and the Commissioner to set an inquisitorial tone from the beginning.⁷⁷

Second, sitting or retired judges are often appointed as Commissioners in public inquiries, especially in investigative inquiries. The rationale is that judges are familiar with the fact-finding process and can go through large evidentiary records.⁷⁸ However, in their role, judges are not oriented towards encouraging broad public participation. In contrast to the judicial role, the role of a Commissioner in hybrid inquiries is multi-faceted and includes being a fact-finder, a proposer for policy reform, a healer for traumatized communities, and an administrative manager.⁷⁹ Public inquiries need Commissioners who are highly attuned to the importance of public participation and who are receptive to ideas brought forward by participants. This is not to say that judges can never accomplish this goal. Justice Berger has been widely praised for his work during the Berger Inquiry in broadening the scope of those consulted and transforming how inquiries conceive of public participation.⁸⁰ However, this appears to be the exception, not the norm. A hurdle in selecting a Commissioner who is willing to encourage deliberative democracy is the fact that the convening government chooses the Commissioner. This will likely continue to be a barrier to achieving deliberative democracy in public inquiries so long as the government seeks to maintain control of the process. Further, concerns about judicial independence from the executive are heightened when Cabinet hand-picks a sitting judge to lead a public inquiry into a politically charged issue.⁸¹ The considerations involved in choosing a Commissioner will also vary depending on whether the inquiry is investigative, policy advisory, or hybrid. While an investigative inquiry may be more suited to the skills of a lawyer or judge, the policy advisory inquiry may require multidisciplinary policy perspectives.⁸²

⁷⁷ Goudge & MacIvor, *supra* note 3 at 15.

⁷⁸ O'Connor, *supra* note 36.

⁷⁹ *Ibid.*

⁸⁰ Salter, "Two Contradictions", *supra* note 18 at 180.

⁸¹ Goudge & MacIvor, *supra* note 3 at 4.

⁸² Trebilcock & Austin, *supra* note 11 at 10.

Third, the form of participation in public inquiries is confined to oral hearings and community meetings. On this issue, the BC Recommendations questioned whether the inquiry process should allow for conversation instead of examination.⁸³ Inquiries should strive to have a process where the form of participation is dictated by the Participants. For example, narrative storytelling has emerged in other forms of civic engagement as a way for participants to contribute to policy discussions while doing so in a way that is natural and comfortable for them:

“It is through the act of storytelling that individuals understand the goals and values of their social groups and communities, internalize social conventions, understand who they are vis-à-vis other members of groups, and how to empathize with one another”.⁸⁴

Giving evidence through narrative storytelling is one way for Participants to meaningfully engage in public inquiries.⁸⁵ Narrative storytelling enhances individual agency, a key feature of full participation, and encourages contributions from those who would otherwise be alienated by the adversarial process. Breaking away from the rigid format of oral hearings and towards a format that encourages debate and discussion would move public inquiries toward deliberative democracy. Community meetings are thought to accomplish this goal. However, as previously discussed, people who participate in these meetings are not given the chance to influence policy and are often not deemed credible enough to influence recommendations.

Fourth, the emphasis given to certain forms of testimony should be re-evaluated. In the adversarial system, expert evidence is often deemed more credible than that of lay people. However, this neglects the viewpoints of “groups at the margin of the dominant culture, in particular those who employ other modes of reason and expression”.⁸⁶ Although expert opinion should continue to have a role in public inquiries, it should not diminish the credibility and deemed utility of other Participants. The Berger Inquiry overcame this problem because Justice Berger recognized that expertise lay in the northern communities who would be impacted by the pipeline and his recommendations reflected the perspectives of these knowledge-holders.⁸⁷

⁸³ BC Recommendations, *supra* note 16 at 41.

⁸⁴ Fischer, *supra* note 24 at 194.

⁸⁵ *Ibid* at 195.

⁸⁶ Fischer, *supra* note 24 at 79.

⁸⁷ Salter, “The Public”, *supra* note 29 at 300.

