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Should We Abandon the Adversarial Model in Favour of the Inquisitorial Model in Commissions of Inquiry?

Patrick Robardet*

1. INTRODUCTION

I approach the question I was asked to address today from the perspective of administrative law with a particular emphasis on related issues of public administration. In doing so, I bear in mind Professor Arthurs' well known criticism of common lawyers' attitudes towards public administration.1 In a similar vein of thought, Professor Wesley Pue recently noted:

Such attitudes are part and parcel of the ideology of law and as such are inculcated in lawyers as they partake of legal education, read legal scholarship and practice law. Even where serious efforts are made to escape the bounds of inherited legal thought, a persistent suspicion of public administration and

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consequently a general preference of “private” rather than “public” ordering lingers in the juristic mind.²

As I do not share whole-heartedly the lawyer’s inbred suspicion of public administration, I find it somewhat difficult to support the adversarial model without a more in-depth analysis of its foundations.³

I must confess a feeling of being somehow uncomfortable with the initial question itself and the word “inquisitorial”. Words can be heavily loaded. They are not neutral or value-free and embody global representations of reality with them. If I ignore the insinuations inherent in the word “inquisitorial”, then, frankly, I do not know what is the inquisitorial model.

The question initially posed in this paper is an invitation to define and compare the adversarial and the inquisitorial models for commissions of inquiry. The question, however, is unfortunately complicated by a number of different, yet related, considerations. First, there is the absence of a common understanding of what is a commission of inquiry, both formally and functionally. Second, there is the issue of whether we can dispense with definitions of the terms and techniques used in relation to these models and simply content ourselves with their assumed common notions. One must be aware, however, that, although there are common notions of the adversarial and the inquisitorial models, these notions are probably assumed to be understood more than they are actually understood. Finally, we must take into account the value preferences and the images we hold of social processes and institutions associated with these different models.

2. SOME PRELIMINARY OBSERVATIONS

I will not reflect here on the dichotomies created by the two models or on the values and attitudes that may have influenced the perception of inquisitorial models in the common law tradition. This would be a bit too “dicey”. Rather, I propose to investigate the nature of both the adversarial and the inquisitorial models. As it happens, the one cannot be defined without reference to the other.

Let us start with a definition of the inquisitorial model. Sadly, a quick glance at the dictionaries does not provide much help. The Oxford Companion to Law states that

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In all forms [of the inquisitorial system] the judge's investigation is not limited to the evidence put before him, but he proceeds with an inquiry on his own initiative. The alternative is the accusatory system.4

Black's Law Dictionary defines the inquisitorial system as distinct from the adversary system in which "the judge acts as an independent magistrate rather than prosecutor";5

One having opposing parties; contested, as distinguished from an ex parte hearing or proceeding. One of which the party seeking relief has given legal notice to the other party, and afforded the latter an opportunity to contest it.6

The latter definition could cover the rules of natural justice and the administrative law notion of judicial or quasi-judicial procedure.

According to another definition, an inquisitorial procedure means that the judge assumes an active role. Bernard Schwartz states that in that model "the case is primarily developed by the judge — instead of by counsel, who plays either a greatly subdued role or no role at all".7 Although he considers an inquisitorial procedure to be a practical method of dispensing mass justice and of achieving greater efficiency by eliminating the adversary element. Schwartz underlines that "to the lawyer, inquisitorial procedure inevitably appears suspect".8

Schwartz's definition is supported by the description of judicial review procedure before French administrative courts as being "inquisitoriale, c'est-à-dire dirigée par le juge" as opposed to the adversary system used before French civil courts, which is "contradictoire".9 Brown and Garner note the French inquisitorial administrative procedure amounts to the court taking "upon itself the task of finding out the facts, not being content to decide the

