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Mandates, Legal Foundations, Powers and Conduct of Commissions of Inquiry

*A. Wayne MacKay**

1. COMMISSIONS OF INQUIRY: THEIR NATURE AND IDENTITY

Like so much of “real” administrative law [the role of public inquiries] lies in the borderland between “law”, “political science” and “practical politics”, with the result that few have ventured to explore it, it being too high for the lawyers, too low for the political scientists and too arduous for the practical politicians.¹

As the above quote from John Willis suggests, few have attempted to elucidate the role of public inquiries in Canadian life. With typical legal arrogance I shall ignore the warning that my topic is too “high” for lawyers; take comfort in the fact that it is too “low” for political scientists; and with respect to the challenge that the task would pose for practical politicians, I shall rely on the following pithy observation of a British judge.

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1 J. Willis, “Comment, The Role of the Public Inquiry in Our Constitutional System” in J.S. Ziegel, ed., *Law and Social Change* (Agincourt: The Carswell Company Ltd., 1973) at 98.

My attitude towards political life is much the same as that of a monk towards sex, nostalgic memories of youthful indiscretion, a frank acknowledgment of its attractions and unshakable conviction that I could do better than those currently engaged in it. . .²

Indeed, it may be just as difficult to disentangle law and politics as it is to separate religious and sexual passions. While law has traditionally been presented as more value-neutral than politics, in either its academic or applied form, the inaccuracy of this view of law is becoming widely recognized. Value choices have always been a vital aspect of legal adjudication and the arrival of the *Canadian Charter of Rights and Freedoms* in 1982 has forced judges to be more overt about this aspect of their job.³ The separation of law and politics is more a matter of mythology than fact and nowhere is that more apparent than in the operation of public inquiries. The question that I have been asked to address is what kind of child has been born of this classically Canadian union of law and politics.

Answering the question is far from simple. The varieties of inquiries are as diverse as the legal and political couplings from which they emerge. They range from full-scale royal commissions to the state of Canadian political and economic life to very specific investigations into particular situations. There is a vast difference between the Macdonald Royal Commission on the Canadian Economy, which laid the foundation for free trade with the United States, and a coroner's inquest into the death of a particular individual. Because of the diverse use of the public inquiry device, this classic Canadian institution is suffering from an identity crisis.

The juxtaposition of commissions of inquiry and identity crises provides a quintessential Canadian topic. Sandwiched between our British and French roots and pervasive influences from our American neighbour to the south, Canadians appear to be in a perpetual state of identity crisis. One feature of Canadian political life which might serve to establish a unique identity is the extensive use of public inquiries. If hockey could somehow be worked into this topic the fit would be perfect. Perhaps we can take some consolation from the fact that as I write this article Mr. Justice Dubin is conducting a public inquiry into the use of steroids in Canadian sport. Commissions of inquiry do

2 Sir J. Donaldson, speech given to a High Court Journalists' Dinner, as quoted in "Industrial Relations Court not Political, President Says" *The Times* (1972 November 24) 3.

3 Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982 c. 11. See W. MacKay, "Interpretation of the *Charter of Rights: Law, Politics and Poetry*" in G. Beaudoin, ed., *Charter Cases 1986-87* (Cowansville: Yvon Blais Inc., 1987) at 347.

appear to be part of the Canadian identity, which lends a further air of urgency to solving the identity crisis of the former.

One of the reasons that the nature of public inquiries is confusing is that governments often fail to distinguish between the different kinds of inquiries. It is rare that the orders in council establishing an inquiry actually give it a name. The MacKenzie Valley Pipeline Inquiry or the Berger Commission was not given either of these names in its mandate but it was left to the media to give the inquiry an appropriate shorthand title. In legal terms, there is no real distinction between a public inquiry and a royal commission. In practical terms, the latter title is generally reserved for matters of national significance, for example, The Royal Commission on Bilingualism and Biculturalism. There are no clear rules, however. Given its significance for Canada, the Berger Commission might have been designated the Royal Commission on Northern Gas Pipeline Construction. Similarly, the Commission on the Non-Medical Use of Drugs has often been referred to as the LeDain Inquiry.

The naming of an inquiry can be important. The failure of the government to provide a workable title will leave the matter squarely in the hands of the media. Whatever long title the government might have wished to use, the investigation into the prosecution of Donald Marshall was destined to be the Marshall Inquiry. There has been a clear tendency to personalize commissions of inquiry either in terms of the presiding commissioner or one of the key participants. When the commissioners have names such as LeDain, Berger or Dubin, there is little chance of confusion but when the name is MacDonald, it is not quite so clear. The McDonald Commission on the R.C.M.P. and the Macdonald Royal Commission into the Canadian Economy, while distinguishable, can be easily confused. The Marshall Inquiry and the Sinclair Stevens Inquiry focus on the participants while others such as the Ocean Ranger Inquiry and the Hinton Train Inquiry emphasize the incidents that gave birth to the inquiry in the first place. A focus on the commissioner can also be confusing where he or she has conducted numerous public inquiries as is the case with Charles Dubin and Alexander Hickman. There seem to be no clear rules on naming the commission but it is clear that the name sets the tone for the media coverage of its deliberations.

A central theme of this article is the vital role that the media plays in the operation of an inquiry and its public identity. Whatever the government states in the order in council creating a commission it is unlikely to be reported verbatim in the media. It is the media which must act as an intermediary between the work of a particular commission and the broader public that it is designed to serve. In a time when inquiries are created for a vast array of social problems, the difficulty which the media may have in delineating the role of a particular commission is understandable. Given the significance of the media's role in making commissions effective, I can only urge that they explore the many species that come under the genus "public inquiry."