The Commission of Inquiry on the Blood System in Canada (the “Krever Commission”) serves as an example of the perils caused by strict adherence to adversarial features, especially in hybrid inquiries. The Krever Commission, led by Commissioner Justice Horace Krever, was convened to examine Canada’s blood system and the contamination of blood with HIV and hepatitis C during the 1980s.⁸⁸ It was a hybrid inquiry that sought to investigate what led to the contamination and develop policy changes to prevent a similar tragedy in the future. The Krever Commission adopted a multitude of hearing approaches with 42 counsel appearing for parties with standing and 288 people testifying over 97 days. The inquiry spanned over four years and its initial budget of \$2.5 million ballooned to \$17.5 million. The total public monies spent by participants including governments and the Red Cross was estimated at \$57 million.⁸⁹ The Krever Commission ultimately recommended the creation of a new national blood agency, which the federal and provincial governments had already adopted prior to the completion of the inquiry.⁹⁰ After the Commissioner issued notices to participants who might be implicated in wrongdoing in the final report, participants sought judicial review of the notices at the Federal Court.⁹¹ The Federal Court upheld the notices, although this decision was appealed unsuccessfully first to the Federal Court of Appeal followed by the Supreme Court of Canada. While recognizing that recommendations to ameliorate the blood system are a positive result, the processes employed, the court challenges that derailed progress, and the overall efficiency of the inquiry can be seriously questioned in meeting the goal of promoting deliberative democracy.

The reliance on these adversarial elements continues to plague public inquiries and stifles broader discussions and participation. Deliberative democracy cannot flourish where there are rigid boundaries that curtail the expression of ideas and opinions. In the following section, the use of these elements will be analyzed to determine their effect on encouraging participation.

II. The Mass Casualty Commission – A Case Study

1. Introduction

The Mass Casualty Commission (the “MCC”), a hybrid inquiry, was convened to inquire into the events of April 18 and 19, 2020 where a gunman killed 22 people across central Nova Scotia. Taking a moment to pause, I encourage you to read the

⁸⁸ Trebilcock & Austin, *supra* note 11 at 20.

⁸⁹ *Ibid* at 28-30.

⁹⁰ *Ibid* at 25.

⁹¹ *Ibid* at 22.

commemorations shared by family members and friends about the victims in Part A of MCC's Final Report.⁹² The lives lost and people impacted by the events of April 2020 were central to the MCC throughout its mandate. This should not be overlooked in the examination and critique of the MCC's process that follows.

In the wake of this tragedy, the Governments of Canada and Nova Scotia announced a federal-provincial review of the events. However, there was a public outcry against the review and families of the victims called for a public inquiry that would have the power to compel evidence. In response, the Governments of Canada and Nova Scotia convened the MCC on October 21, 2020.

The MCC adopted values of independence, respect, and transparency with a focus on restorative principles and being trauma-informed.⁹³ Despite this goal, the inquiry's processes drew criticism from Participants and the public. Notwithstanding the release of seemingly strong and broad recommendations, examining the process that led to these recommendations may determine whether they fostered general public participation. In the following sections, select procedural elements of the MCC will be analyzed for their ability to encourage or detract from deliberative democracy.

2. Overall Approach

Before analyzing the procedural elements, it is useful to identify which conceptions of the public the MCC sought to engage. Within Salter's framework, the MCC adopted four conceptions of the public, the dominant of which being the "public as disaffected". This is due to the MCC's purpose behind the inquiry as a healing process for the victims' families and their communities, shaping their trauma-informed approach.

Secondly, the MCC adopted "public as interest groups", with several organizations granted standing and grouped into coalitions based on their purpose. These coalitions included Victim Advocacy Organizations, Health-Related Organizations, Firearm Organizations, Justice Organizations, Gender-Based Organizations, and Police-Related Organizations. Generally, these organizations were well-established interest groups with experience in lobbying and participating in policymaking forums. Thirdly, by adopting the conception of the "public in need of information", the MCC aimed to inform the public about the events of April 18 and

⁹² "Final Report, Volume 1", online: *Mass Casualty Commission*, online: <masscasualtycommission.ca/files/documents/Turning-the-Tide-Together-Volume-1-Context-and-Purpose.pdf> [perma.cc/8X5P-U5YX].