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6 Ibid.
7 B. Schwartz, Administrative Law, 2d ed. (Boston: Little, Brown and Co., 1984) at 263. Schwartz says at 261-262 that "The outstanding contrast of inquisitorial procedure as compared with the adversary type familiar to the common lawyer is the assumption by the judge of an active role . . . The administrative law judge [formerly known, before 1972, as hearing officer under the 1946 Administrative Procedure Act] has another function which is usually associated with inquisitorial, rather than adversary, procedure: that of preparing the case of hearing."
8 Ibid. at 263. In a footnote, Schwartz explains: "In part, this may be due to its name and the pejorative character of anything even remotely suggesting the Inquisition".
case on the facts as established by the parties”.10 This is explained by the nature of judicial review in France. Contrary to the English perspective where judicial review is considered to be an avenue for obtaining individual redress and protecting individual rights against encroachments by public authorities, in France it is viewed as a means to ensure implementation of the public interest at the initiative of representatives of collective values.11 But Brown and Garner also remark that the French procedure is also

[A]dversary. For it is, in French terminology, “contradictoire”, a characteristic common to French civil procedure and denoting that each side must be given an opportunity of contradicting what the other party has said. One may compare, in England, the exchange of pleadings before the trial or the general principle that both sides should be heard.12

Taking the above descriptions into consideration, we are still left, in the end, with relatively imprecise definitions of the two models. These ambiguous definitions would have us accept general procedural patterns and the idea that both models can be defined only in contrast to each other without definite clarity or precision. If one must consider that the adversarial model is distinct from the concept of a trial, which is but one of the diverse versions of the adversarial model, one is compelled to ask whether this model represents more than simply a paradigm for resolution of issues. Bearing in mind that the inquisitorial model also has as its objective the resolution of issues, I suggest that one look for, in addition to criteria supporting classifications and dichotomies between the two procedural regimes, a core of common, unifying elements.

3. REASON FOR QUESTIONING, OR REJECTING, A DICHOTOMY BETWEEN THE ADVERSARY AND INQUISITORIAL MODELS

Asking “what do we mean by an inquiry or a commission of inquiry?” would be a logical first step. The concept of inquiry can have either an ordinary meaning or a formal meaning.13 According to the former, an inquiry is

11 This is the view given of judicial review in England by P. P. Craig in his excellent text *Administrative Law* (London: Sweet and Maxwell, 1983) at 431, 444-445.
12 Supra, note 10.
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the “act or course of action of inquiring . . . the action of seeking . . . truth, knowledge or information concerning something . . .”, without regard to an organization, or process or procedure or rules for the guidance of the person(s) making the inquiry. In the 1987 Irvine case, on the other hand, the Supreme Court of Canada used the notion of “an inquiry in the formal sense” in the context of ascertaining whether a process is functionally limited or whether preliminary requirements, such as a legal duty of disclosing grounds for commencing an inquiry, are imposed. The notion of formal inquiry, therefore, can be used to include a legally structured process.

Similarly, whether the inquiry is public and comes within the terms of the federal Inquiries Act, as opposed to an investigative inquiry held in private, can influence perceptions as to what sort of process inquiry will be employed. A public inquiry will be thought of as being more formal and legal in nature than an informal and private investigative inquiry. This is not due to the formalities that can be implied, but to the consequences generally associated with public inquiries, that is, prejudice, prosecution or deprivation. Clearly, therefore, patterns of and attitudes about the process are engaged by definitions of the types of inquiry.

To avoid the “terminological confusion” caused by the diversity of inquiry types, we can look for basic functions and purposes to which the adversarial or the inquisitorial model can be attached. In the Foreword to its 1977 Working Paper on Commissions of Inquiry, the Law Reform Commission of Canada (LRCC) states that “government frequently establishes another type of tribunal: ad hoc commissions to advise on or investigate any number of matters”. This statement must be qualified because an inquiry, not necessarily in the formal sense, can be used by any of the three traditional branches. The LRCC paper remarks that “the public inquiry (has
increased) in prominence as an instrument of government" and that "much of the history of Canada could be interpreted through the work of commissions of inquiry". If one casts inquiries in this mould of governing instruments, the tendency would be to classify them as legislative or executive, rather than judicial, tools. We already know, however, that words such as "judicial" or "tribunal" sometimes implicitly designate institutions, processes or functions unrelated to the court system. Hence, we have another reason for looking at inquiries from beyond the traditional constitutional tripartite division of powers. In Canada, because it can be said that there is no real separation of powers, any attempt to clothe inquiries with the fabric of one of the three branches adds little to our understanding of them.