In a trail-blazing work on Canadian public inquiries Liora Salter and Debra Slaco set out two major categories.⁴

Inquiry as a Research Study	Inquiry as Arbitration
An inquiry that views itself as a research study must have some means, either within or separate from it, of generating independent data.	An inquiry that uses the arbitration model is highly dependent upon the quality of research brought into the process.
An inquiry that uses the research model can take the complexity of information, the inter-relationship of variables and the conflicting views of scientists into account.	An inquiry that uses the arbitration model forces scientists to speak a language that lay people can understand. It reduces complexities to problems which are manageable and translates science and technology into something which is seen to have important public effects.
An inquiry that uses the research model is sensitive to that which is not known and it becomes as open-ended as science itself.	An inquiry that uses the arbitration model forces closure on issues.

While the focus of the authors was on scientific inquiries, their models have a broader application as well. The Macdonald Royal Commission on the Canadian Economy was primarily within the "Research Study" model and aimed at an open-ended inquiry into the Canadian economy and political state. It remained for the Canadian public in the 1988 federal election to "arbitrate" in a closed fashion on the recommendation of free trade with the United States, which emerged from the Macdonald Commission. Some inquiries could adopt both models at different stages in their operation. The early stages of the Nova Scotian Marshall Inquiry were concerned with the wrongful prosecution of Donald Marshall and conducted more like an arbitration. In the latter stages of the Inquiry, when the commissioners directly explored the problem of racism in the Nova Scotia justice system, they operated more under the research study model. The same dual approach may be

4 L. Salter and D. Slaco, *Public Inquiries in Canada* (Hull: Canadian Government Publishing Centre, 1981) at 160.

adopted by Mr. Justice Dubin to separate the specific facts surrounding the Ben Johnson case and the wider social problem of steroid use by Canadian athletes.

In an earlier work, former Supreme Court Justice Gerald LeDain divides public inquiries into three major categories.⁵

1. Determination of Public Policy
2. Review of Political Judgment
3. Determination of Guilt or Innocence

As with the previous typology, these categories are not mutually exclusive and wide-ranging inquiries such as Nova Scotia's Marshall Inquiry may involve the performance of all three functions.

In the preceding piece in this volume, Frank Iacobucci, now chief Judge of the Federal Court, explores the origins of inquiries and the pros and cons of using a commission of inquiry compared to other governmental devices.⁶ Concerns about cost, judicial overkill and delay are particularly acute with the wide-ranging inquiries designed to determine public policy. The role of lawyers is also less obvious in policy inquiries such as the Macdonald Royal Commission on the Canadian Economy. There was some recognition of this fact in the absence of a commission counsel for the Macdonald Commission, although the Hon. Donald Macdonald is a lawyer by profession, as well as politician.

A review of political judgment is often the most controversial kind of inquiry for a judge to become embroiled in. The genesis of such a commission is often the desire of the relevant political actors to avoid a hot political issue, by putting it in the judicial deep freeze. One of the dangers of these inquiries is that the judge who agrees to preside over a review of political judgment puts his/her reputation for objectivity on the line and rarely escapes totally unscathed. A classic illustration of this problem was the involvement of Mr. Justice Spence in the Gerda Munsinger Inquiry in the mid-1960s. He was forced to walk the narrow line between law and politics with only partial success. The dangers implicit in this exercise have not scared away all judges. Chief Justice Parker's Sinclair Stevens Inquiry and former Supreme Court Justice Estey's Banking Inquiry are two recent examples of judges reviewing acts of political judgment.

An inquiry into the guilt or innocence of particular parties most clearly draws upon the skills of lawyers. The concerns about fair process and accurate

5 G. LeDain, "The Role of the Public Inquiry in Our Constitutional System" in J.S. Ziegel, ed., *supra*, note 1.

6 Chapter 1, *Commissions of Inquiry and Public Policy in Canada* at 1.

facts, which lawyers bring to such an investigation, are vital. There are, however, concerns about prejudicing the rights of individuals in later judicial proceedings by compelling them to take part in a highly public inquiry process. In addition to the potential problems of self-incrimination, there are real difficulties in maintaining a presumption of innocence in later court proceedings. These kinds of problems were highlighted in Mr. Justice Grange's Susan Nelles Inquiry into the infant deaths at the Toronto Hospital for Sick Children. I shall explore the threat to individual rights posed by commissions of inquiry later in this paper.

2. BROAD MANDATES AND CONSTITUTIONAL LIMITATIONS

The mandates of commissions of inquiry are as varied as the orders in council or other legal mechanisms used to establish them. Some of the tasks to be carried out would normally include: ascertaining the facts, identifying the relevant issues, researching problems, educating the public on certain issues and making recommendations on matters of public policy. While created by government, one of the major attractions of an inquiry as an instrument of public policy is its independence from the governments of the day. They are special creations of the executive branch but are not answerable to it, as is a regular government department. Terms of reference for commissions of inquiry are usually broadly stated and governments have little control over the shape or direction of the inquiry.

In their procedures and operations, commissions of inquiry sometimes resemble courts but they are not a branch of the judiciary. Mr. Justice David McDonald, in a ruling during the R.C.M.P. Commission, put the issue succinctly. "The Executive Branch through its chosen Executive instrument, is examining itself."⁷ Liora Salter in her contribution to this volume refers to the advantages of "putting the state on trial"⁸ and at the same time allowing democratic input into the making of government policy.