⁹³ Joint Federal/Provincial Commission into the April 2020 Nova Scotia Mass Casualty, *Mass Casualty Commission Interim Report* (Ottawa: Public Safety Canada, 2022) at 21 [Interim Report].

19. Lastly, the MCC engaged the “public as public opinion”. On the MCC’s website, people could share suggestions, email the Commission, or host a group discussion.⁹⁴

Although laudable in its goals, the MCC struggled to put its adopted values into practice. Criticism emerged early on that the inquiry process re-marginalized families and that it lacked transparency. The MCC came about in large part due to lobbying by families of the victims and community members. However, similar to the BC Commission, which also originated from lobbying, the MCC faced criticism as those who advocated for the inquiry felt marginalized by its processes.⁹⁵ Despite being “trauma-informed”, families of the victims felt infantilized instead.⁹⁶

Finally, there was criticism about the amount of time spent gathering documents and conducting interviews “behind closed doors”. This limited transparency and quickly led to frustration among the public.⁹⁷ Carlene Bagley, whose father was killed by the gunman, criticized the lack of transparency provided to Participants:

“How are we just 7 days away and we still do not know who is even going to be called as witnesses, let alone whether or not our counsel can examine witnesses?”⁹⁸

These themes of lack of transparency and marginalization ran throughout the inquiry and were amplified by the choice of procedural elements.

3. Mandate

⁹⁴ “Public Submissions”, online: *Mass Casualty Commission* <masscasualtycommission.ca/proceedings/public-submissions/> [perma.cc/JX79-HWMD].

⁹⁵ Blair Rhodes, “In their final word, families of N.S. shooting victims call commission ‘rudderless’”, *CBC News* (29 November 2022), online: <www.cbc.ca/news/canada/nova-scotia/final-submissions-mass-casualty-commission-portapique-1.6666474> [perma.cc/TL29-236M].

⁹⁶ *Ibid.*

⁹⁷ Haley Ryan, “N.S. shooting inquiry sets example for ‘how not to run a commission’: expert”, *CBC News* (20 October 2022), online: <www.cbc.ca/news/canada/nova-scotia/n-s-shooting-inquiry-sets-example-for-how-not-to-run-a-commission-1.6620042> [perma.cc/6VH6-FQ42].

⁹⁸ Heidi Petracek, “‘We have been let down’: Mass Casualty Commission facing intense criticism from families affected by N.S. shooting”, *CTV News Atlantic* (16 February 2016), online: <atlantic.ctvnews.ca/we-have-been-let-down-mass-casualty-commission-facing-intense-criticism-from-families-affected-by-n-s-shooting-1.5784026> [perma.cc/N4PY-36PS].

On October 21, 2020, the Government of Canada and the government of Nova Scotia issued Orders in Council (OICs) to convene the joint public inquiry.⁹⁹ The OICs set out the inquiry's three-fold mandate:

1. To inquire into and make findings on matters related to the tragedy in Nova Scotia on April 18 and 19, 2020;
2. To examine issues related to the tragedy, including specific listed issues like communication with the public, firearms access, and gender-based and intimate partner violence; and
3. To prepare and submit lessons learned and recommendations that could help prevent and respond to similar incidents in the future.

On its face, the mandate was sufficiently broad to allow the Commission to explore areas of importance. Although it is unclear whether the public was consulted in developing the mandate, the breadth of the mandate is not the source of the problem. Rather, issues emerged in how the Commission carried out the mandate.