Regardless of the resolution of the issue raised by the traditional branches of government, the 1977 LRCC Working Paper dichotomizes inquiries into two types which themselves lead to additional dichotomies and characterizations. The first type is the advisory inquiry which addresses itself to "a broad issue of policy and gather[s] information relevant to that issue". The second type is the investigatory inquiry which addresses itself "primarily to the facts of a particular alleged problem, generally a problem associated with the functioning of government". This division is based on which function, either advising or investigating, predominates rather than exhausts the nature of an inquiry, but the LRCC also remarks that "[m]any inquiries both advise and investigate". Why, then, purport to tie procedural dichotomies to functions if the latter are mixed and ideal types are not possible?

A partial, and implicit, answer lies in the description of the functional dichotomy just quoted: procedural differentiation would be based on whether the inquiry in question tends to focus on a specific alleged problem the resolution of which may adversely affect individuals. Arguably, therefore, whether the inquiry has to deal with, facts, as opposed to policy, would likely be irrelevant, if only because policy-making generally requires collection and analysis of factual information.

The key criterion for procedural differentiation is identified by the LRCC as being the nature of the function of investigation:

Finally, it has been observed that all commissions — advisory or investigatory — are fact-finding commissions, and that the distinction we make is accordingly

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22 Working Paper 17, supra, note 13 at 3 and 11.
24 Working Paper 17, supra, note 13 at 13; Report 13, supra, note 13 at 5.
25 Report 13, supra, note 13 at 5: "But almost every inquiry either primarily advises or primarily investigates".
an illusory one. We do not agree. The “facts” sought out by an advisory commission will be very different from the “facts” pursued by an investigatory commission, which may well be interested in questions of fault and blame.\textsuperscript{26} [emphasis added]

Hence, while reaffirming that an inquiry is not a trial and that “any system that might promote confusion of that sort must be avoided”,\textsuperscript{27} the LRCC divorces the two procedural regimes, advisory and investigative, one from the other. Under the LRCC's view of the matter, where the inquiry is a political and policy-oriented process, powers and safeguards of a “judicial” nature, such as subpoenas and protection of witnesses, are not needed. On the other hand, where the inquiry is a potentially “quasi-criminal” process, “[s]tructure and powers must be strictly defined and carefully limited.”\textsuperscript{28} This approach largely follows either the old distinction between law and policy, with the result that policy-oriented governmental action may lie outside the reach of law, or the old distinction between “administrative” and “judicial or quasi-judicial” functions.\textsuperscript{29} However, the most recent case law confirms our theory that a determination of process, for a given inquiry ought not to be settled simply by concluding that the inquiry’s function is primarily advisory in nature. One must go further and consider what happens in reality and ascertain whether a report or recommendation directly affects an individual.\textsuperscript{30} The dominant criterion is the direct consequences of a report rather than the nature of an inquiry.\textsuperscript{31}

The function of an advisory inquiry does not prevent it from taking an adversarial character or from having “something like an adjudicatory function . . . (or) approaching a \textit{lis inter parties} . . . ” because “the repeated advocacy of a particular point of view by a group or organization” generally can be “of an adversarial nature”.\textsuperscript{32}

For investigations on the other hand, the LRCC advocated the provision of the safeguards found in the court process when matters cannot be referred to the courts themselves.\textsuperscript{33} The LRCC regards commissions of inquiry generally