Both federal and provincial governments have enacted inquiries statutes conferring broad powers on the executive to set up such bodies. There are also a number of other federal⁹ and provincial statutes containing powers to establish commissions, either under the relevant inquiries statute or otherwise. Once an inquiry has been created there is a dearth of guidance on how it should proceed. Anthony and Lucas have written *A Handbook on the Conduct*

7 *Re RCMP Commission* (1978), 94 D.L.R. (3d) 365 at 370.

8 Chapter 11, *The Two Contradictions in Public Inquiries* at 173.

9 Law Reform Commission of Canada, *Commissions of Inquiry — Working Paper 17* (Ottawa: Minister of Supply and Services, 1977) at 77–86 contains a list of the relevant federal statutes.

of *Public Inquiries in Canada*¹⁰ which is a well documented analysis of the proper role of inquiries within the Canadian legal system. For most front-line commissioners, the operations "Bible" is Harry Wilson's *Commissions of Inquiry: A Handbook on Operations*.¹¹

The breadth of the legislative mandate available to commissions of inquiry is best illustrated by quoting from a couple of representative statutes. Section 2 of the federal *Inquiries Act*¹² states:

The Governor in Council may, whenever the Governor in Council deems it expedient, cause inquiry to be made into and concerning any matter connected with the good government of Canada or the conduct of any part of the public business thereof.

An equivalent section in Nova Scotia's *Public Inquiries Act*¹³ reads:

The Governor in Council may whenever he deems it expedient cause inquiry to be made into and concerning any public matter in relation to which the Legislature of Nova Scotia may make laws.

As the latter portion of the Nova Scotia statute emphasizes and the federal statute alludes to in more general terms, a commission of inquiry must operate within the constitutional authority of the level of government which created it.¹⁴ These constitutional limits on the mandate of inquiries distinguish them from other forms of public policy research.

In *Di Iorio v. Montreal Jail Warden*,¹⁵ it is established that there are constitutional limits on the operation of a provincial inquiry. There are suggestions that a provincial inquiry can touch on federal issues and possibly even recommend changes in federal laws but could not directly inquire into a federal matter. In *A.G. (Quebec) v. A.G. (Canada)*,¹⁶ the Supreme Court held that the federal Solicitor General could not be subpoenaed to appear before the Quebec crime commission. The principles enunciated in the previous two

10 R. Anthony and A. Lucas, *A Handbook on the Conduct of Public Inquiries in Canada* (Toronto: Butterworths, 1985). I am indebted to their research and organization in this part of my paper.

11 H.A. Wilson, *Commission of Inquiry: A Handbook on Operations* (Ottawa: Supply and Services Canada, 1983).

12 *Inquiries Act*, R.S.C. 1985, c.I-11, s.2.

13 *Public Inquiries Act*, R.S.N.S. 1967, c. 250, s.1.

14 *A.G. (Quebec) v. A.G. (Canada)*, [1979] 1 S.C.R. 218, 6 C.R. (3d) 145, 43 C.C.C. (2d) 49, 90 D.L.R. (3d) 161, 24 N.R. 1.

15 [1978] 1 S.C.R. 152, 35 C.R.N.S. 57, 8 N.R. 361.

16 *Supra*, note 14.

cases on the federal limits of commissions of inquiry were reaffirmed in the recent Supreme Court decision in *O'Hara v. B.C.*¹⁷

The Marshall Inquiry in Nova Scotia has spawned some fundamental constitutional questions of a different type. In a precedent-setting ruling, the Nova Scotia Supreme Court, at both the trial and appeal divisions, held that Ministers of the Crown could be compelled to testify about cabinet conversations germane to the compensation of Donald Marshall Jr.¹⁸ The convention of cabinet confidentiality had to give way, in controlled circumstances, to the proper administration of justice in the form of a full public inquiry. Commission counsel did not have the same success in compelling the judges of the Nova Scotia Supreme Court Appeal Division to appear before the Marshall Inquiry.¹⁹ In the Marshall situation, concerns about the objectivity and independence of the judiciary won over the potential value of the judges' testimony in the proper administration of justice. Having opened the cabinet room to the Marshall Inquiry, Nova Scotian judges were not so willing to open the door to their own chambers of deliberation.

The *Charter of Rights and Freedoms* introduced as part of the *Constitution Act, 1982*²⁰ also places constitutional limits on the operations of commissions of inquiry. In large measure, the *Charter* will reinforce the statutory and common law protections for individual rights that are already present in the inquiry process. Anthony and Lucas argue in their book that the *Charter* may even place limits on the creation of a commission of inquiry.²¹ They cite as an example the possible violation of freedom of religion in setting up an inquiry into a particular religious group. Except in most unusual circumstances, I doubt that the substantive provisions of the *Charter* would bar the creation of a particular inquiry. However, the legal rights contained in sections 7 to 14 of the *Charter* will have an impact on how commissions operate once they have been established. The net result of this impact will be the enhancement of the rights of the individual caught up in the inquiry process.

17 *O'Hara v. B.C.*, [1987] 2 S.C.R. 591, 19 B.C.L.R. (2d) 273, [1988] 1 W.W.R. 216, 38 C.C.C. (3d) 233, 45 D.L.R. (4th) 527, 80 N.R. 127.

18 *A.G. (Nova Scotia) v. Royal Comm. into the Donald Marshall Jr. Prosecution* (1988), 222 A.P.R. 183, 87 N.S.R. (2d) 183, 44 C.C.C. (3d) 330, 54 D.L.R. (4th) 153 (C.A.).