4. Standing, Funding, and Support

The OICs directed that those most affected be granted standing to participate. This included the families of the victims and both governments. Advocacy groups and organizations were also granted standing. Notably missing from these groups is the public at large: those who were not directly impacted or affiliated with a public interest organization but who were interested in participating. For example, the MCC denied standing to several individuals who purported to be impacted by the tragedy or had a special perspective to offer.¹⁰⁰ Only two individuals not deemed to be “those most affected” were eventually granted standing.¹⁰¹ This restrictive view of standing does not invite discourse or deliberative democracy because it narrows the voices being heard.

⁹⁹ *Joint Public Inquiry into the Nova Scotia April 2020 Tragedy*, PC 2020-822 (*Inquiries Act*) [Federal Order in Council]; *Joint Public Inquiry into the Nova Scotia April 2020 Tragedy*, PC 2020-293 (*Inquiries Act*) [Nova Scotia Order in Council].

¹⁰⁰ “Participation Decision” (13 May 2021) at 10, online (pdf): *Mass Casualty Commission* <masscasualtycommission.ca/files/documents/Mass_Casualty_Commission_Participation_Decision_May132021.pdf> [perma.cc/Y28B-KALC].

¹⁰¹ “Participation Decision Addendum” (25 June 2021) at 1, online (pdf): *Mass Casualty Commission* <masscasualtycommission.ca/files/documents/Mass_Casualty_Commission_Participation_Decision_Addendum_June252021.pdf> [perma.cc/6PRD-WCBN].

Funding was not an apparent issue for the MCC, as it provided financial assistance to 62 Participants, contributing to their legal costs with a total of \$2.5 million.¹⁰²

Wellness support was advertised to the community through the Commission's 'Community Information Packages'.¹⁰³ However, this too received backlash because families of the victims faced barriers to accessing mental health services. Sandra McCulloch, a lawyer for the families, said:

“When you are scrolling and have to call a list of 10 or 15 current service providers ... that’s just not good enough”.¹⁰⁴

The narrow view of standing and lack of support for those most affected undermined the MCC's intention to serve as a healing process. Ultimately, this alienated Participants from the process and diminished the inquiry's potential of encouraging deliberative democracy.

5. Adversarial Features

i. Cross-Examination

During the MCC, cross-examination played a crucial role. Despite the previous analysis suggesting reduced reliance on cross-examination, it remains an effective tool for eliciting the truth in cases of conflicting evidence within investigative inquiries.¹⁰⁵

However, the form of cross-examination in the MCC drew criticism from Participants. For example, counsel for the families of the victims criticized Commission Counsel for failing to ask follow-up questions, leading to incomplete evidence. Commission Counsel also avoided areas already covered by police

¹⁰² Elizabeth McMillan, “N.S. mass shooting inquiry breaks down how it spent \$25.6M so far”, *CBC News* (21 May 2022), online: <www.cbc.ca/news/canada/nova-scotia/mass-casualty-commission-cost-breakdown-1.6461465> [perma.cc/6EA3-JR3A].

¹⁰³ “Community Engagement”, online: *Mass Casualty Commission* <masscasualtycommission.ca/proceedings/community-engagement/> [perma.cc/ACG7-T8EJ].

¹⁰⁴ Heidi Petracek, “‘It just can’t be left to happen that way again’: Families affected by N.S. call for action, better supports”, *CTV News Atlantic* (4 Nov 2022), online: <atlantic.ctvnews.ca/it-just-can-t-be-left-to-happen-that-way-again-families-affected-by-n-s-shooting-call-for-action-better-supports-1.6138455> [perma.cc/9PHM-P842].

¹⁰⁵ Ryan, *supra* note 97.

statements, notwithstanding their importance.¹⁰⁶ For instance, when Sean Conlogue, the gunman's friend from Maine who supplied him with the firearms used on April 18 and 19, testified, questions about the gunman's history of smuggling firearms into Canada were notably absent.¹⁰⁷ This topic, while perhaps addressed in other criminal investigations, was of significant public interest.