\textsuperscript{26} Working Paper 17, supra, note 13 at 25.
\textsuperscript{27} Working Paper 17, supra, note 13 at 40.
\textsuperscript{28} Working Paper 17, supra, note 13 at 41.
\textsuperscript{29} R. A. Macdonald, supra, note 17 at 375-376.
\textsuperscript{31} Ibid. at 224 (per Estey J.).
\textsuperscript{32} Working Paper 17, supra, note 13 at 27.
\textsuperscript{33} Working Paper 17, supra, note 13 at 19: “... matters that can be referred to the courts should be ... because the courts offer to those being investigated a full range of safeguards that are most valuable to a society that respects justice. Second, when a matter falls outside the scope of our judicial institutions and needs must be referred to an inquiry, then, for the
“as . . . unusual institutions which may seriously affect individual rights”, and concludes that, “if a governmental power is not necessary and is capable of abuse, it should not be given”.\textsuperscript{34} hence it argues in favour of judicializing those commission of inquiries which investigate. It assumes, however, that the selection of a type of process on a functional basis can be more or less mechanical.\textsuperscript{35} Further, instead of associating different procedural models with the nature and objectives of a given inquiry, it purports to tie certain prefabricated models to certain given types of outcomes. These assumptions make the LRCC's perspective less meaningful.

Essentially, the LRCC's approach has been to superimpose the adversarial/inquisitorial dichotomy onto the dichotomy between an advisory/recommendatory inquiry and an investigatory inquiry. Does this approach adequately address the "procedural implications [resulting] from [a] juridical characterization"\textsuperscript{36} of inquiries?

The functional dichotomy made by the LRCC is evidenced in the current case law. The distinction between recommendatory and adjudicative functions recently was used by the court of first instance in the Robinson case.\textsuperscript{37} In Robinson, Legg, J. was of the opinion that, in determining the question of whether an inquiry is adjudicative or recommedatory in nature, one must ascertain whether "its report [will] necessarily lead to any subsequent proceedings against anyone".\textsuperscript{38} This is so even if the inquiry report itself does not include any conclusions respecting civil or criminal culpability or liability.

In the Irvine case, the absence of statutory directions or authorizations to disclose findings, facts or recommendations to potentially affected parties or other public officers was considered as virtually conclusive as to these third parties' rights to such disclosure.\textsuperscript{39} Nevertheless, Estey, J., who delivered the judgment for the Court in Irvine, held that the determinant criterion is not whether the inquiry is conducting fact-finding only or is but only the prelimi-

\textsuperscript{34} Report 13, supra, note 13 at 6, 7.
\textsuperscript{36} See R.A. Macdonald, supra, note 17.
\textsuperscript{39} Supra, note 13 at 208-209.
nary stage of a more extensive process.\textsuperscript{40} Instead, the notion of an investigatory process, in which the inquiry simply concludes by making non-binding recommendations, was contrasted with the concept of the making of "decisions in the sense of a final determination of a right or an interest".\textsuperscript{41} Hence, specific procedural exigencies cannot be decided on the basis of a characterization of an inquiry limited to a determination of where and when a decision can be made or actually has been made. The concrete effect of the inquiry on the rights of the affected parties is the primary consideration in determining what sort of procedural requirements should be adopted and, therefore, the procedural model dichotomy is largely made irrelevant.

Another reason for questioning the validity of the dichotomy has to do, paradoxically, with the very dominance of the adversary model as, what I would call, the "normal way of doing things legal". I am not referring here to the court trial model as the ordinary model for legal dispute resolution or adjudication but rather to the distinction between the existence of adversarial systems as practically applied in our legal system and "the adversarial system . . . [which] is the procedural sub-structure upon which the common law itself has been built".\textsuperscript{42} In my opinion, one is justified in searching for procedural principles extending beyond the adversarial model and all sub-models founded upon it. The key to this opinion is the position that the adversarial model is not monolithic, even when used for trials.