19 *A.G. (Nova Scotia) v. Royal Comm. into the Donald Marshall Jr. Prosecution* (1988), 222 A.P.R. 443, 87 N.S.R. (2d) 443, 46 C.C.C. (3d) 191 (C.A.); leave to appeal to S.C.C. granted (1989), 89 N.S.R. (2d) 90 (note) (S.C.C.).

20 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11.

21 *Supra*, note 10 at 9.

3. THREATS TO INDIVIDUAL RIGHTS IN THE INQUIRY PROCESS

Nowhere are the distinctions between lawyers' values and policy makers' values likely to be more pronounced than in the protection of individual rights in the inquiry process. The public policy role of an inquiry requires a high degree of flexibility and discretion which will be stifled if too many procedural and legalistic protections are placed upon its operation. From the lawyer's perspective the failure to provide individuals with proper legal safeguards would render the inquiry process fundamentally unfair. The challenge is to strike the proper balance between creative articulation of public policy and the proper protection of the rights of the individuals involved in the process. The difficulty in striking this balance was dramatically exemplified in the Susan Nelles Inquiry presided over by Mr. Justice Grange and discussed in his contribution to this volume.²²

There are a number of dangers to the rights of individuals implicit in the inquiry process. By design, commissions of inquiry provide fewer procedural protections than are available in the courts. This can lead to problems such as self-incrimination which can disadvantage an individual in later criminal proceedings. While the consequences are less severe, a commission's determination of culpability can significantly affect later civil proceedings as well. Unlike preliminary inquiries, commissions of inquiry are highly public and individuals can suffer a loss of reputation regardless of the ultimate findings. The fact that many different proceedings can converge on a single situation creates the impression of double or triple jeopardy without the protection that would accompany such a legal conclusion. As an example, a single case of police misconduct could produce an internal investigation, an inquiry, a human rights complaint, civil proceedings and a criminal prosecution.

Some statutory protections are built into inquiries Acts in recognition of the need to protect individuals in the inquiry process. Under the federal statute, affected individuals have the right to be represented by legal counsel²³ and any person against whom there is a charge or allegation of misconduct has a right to notice of such charge or allegation.²⁴ Similar kinds of statutory protections also exist at the provincial level.²⁵ However, the degree of protection varies from one province to another. For example, Nova Scotia's Act provides, in rather open-ended fashion, for "full investigation of the matter" and pays little attention to the protection of individual rights.²⁶

22 Chapter 9, *How Should Lawyers and the Legal Profession Adapt?* at 151. See also: *Nelles v. Grange* (1984), 42 C.P.C. 109, 9 D.L.R. (4th) 79, 3 O.A.C. 40 (C.A.).

23 *Inquiries Act*, *supra*, note 12, s.12.

24 *Inquiries Act*, *supra*, note 12, s.13

25 *Public Inquiries Act*, R.S.O. 1980, c.411, s.5.

26 *Public Inquiries Act*, *supra*, note 13, s.3.

The problems of protecting individuals involved in a commission of inquiry are accentuated by the barriers to judicial review of commission determinations. There is no direct form of repeal, appeal or review of the findings of an inquiry.²⁷ In Ontario, there is a "stated case" mechanism available²⁸ while Quebec, at the other end of the judicial access spectrum, appears to severely limit judicial review of inquiries.²⁹ At the federal level, the availability of judicial review depends upon untangling the mess of sections 18 and 28 of the *Federal Court Act* and drawing the line between administrative and judicial decisions.³⁰

One of the potential problems with traditional judicial review of inquiries is that their role is to advise and make recommendations rather than to make the final decisions on matters. Traditionally judicial review has only been available at the final decision stage and not an intermediary advisory stage.³¹ This position has been softened by the evolution of the doctrine of fairness even for administrative decision making. In *Re Abel and Advisory Review Board*,³² Mr. Justice Grange applied the procedural rules of fairness to the decision of an advisory body. There is some judicial support for taking this same approach with respect to the decisions of a commission.³³

Statutory provisions under the federal *Inquiries Act* add to procedural protections at common law by imposing a right to counsel under section 12. Like most guarantees of a right to counsel, there are no provisions for funding this legal representation and this is a real economic barrier to the involvement of groups and individuals in complex inquiries. As inquiry processes become more judicial in their character, the economic hurdles to citizen participation increase, unless the government is willing to pay the legal expenses of the participants.³⁴ In the famous *Landreville v. R.*,³⁵ findings of Mr. Justice Rand were struck down 11 years after the fact on the basis of improper notice pursuant to section 13 of the federal *Inquiries Act*.

27 *Supra*, note 10, chapter VIII. This chapter provides a thorough analysis of the availability of judicial review.

28 *Public Inquiries Act*, *supra*, note 25, s.6.

29 *Public Inquiry Commissions Act*, R.S.Q., c.C-37, s.17.

30 R.S.C. 1985, c.F-7, s.18, s.28.

31 *Guay v. LaFleur*, [1965] S.C.R. 12, [1964] C.T.C. 350, 64 D.T.C. 5218, 47 D.L.R. (2d) 226.

32 (1979), 24 O.R. (2d) 279, 46 C.C.C. (2d) 342, 97 D.L.R. (3d) 304 (Div. Ct.), affirmed (1980), 31 O.R. (2d) 520 56 C.C.C. (2d) 153, 119 D.L.R. (3d) 101 (C.A.).

33 One judge in *Fraternité Inter-Provinciale des Ouvriers en Électricité v. Office de la Construction du Québec* (1983), 148 D.L.R. (3d) 626 (Que. C.A.), applied the doctrine of fairness to commissions.