It was also suggested that facts were being concealed and that the Commission was assisting the RCMP in covering up the mistakes in their response on April 18 and 19.¹⁰⁸ The Commission granted accommodation requests to several RCMP members that allowed them to testify remotely and without cross-examination from Participants. Although made in the spirit of being "trauma-informed", the decision was heavily criticized given the importance of these witnesses' evidence. Several families of the victims instructed their counsel not to take part in the hearings as a result of the accommodation decisions.¹⁰⁹ To Professor Ed Ratushny, this decision was misaligned with the MCC's trauma-informed mandate:

"To the average person, he said, this means the commission should consider that the victims' families might need help throughout the process and the inquiry should be "gentle" with them.

Instead, Ratushny said it seems the commission considered trauma-informed through the lens of 'that police officer must feel so badly about this'".¹¹⁰

If cross-examination is deemed necessary in a public inquiry, it should be conducted in a way that is responsive to the public's concerns. Cross-examination that is too adversarial or ignores relevant issues will not encourage public participation.

¹⁰⁶ *Ibid.*

¹⁰⁷ *Ibid.*

¹⁰⁸ Adam Rodgers, "What the MCC Can Learn from Commissioner Stanton's Inquiries Book" (6 June 2022), online (blog): *Adam Rodgers* <adamrodgers.ca/2022/06/06/what-the-mcc-can-learn-from-commissioner-stantons-inquiries-book/> [perma.cc/S2YR-AUMF].

¹⁰⁹ Stephen Kimber, "The Mass Casualty Commission and the Catch-22 of witness 'accommodation'", *Halifax Examiner* (29 May 2022), online: <www.halifaxexaminer.ca/commentary/the-mass-casualty-commission-and-the-catch-22-of-accommodation/> [perma.cc/B22T-CHUH].

¹¹⁰ Ryan, *supra* note 97.

ii. Judges as Commissioners

Three Commissioners were appointed to the MCC. The Chief Commissioner was the Honourable J Michael MacDonald, former Chief Justice of Nova Scotia. Leanne J Fitch, retired Police Chief for the Fredericton Police Force, and Kim Stanton, a Toronto lawyer with experience in constitutional law and public inquiries, were also appointed as Commissioners.¹¹¹

Chief Commissioner MacDonald and Commissioner Fitch were originally appointed to head the independent federal-provincial review of the events of April 18 and 19.¹¹² After public outcry, the public inquiry was called and both appointees were retained to serve as Commissioners. However, the role of a review and public inquiry are distinct and there are different skills that Commissioners should have for each. This raises the concern about whether Commissioners were selected for their ability to encourage public participation.

In 2021, Commissioner Stanton released a book titled *Reconciling Truths: Reimagining Public Inquiries in Canada*. In the book, she provides recommendations about how inquiries can create dialogue on issues of public importance. Her inclination towards creating spaces of public engagement was promising, suggesting that she could shape the MCC into a forum that encouraged deliberative democracy. However, the ability to incorporate these ideas into the MCC was questioned, given the process eventually employed in the inquiry.¹¹³

Despite the relevant background and experience each Commissioner brought to the MCC, the team lacked a social justice or community well-being perspective. Two of the Commissioners had legal backgrounds while one was well-versed in policing. Appointing a Commissioner with a social work background could have avoided the re-marginalization of families of the victims and supported more meaningful participation.

3. Form of Participation

Before public hearings began, the Commissioners spent months gathering documents and conducting closed-door consultations. While important to set the

¹¹¹ “The Commissioners”, online: *Mass Casualty Commission* <masscasualtycommission.ca/about/the-commissioners/> [perma.cc/KP4L-LQTP].

¹¹² Interim Report, *supra* note 93 at 11.

¹¹³ Rodgers, *supra* note 108.

evidentiary foundation, this delay and lack of transparency were heavily criticized. The MCC's decision not to start with community hearings in Portapique, the community most impacted, exacerbated the feelings of distrust among residents.¹¹⁴ If public inquiries are to be responsive to the public affected, they must initiate their work in the affected community, rather than sifting through documentary evidence. More criticisms emerged when the public hearings were held in Halifax, not Portapique.

Notwithstanding the delay in consultation, members of the public who were consulted felt like they had a meaningful opportunity to have their voices heard.¹¹⁵ These testimonials underscore the need for greater public engagement, particularly if an inquiry aims to be a healing process. Jennifer Zahl Bruland, a family member of the victims, John Zahl and Joanne Thomas, expressed her desire to have a greater degree of participation in the inquiry. She voiced her disappointment to the Commissioners in the following statement:

"I appreciate the opportunity to be here, but I also want the three of you to know that I'm extremely disappointed in the commission for not allowing me to provide a live statement in front of the public and all participants. And that my only means of participating has been reduced to providing statement by transcript, where my feelings and emotions can't be seen or heard".¹¹⁶

This statement highlights the importance of allowing the public to participate in a way that is most meaningful to them. It also reinforces the role of narrative storytelling where emotions and feelings can be expressed. Although this was an investigative inquiry where ascertaining evidence about the events was critical, more time should have been spent listening to the experiences of Participants and the public. It is only through public-directed forms of participation that deliberative democracy will flourish.

iv. Expert Evidence

Expert opinion and panels occupied a significant part of the MCC. Expert reports were commissioned on topics like police impersonators, the history of gun

¹¹⁴ Ryan, *supra* note 97.

¹¹⁵ Petracek, *supra* note 104.

¹¹⁶ Nicole Munro, "'The final straw': Victims' families voice disappointments about N.S. mass shooting inquiry", *SaltWire* (3 November 2022), online: <www.saltwire.com/atlantic-canada/news/the-final-straw-victims-families-voice-disappointments-about-ns-mass-shooting-inquiry-100790946/> [perma.cc/M2Y9-FHQ4].

control in Canada, and the structure of rural policing.¹¹⁷ One of these documents alone, the ‘Structure of Policing in Nova Scotia’, was 1562 pages. Professor Ed Ratushny criticized the over-reliance on experts and said that the Commission was in some “academic wonderland ... and they forgot that there’s a reality going on out there”.¹¹⁸ Sandra McCulloch, a lawyer representing the families of the victims, said that too much time was spent on expert panels exploring side issues rather than on the tragedy itself.¹¹⁹ Although the issues were complex, the utility of such in-depth research is questionable, especially when met with criticism from the public about the duration and cost of the inquiry.

Another criticism was that the inquiry was too focused on “paper fact-finding”.¹²⁰ Before the public hearings, the MCC produced dozens of Foundational Documents from information gathered during independent investigations. These findings were about key times, locations, or incidents that formed the factual record for the inquiry.¹²¹ On their website, the MCC said that hearings would provide the chance to fill gaps in these documents and that Participants would be able to review drafts of the documents before their publishing. This approach perpetuates the worrying practice in public inquiries where the Commission dictates the process, while relegating public consultation to the end to review or add suggestions. This process is fundamentally antithetical to deliberative democracy where the public should be central to the decision-making process and recommendations. The problem with this over-reliance on document production without meaningful public involvement runs the risk of leaving important information unchallenged. When an inquiry adopts the conception of the “public in need of information and education”, experts must be able to translate and convey relevant information in a way that is understandable to the public. The over-reliance on lengthy expert reports does not accomplish this goal. Public engagement and deliberative democracy are hindered in an academic setting, which renders the search for information opaque and time-consuming.

6. Final Report and Recommendations

¹¹⁷ “Roundtable”, online: *Mass Casualty Commission* <masscasualtycommission.ca/proceedings/roundtables/> [perma.cc/9UPC-MULV].

¹¹⁸ Ryan, *supra* note 97.

¹¹⁹ *Ibid.*

¹²⁰ *Ibid.*

¹²¹ “What are Foundational Documents?”, online: *Mass Casualty Commission* <masscasualtycommission.ca/about/what-are-foundational-documents/#5-address-any-issues-in-the-foundational-documents-during-public-proceedings> [perma.cc/G5H7-6P4S].