34 Various groups appearing before Nova Scotia's Marshall Inquiry were funded by the government of Nova Scotia. Similarly Sinclair Stevens' legal fees were covered at the federal level. These are exceptions.

35 [1977] 2 F.C. 726, 75 D.L.R. (3d) 380 (T.D.).

The newest avenue of judicial review on both the substantive and procedural aspects of the work of commissions of inquiry is the *Canadian Charter of Rights and Freedoms*.³⁶ In all likelihood it is the legal rights contained in sections 7 to 14 of the *Charter* which will have the major impact on administrative action generally and commissions of inquiry in particular. It is possible that substantive guarantees such as the fundamental freedoms in section 2 and the equality guarantees in section 15 could be used to challenge the way in which a particular inquiry operates. For example, it might have been argued that nurses were singled out in the Susan Nelles Inquiry and given less favourable treatment than doctors. Such an argument is unlikely to meet the judicial threshold for equality rights,³⁷ but the potential for such arguments is present.

A major concern for people appearing before commissions of inquiry is self-incrimination. In some cases the evidence may be used in later proceedings, or if the *Charter* or statutory protections prevent that, it may be used as a way of obtaining derivative evidence of an offence. In recognition of this problem the self-incrimination protections of both federal and provincial evidence Acts have been applied to commissions of inquiry.³⁸ The extent to which the *Charter* may be used to supplement this statutory protections is not yet clear.

The relevant *Charter* provisions are sections 11(c) and 13 which read as follows:

11. Any person not charged with an offence has the right

. . .

(c) not to be compelled to be a witness in proceedings against that person in respect of the offence;

13. A witness who testifies in any proceedings has the right not to have any incriminating evidence so given used to incriminate that witness in any other proceedings, except in a prosecution for perjury or for the giving of contradictory evidence.

36 *Supra*, note 20, s. 52.

37 *Andrews v. Law Society of B.C.*, [1989] 1 S.C.R. 143, 34 B.C.L.R. (2d) 273, [1989] 2 W.W.R. 289, 10 C.H.R.R. D/5719, 36 C.R.R. 193, 56 D.L.R. (4th) 1, 91 N.R. 255. The articulation of a judicial standard of equality is in its infancy.

38 *Canada Evidence Act*, R.S.C. 1985, c.C-15, s.5. See also the *Public Inquiries Act*, *supra*, note 25, s.9 which deems a witness to have objected to answer any question on the ground that his answer may tend to incriminate her or him. This section also requires the commission to inform the witness of her/his right to object to answer any question under s.5 of the *Canadian Evidence Act*.

In order to claim the protection of any of the section 11 guarantees, the claimant must be a person "charged with an offence". The Supreme Court of Canada in *Wiggelsworth v. R.*³⁹ has read that phrase to limit the reach of section 11 to criminal and quasi-criminal proceedings. The same approach has been applied in the context of an inquiry into alleged police abuse of a prisoner in *Robinson v. British Columbia*.⁴⁰ In the latter case, the British Columbia Supreme Court held that the person was governed by proceedings under an order in council and was in no way charged with an offence. Accordingly, any claim should be made under section 13 of the *Charter* at the point where damaging evidence might be used in a later proceeding, but could not be presently made under section 11(c).

For the purposes of challenging administrative procedures, the key *Charter* provision is section 7, which reads:

Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

Section 7 may also be used to supplement other legal rights in the *Charter*. If so, this may further limit the state's ability to obtain evidence. The use of section 7 to expand rights expressly listed in the *Charter* can best be demonstrated by cases concerning an individual's section 11(c) and section 13 rights against self-incrimination. This case study also provides an example of section 7 as the umbrella provision encompassing the other legal rights in sections 8 to 14.

In two important cases, *R.L. Crain Inc. v. Couture and Thompson Newspapers Ltd. v. Director of Investigations and Research, Combines Investigation Act*,⁴¹ the applicants sought to have struck down as a violation of section 7, the inquiry procedures under the *Combines Investigation Act*,⁴² particularly section 17 (now section 19) which authorizes the Director to order the examination of witnesses under oath. The purpose of the inquiry is to gather evidence to be submitted either to the Attorney-General of Canada or the Minister of Consumer and Corporate Affairs. The information gathered

39 *Wiggelsworth v. R.*, [1987] 2 S.C.R. 541, 28 Admin. L.R. 294, 60 C.R. (3d) 193, [1988] 1 W.W.R. 193, 37 C.C.C. (3d) 385, 32 C.R.R. 219, 45 D.L.R. (4th) 235, 81 N.R. 161, 24 O.A.C. 321, 61 Sask. R. 105.

40 [1986] 4 W.W.R. 729, 3 B.C.L.R. (2d) 77, 28 C.C.C. (3d) 489 (S.C.).

41 *R.L. Crain Inc. v. Couture* (1983), 30 Sask. R. 191, 10 C.C.C. (3d) 119, 6 D.L.R. (4th) 478 (Q.B.) and *Thompson Newspaper Ltd. v. Canada (Director of Investigations and Research)* (1986), 57 O.R. (2d) 257, 55 C.R. (3d) 19, 30 C.C.C. (3d) 145, 12 C.P.R. (3d) 97, 34 D.L.R. (4th) 413, 17 O.A.C. 330 (C.A.).

42 R.S.C. 1970, c.C-23 (now R.S.C. 1985, c.C-34; renamed R.S.C. 1985 (2nd Supp.), c.19).

may form the basis for a subsequent criminal prosecution. The applicants argued that such an inquiry forced them to incriminate themselves.