The MCC released its Final Report on March 30, 2023.¹²² The Final Report contained 130 recommendations aimed at various parties: the RCMP, the government of Canada, the government of Nova Scotia, other police agencies, municipalities, and others. Several recommendations included timelines for implementation, with some occurring as early as six months following the release of the Final Report. Key recommendations included were: an external, independent review of the RCMP; closing the RCMP's depot in Regina in favor of a three-year degree-based program; revising the RCMP's national communications policies; establishing a national framework for public alerting systems; declaring that gender-based violence is an epidemic; creating a federal resource hub for victims of mass casualties; and forming a body to ensure the recommendations in the Final Report are implemented.

Despite having reservations throughout the inquiry, family members of the victims were "pleasantly surprised" at the breadth of the recommendations and the strong criticism of the RCMP.¹²³ Several organizations, including the East Coast Prison Justice Society, the Women's Legal Education and Action Fund, and the British Columbia Civil Liberties Association, applauded the recommendations, particularly for their focus on gender-based violence and the promotion of community-focused approaches to public safety.¹²⁴

A lingering concern among Participants and interested parties is whether all of the recommendations will be implemented. A good sign came in September 2023 when the RCMP announced its successful implementation of the two recommendations with a six-month deadline: an external expert review of incident response training for frontline supervisors and publication of a report that explained how the RCMP selects, develops, recognizes, and rewards its commissioned

¹²² "Final Report", online: *Mass Casualty Commission* <masscasualtycommission.ca/final-report/> [perma.cc/8GWF-QPGK].

¹²³ Haley Ryan, "'Somebody is listening:' Families of N.S. shooting victims hope final report brings change", *CBC News*, (30 March 2023), online: <cbc.ca/news/canada/nova-scotia/commissioners-call-for-action-on-hard-truths-in-n-s-shooting-report-1.6796049> [perma.cc/DWL6-R4NG].

¹²⁴ Jennifer Henderson, "Civil liberty groups, Montreal Massacre survivors, and women advocates applaud Mass Casualty Commission report", *Halifax Examiner* (31 March 2023), online: <www.halifaxexaminer.ca/mass-casualty-commission/civil-liberty-groups-montreal-massacre-survivors-and-women-advocates-applaud-mass-casualty-commission-report/> [perma.cc/L4TE-F2ZJ].

officers.¹²⁵ Only time will tell whether this momentum continues and whether other recommendations aimed at structural changes to the RCMP are implemented.

Following the release of the final report, the Provincial and Federal governments launched a Process Monitoring Committee to monitor, report on, and create mutual accountability as various parties respond to the recommendations.¹²⁶ Several family members of the victims, along with representatives from both levels of the government and the RCMP, were appointed as panel members. This is a positive sign indicating that parties will be held accountable in the implementation of the MCC's recommendations.

Overall, the MCC's Final Report and recommendations have been well-received and show signs of bringing change to outdated systems. While the extent of implementation remains to be seen, positive initial steps have been taken. Despite this, the focus of this paper is on the process employed by public inquiries and its promotion of deliberative democracy. There are several lessons to be learned from shortcomings in the MCC's process – all of which must be remembered when examining the recommendations. If open, deliberative democracy is the goal, the question that we must ask when examining the report becomes whether it represents the most desirable outcome for the public, or whether a process more firmly rooted in deliberative democracy could have yielded results more attuned to the needs and wants of citizens.

7. Conclusion

The criticisms faced by the MCC lasted throughout the life of the inquiry. Although the MCC has uncovered enormous amounts of information about the events of April 18 and 19, 2020, investigative success is not a replacement for deliberative democracy. The concerns raised by Participants and the public reveal deeper issues with the process and procedures employed, resulting in a lack of trust and alienation between the inquiry and the public. The danger is that the recommendations will not be supported by the affected communities, leading to a lack of implementation by both levels of government. This fear was expressed by

¹²⁵ "Addressing the Recommendations", online: *Royal Canadian Mounted Police* <rcmp.ca/en/response-mass-casualty-commission/addressing-recommendations> [perma.cc/8QXZ-PFDZ].