The argument was brought under section 7 because neither section 11(c) nor 13 was of use to the applicants. Section 11 applies only to persons "charged with an offence", and thus was not available to the applicants. Section 13, which is echoed in section 5(2) of the *Canada Evidence Act*, would prevent the admission of the answers given at the inquiry into evidence at future proceedings, but it would not prevent the police from using the answers given at the inquiry as clues in their investigation. In both cases, the courts found that the specific enumerated rights in sections 8 through 14 are merely illustrative of the larger section 7 rights, a conclusion in accordance with the Supreme Court ruling in *Reference Re s.94(2) of the Motor Vehicle Act (B.C.)*.⁴³

In *Crain*, the court found that section 7 recognizes the principles that the individual is sovereign and that there are limits to the valid exercise of governmental authority. One limit " . . . is that a person should not be compelled to incriminate himself".⁴⁴ Since the grounds for commencing an inquiry under the *Combines Investigation Act* are all predicated on a suspicion of wrongdoing, with no requirement that the suspicion be reasonable; since the witness can be compelled to answer an unrestricted range of questions; since the suspect need not be informed of the allegations against him; and since section 17 "may be an integral step in an eventual criminal prosecution of a suspected person", the section violates section 7 of the *Charter*.⁴⁵ The court declared the offending sections to be of no force and effect.

In *Thompson*, however, the court found that, while sections 8 to 14 are specific illustrations of the greater rights set forth in section 7, the only rights against self-incrimination are found in sections 11(c) and 13 of the *Charter*. The court adopted the reasons of Holland J. at trial which, apparently, applied the maxim *expressio unius est exclusio alterius* to illustrate that

The rights set out in section 11(c) and section 13, then, are the only rights against self-incrimination which are so deeply rooted in our law and tradition as to be fundamental. There is no residual right to fall within the ambit of the section 7 term 'fundamental justice'.⁴⁶

43 *Ref. Re. B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486, 69 B.C.L.R. 145, 48 C.R. (3d) 289, 36 M.V.R. 240, [1986] 1 W.W.R. 481, 23 C.C.C. (3d) 289, 18 C.R.R. 30, 24 D.L.R. (4th) 536, 63 N.R. 266.

44 *Supra*, note 41 at 213.

45 *Supra*, note 41 at 220.

46 *Thompson Newspapers Ltd. v. Canada (Director of Investigation and Research)* (1986), 54 O.R. (2d) 143, 25 C.C.C. (3d) 233 at 271, 9 C.P.R. (3d) 72, 21 C.R.R. 1, 26 D.L.R. (4th) 507 (H.C.).

Since section 17 of the *Combines Investigation Act* did not infringe section 7 of the *Charter*, it was valid. An argument which contended that section 17's provisions concerning disclosure of documents was a violation of section 8 of the *Charter* was accepted at trial, but rejected on appeal.

Both the disclosure and the compulsory delivery of documents at an inquiry could trigger a challenge based on the guarantees of section 8 of the *Charter* which reads:

Everyone has the right to be secure against unreasonable search or seizure.

As with the *Thompson* case above, this was given little force in the civil proceedings of *Gershman Produce Co. v. Motor Transport Bd.*⁴⁷ The court held that any section 8 rights would arise at the point of seizure and not upon the board's demand for the delivery of the documents. There is also an interesting question about whether evidence obtained in an unconstitutional manner could be excluded before a commission of inquiry under section 24(2) of the *Charter*. Such an interpretation does not appear likely to me but the point is yet to be decided.

While other legal rights may be relevant to the operation of commissions of inquiry, such as the right to have an interpreter under section 14 of the *Charter*, the examples given make the point that the courts have been cautious in extending *Charter* guarantees to the administrative domain. This general approach to administrative decisions has been expressly emphasized in the inquiry context. In respect to the section 7 argument in *Robinson v. British Columbia*, Legg J. stated:

I agree with counsel for the Attorney General that the commission of inquiry appointed by the Order in Council is a recommendatory, not an adjudicative, body. It will report findings to the Lieutenant Governor in Council. It will make no determinations as to guilt or innocence or civil or criminal liability. It cannot terminate the employment of or otherwise discipline any person. Nor will its report necessarily lead to any subsequent proceedings against anyone. That being so, it cannot be said that the inquiry will deprive any person of liberty or security of the person: see *Di Iorio*, supra, at 35 C.R.N.S. 57 at 76, per Dickson J.; and *Anderson v. Laycraft, Commr. of Inquiry* (1978), 5 Alta. L.R. (2d) 155, 39 C.C.C. (2d) 217 (sub nom. *Re Anderson and Royal Comm. into Activities of Royal Amer. Shoes Inc.*), 82 D.L.R. (3d) 706 at 713 (T.D.).

It cannot be presumed that the proceedings before the commissioners appointed under the Order in Council will not be in accordance with the "principles of fundamental justice". Rather, it must be presumed that they will be. If they are not, they may be susceptible to judicial review at an appropriate juncture.⁴⁸

47 16 Admin. L.R. 1, 37 M.V.R. 96, [1986] 1 W.W.R. 303, 17 C.R.R. 132, 22 D.L.R. (4th) 520, 36 Man. R. (2d) 81.

48 *Supra*, note 40 at 747.

This distinction between advisory and adjudicative functions is somewhat surprising in light of the Supreme Court of Canada's rejection of the distinction between rights and privileges in the section 7 challenge to immigration procedures in *Singh v. Minister of Manpower and Immigration*.⁴⁹ Nonetheless, this limited use of the *Charter* in the inquiry setting was also expressed in *Re Rosenberg and Morrison*.⁵⁰ In that case the District Court held that even if the protections of section 7 extended to "reputations", the publication of a report with damaging comments would not violate the affected individual's rights. Accordingly, there was no need to let an individual comment on a report prior to publication.

The early indications are that there will be no individual rights revolution in the inquiry process as a consequence of the *Charter*. There are no Supreme Court of Canada or even appeal rulings on point, but rulings in respect to other administrative agencies reflect a cautious judicial approach. While the *Charter* will expand some common law and statutory rights of the individual in the inquiry process, the gulf between policy makers' values and lawyers' values may not be as wide as is often assumed. This will be one of the assumptions I will explore in the next section.

4. MYTHS, ASSUMPTIONS AND KEY PLAYERS IN PUBLIC INQUIRIES

There are a number of myths and assumptions that underlie public inquiries. One is that there will be an inevitable tension between the policy-makers and the lawyers. John Willis referred to the clashing world views and values of civil servants and lawyers⁵¹ in the administrative process generally and that has been applied at this conference to commissions of inquiry. There is, of course, some conflict of values between the lawyers and the policy makers but the degree has been exaggerated. As we saw in the previous section, the *Charter* has not been used by the courts to remake inquiries in accordance with lawyers' values. While individual lawyers are oriented towards the rights of particular clients, judges are very conscious of the collective good of the larger society and reflect this in their rulings from the bench and as commissioners. Similarly, administrators are also concerned about the fair treatment of individuals in the broader sense, as well as the efficient execution of public policy.

49 *Singh v. Min. of Manpower and Immigration*, [1985] 1 S.C.R. 177, 12 Admin. L.R. 137, 14 C.R.R. 13, 17 D.L.R. (4th) 422, 58 N.R. 1.

50 *Re Rosenberg and Morrison* (1983), 20 A.C.W.S. (2d) 334 (Ont. Div. Ct.).

51 J. Willis, "The McRuer Report: Lawyers' Values and Civil Servants' Values" (1968), 18 U.T.L.J. 351.

While the Willis dichotomy between lawyers and administrators is a useful starting point, our analysis should not end there. It feeds another false dichotomy between law and politics which should be questioned. I am not skeptical enough to conclude that law is merely the exercise of naked power and thus totally indistinguishable from politics but, the line between the two professions is an increasingly thin one. Lawyers and judges, even in the judicial arena, do make important public policy and enter the political fray on a regular basis. Supreme Court decisions on the *Charter*, such as their abortion decision in *Morgentaler*⁵², serve to highlight the policy dimensions of judicial rule-making. Furthermore, political actors find it increasingly difficult to escape the law. Policy makers operate within an increasingly regulated and rule-oriented world and many of them have become quite sophisticated in their understanding of the legal framework in which they operate. Nova Scotia's Marshal Inquiry provides a text book example of the interconnected webs of law and politics that enshroud most public controversies.

Another assumption or myth of the inquiry process is that there is an independent and objective solution to a controversial political question. It is this belief which explains the tendency to appoint judges to commissions, as the people most likely to pursue an objective solution. Ideally, objectivity and independence should guide the operations of commissions of inquiry. However, as ideals, even the best commissioners can only approximate them. Lawyers and judges do not have a monopoly on objectivity or independence nor do policy makers have a monopoly on bias. One of the ways to alleviate the identity crisis of inquiries is for governments and the general public to accept that the commissioners are unlikely to find objective, politically popular and cost-free solutions.

It is easy to overstate the power of either the government or the commission of inquiry to define the issues and shape the public agenda for the inquiry. Because of the public nature of the process and the important role of the media in Canadian society, much of the educational role of the commissioners is taken out of their hands. That does not mean that the media should be ignored as beyond control, but rather that media relations should be a high priority. Thomas Berger clearly recognized the value of the media as the vehicle for reaching the public about the impact that the proposed MacKenzie Valley Pipeline might have on Canada's native peoples. By involving not just the media but also those who would be most affected by a pipeline, Berger turned his inquiry into a national seminar on the dreams and nightmares of Canada's native people. By taking his deliberations to the native communities, he created a media event which was broadcast to all Canadians.

52 *R. v. Morgentaler*, 63 O.R. (2d) 281 (note), [1988] 1 S.C.R. 30, 62 C.R. (3d) 1, 37 C.C.C. (3d) 449, 31 C.R.R. 1, 44 D.L.R. (4th) 385, 82 N.R. 1, 26 O.A.C. 1.

The media have a natural love affair with commissions of inquiry⁵³ and commissioners are no longer wasting energy trying to keep the media out of their hair. While it is true that the media can distort and sensationalize, they are the crucial link to educating the public about the broad policy issues that the inquiry is addressing. Furthermore, the media can be a very effective lobby for government action and make it very difficult for governments to ignore the ultimate recommendations. Television access to inquiry hearings has made the participants more accountable as well as more open. Commissioners also have a personal stake in good media relations as presiding over a high profile commission of inquiry may give them a public image that they will carry with them for the rest of their lives.⁵⁴ A good working relationship between the media and the commission is vital to the success of the policy mandate.

Whether we like them or not, lawyers are also key players in the public inquiry process. Designating a judge to head up a commission gives it an instant credibility and an aura of objectivity and independence. One of the first acts of such commissioners is usually to appoint commission counsel, who proceeds to define a fair inquiry process in accordance with lawyers' values. While this may be appropriate for inquiries designed to arbitrate a dispute or to determine guilt or culpability, it is less than ideal for the articulation of public policy or the review of political judgment. This underscores the need for the commission to solve its identity crisis early in the process and assign the role of lawyers in the process in line with its mandate.