¹²⁶ "Progress Monitoring Committee", online: *Government of Nova Scotia* <novascotia.ca/progress-monitoring-committee/> [perma.cc/K37K-CZ76].

counsel for the families of the victims in their closing submissions.¹²⁷ The experience of the MCC highlights a pervasive problem in investigative inquiries: the focus is too often put on uncovering the truth while those most impacted are left in the dark. If public inquiries are to become forums of deliberative democracy, this focus needs to change.

III. General Observations, Recommendations, and Conclusion

Public inquiries have the potential to be flourishing sites of deliberative democracy. Their recommendations, developed independently from the government, could radically change the policy landscape in a way that is more inclusive of the general public and less focused on the perspectives of the select elite. However, to accomplish this, procedures employed in public inquiries must be more welcoming of public opinion and discourse.

At the early stages of an inquiry, the Commissioners should identify the public that they hope to engage. Identifying this conception of the public will aid the inquiry in developing procedures that are responsive to both the issues and the people involved. To be successful, the public should be engaged in the development of procedures.

In order to bring public inquiries closer to being forums of deliberative democracy, procedural elements like the breadth of the mandate, participant standing, and the use of adversarial features must be re-examined. The reliance on adversarial features damages the goals of public inquiries and serves to alienate the public. The use of cross-examination, the choice of Commissioners, the form of participation, and the credibility of witnesses needs to better reflect the distinct goals of public inquiries in order to bring together diverse perspectives and encourage discourse. As seen in the MCC, an inquiry's procedural choices can elicit public criticism and alienate the public. When an inquiry fails to respond to these criticisms, the public may not be motivated to participate or support the implementation of the inquiry's recommendations.

The question remains of who is best positioned to implement these changes given the transient nature of public inquiries. It is unlikely that the convening government will embrace these concepts in the inquiry's mandate. Law reform and legislative changes to the enabling statutes are also not advisable, because a strength

¹²⁷ Patterson Law, "Additional Submissions" (14 November 2022), online (pdf): *Mass Casualty Commission* <masscasualtycommission.ca/files/documents/Additional-Submissions_Patterson-Law.pdf> [perma.cc/9GAP-NEAV].

of inquiries lies in their flexibility, and more detailed prescriptions may not be useful. The Commissioners are well-positioned to implement changes, but they may not necessarily be attuned to the importance of public participation. Historically, the public has played a crucial role in fighting for inquiries to be convened, but their role should not stop there. The duty rests on the public to urge Commissioners and inquiry staff to consider their perspectives and fight to be included in the development of procedures.

The MCC showed early signs of incorporating elements that would encourage wide participation, however, it failed to implement these principles and be responsive to concerns from Participants. Nevertheless, it was moving in the right direction by adopting a trauma-informed approach, granting broad Participant standing and funding, and using forums for participation beyond live testimony. This provides hope that future public inquiries will strive to incorporate the public in meaningful ways. Future research should monitor these improvements and further explore the implementation of procedural changes through additional case studies. Additionally, further research could assess whether certain forms of public participation are better suited for either investigative, policy advisory, or hybrid inquiries.

If public inquiries evolve their procedures to become more inclusive of the public, the resulting recommendations could dramatically transform the policymaking sphere into a “broader, richer, more complex, and more authentically democratic”¹²⁸ forum. Establishing public inquiries as forums of deliberative democracy could strengthen public support for inquiries while also increasing the public’s autonomy and capacity to meaningfully engage in the process. By employing procedural elements that encourage participation, public inquiries could be transformed into unique policy-making spaces that are welcoming of marginalized perspectives. Only then will public inquiries realize their potential as sites of deliberative democracy.

¹²⁸ Landemore, *supra* note 23 at 17.