Judges and lawyers are not the ideal people for all kinds of inquiries. Lawyers do not tend to be very good at applied social science and may not be appropriate for a commission of inquiry structured on the research rather than the arbitration model. Nova Scotia's Marshall Inquiry will provide an interesting case study on the performance of lawyers in applied social science. Many groups appearing before the Commission called upon it to squarely address the problems of systemic discrimination in the Nova Scotian justice system.⁵⁵ How the commissioners respond to this challenge will be interesting.

53 Mr. Justice Grange discusses the media's love affair with commissions in his contribution to this volume. He also comments on the instant fame that is accorded to commissioners and key participants such as himself or Susan Nelles. *Supra*, note 22.

54 Thomas Berger, and possibly Gerald LeDain, will be more remembered for their high profile commissions than for their work as judges. When Gerald LeDain was appointed to the Supreme Court of Canada the most frequent media reference was to his involvement in the Inquiry into the Non-Medical Use of Drugs in Canada.

55 Three days were set aside at the end of the Marshall Inquiry hearings for academics and representatives of Blacks and Natives in Nova Scotia to voice their concerns. It was structured not as a giving of legal testimony but rather as an academic forum for educating the commissioners about the problems of racism in Nova Scotia. In the more legalistic phases of the inquiry the commissioners were reluctant to entertain broad allegations of racism in respect to the treatment of Donald Marshall Jr..

Lawyers do bring valuable skills to the operation of commissions including a healthy respect for the rights of individuals embroiled in the inquiry and an insistence on fair procedures. The real challenge is to make the most of the lawyers' skills without allowing them to take over the whole process. Thomas Berger required the commission staff, including lawyers, to present their views to the commissioners in the public hearing process along with other participants.⁵⁶ This meant that the staff had no special access to the MacKenzie Valley Pipeline Inquiry and the views of the other participants were accordingly given more prominence than might have been the case. Creativity in the design of inquiry processes is to be encouraged and lawyers should promote rather than hamper this evolution. The nature of the inquiry itself should also determine whether or not lawyers should be the key players in that particular commission.

5. NEW TRENDS AND CONCLUDING THOUGHTS FOR COMMISSIONS AS PUBLIC POLICY INSTRUMENTS

Commissions of inquiry are an important vehicle for shaping public policy. How effective they have been is a matter of conjecture. There has been little empirical research on the operations of inquiries and nothing approaching a costs-benefits analysis of their performance. It appears that the inquiry process has been over-used and resorted to in inappropriate situations, producing what I have referred to earlier as an identity crisis. Often a parliamentary committee, the relevant ombud or some other mechanism would be a more appropriate response, especially in light of the escalating costs of commissions of inquiry.⁵⁷

There are also a number of newer trends in Canadian society which affect all kinds of policy making, including that of commissions of inquiry. One of these trends is a growing desire by members of the public to be involved in the formation of policy and to have full access to the process. This has accentuated what John Willis referred to as the, "cult of openness"⁵⁸ in the making of public policy. Inquiries must be open processes with full access to both the media and members of the general public. This facilitates the educational mandate of inquiries but can complicate the articulation of public policy on controversial issues. However, the open process greatly reduces the chances that the ultimate recommendations of a commission will be ignored by the government or significantly out of touch with the broader public opinion on the matter.

56 T. Berger, "The MacKenzie Valley Pipeline Inquiry" (1976), 3 Queen's L.J. 3.

57 Frank Iacobucci presents some of the alternatives to commissions of inquiry in his preceding contribution to this volume. *Supra*, note 6.

58 *Supra*, note 51.

The public nature of the process has been reinforced by the guarantees of the *Charter* as have the higher expectations of individual members of the public in respect to fair treatment and reasonable procedures. Even before the *Charter* the role of the media in shaping public policy was growing, but the guarantees of "freedom of the press and other media of communication" give an enhanced constitutional status to their demands for full access to the channels of decision-making.

Another trend in the policy process is the increased demand that public officials be accountable to the larger public. This expectation arises not just from those involved directly in the commission of inquiry but from the larger public itself, who foot the bills for the operation. Both the commissioners and their staff are expected to produce value for money and whether they have provided this is difficult to assess. While there has generally been a greater public acceptance of administrative boards as legitimate decision makers, there is greater skepticism about *ad hoc* creations, such as commissions of inquiry. This combination of high public profile and increased expectation of accountability adds new levels of difficulty to the satisfactory operation of a commission of inquiry.

While the challenges of meeting the new trends in policy making add to the tasks of commissions of inquiry, the most difficult challenges have deeper roots. These challenges include striking the proper balance between the protection of individual rights and the execution of a broad policy mandate at the same time. While lawyers are useful in striking the proper balance, they should not totally dominate the design of inquiry procedures.⁵⁹ It is vital that the methodology and process of the commission of inquiry fit the subject under study. Too often the subject has been forced to fit a procrustian bed designed primarily by lawyers. It must also be recognized that there are many different types of commissions. The balance between the rights of the individuals involved and the need for flexible procedures for articulating public policy must be struck anew in each particular case. Accepting that there are few universal rules for the operation of commissions of inquiry would go a long distance towards alleviating their identity crisis. It would also enhance their value as a quintessential Canadian policy device.

59 John Willis has explored in his usual colourful fashion the virtues and vices of lawyers in any human enterprise. J. Willis, "What I Like and What I Don't Like About Lawyers: A Convocation Address", (1969) 76 *Queen's Quarterly* at 1.

Part II

Managing the Inquiry