For a large percentage of lawyers, especially common lawyers, the adversarial model conjures up ideas of proceedings analogous to trials which could be used for deciding almost anything. Let us identify some of this model's limitations and shortcomings. To do so, we must go beyond the adversarial model and address the weaknesses of adjudicative theory because adjudication is the founding structure for the adversarial model. As we know, whereas a trial is an adjudication and follows the adversarial model, an adjudication needs not espouse the form of a trial.

Using the term "adjudication" to mean a "trial" causes confusion and does not accord with the various realities of courts and agencies.\textsuperscript{43} Firstly,
adjudication is limited by the factor of polycentricity. This factor would be typically present where the disposition of any single issue has implications for the disposition of every other issue forming part of a “web”. Polycentricity essentially is a matter of complexity of patterns of decision, rather than being a matter of issues or merely a matter of multiplicity of parties.44

When adjudication appears to be unsuited for dealing with such polycentric questions, two possible reactions, already familiar to the student of public administration, are worth noting on the part of the “neutral arbiter”. First, he may ignore “judicial proprieties — he ‘tries out’ various solutions in posthearing conferences, consults parties not represented at the hearings, guesses at facts not proved.” 45 Second, “instead of accommodating his procedures to the nature of the problem he confronts, he may reformulate the problem so as to make it amenable to solution through adjudicative procedures”.46 These two reactions indicate that inherent conditions and constraints of a model, over which a public actor or decision-maker has no control, may force him to resort to practical procedures aimed at finding a decision or an outcome, although they may be “improper” under his ideal model. He also may be forced to manipulate rationality from a substantive point of view. These two, almost anticipated, alternatives underline the potentially unaccommodating nature of a particular decisional or procedural model, in this case, the adjudicative model.

Can we envisage using the adversarial and inquisitorial models as “fall back on” positions in case of procedural uncertainty or a novel situation?

Decision theory illustrates the usefulness of such “fall back on” standard processes. For instance, Herbert Simon defines an “unprogrammed decision” as “a response where the system has no specific procedures to deal with situations like the one at hand, but must fall back on whatever general capacity it has for intelligence, adaptive, problem-oriented action”.47 By

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45 L. Fuller, *supra,* note 43 at 401.
contrast, Simon defines a "program" as "a detailed prescription or strategy that governs the sequence of responses of a system to a complex task environment". A program therefore includes a collection of rules of procedure. Without deciding the point, one can wonder whether both the adversarial and inquisitorial models, but especially the adversarial one in our legal culture, could represent "fall back on" standard processes such as those mentioned by Herbert Simon for situations where there is no clearly defined procedure to follow.

Next, I would like to deal with the emergence of a core of legal principles of procedure. Is administrative or governmental action not now conditioned by general structural and procedural rules? This question is warranted by the description found in the Irvine case of the three-stage evolution of "[t]he law in this country relating to the rights of parties to participate in proceedings outside the traditional court and the modes of such participation".

These three stages are: (1) the pre-1975 era; (2) the introduction of the doctrine of procedural fairness culminating in the 1978 Nicholson decision; and (3) the era opened with the Canadian Charter of Rights and Freedoms in 1982. Generally, the analysis expounded by the Court stressed that: (1) classification of types of bodies did create arbitrary distinctions, as between "adjudicative" and "investigative" processes; and (2) "in the pre-Nicholson era a number of authorities shifted the emphasis away from a process of classification of the tribunal in question to the effect of the statutory procedure on the individual appearing in the administrative process".

Characterization, however, has not been totally discarded, because it still helps to make comparisons based upon broad analogies and historical experience. In the Irvine decision, for instance, we find a comparison between the position of an individual at the stage of the initial investigation by the Director of the Investigation and Research Branch under the former Combines Investigation Act, and that of a person during the police inquiry before a prelimi-
nary hearing. The classification method enables us, without confusing the nature of the different processes, to consider which procedural safeguards are required by comparing the extent to which rights or interests of individuals may be affected by a given process.

Returning to natural justice and procedural fairness, it is fair to say that they do not imply a dichotomy between two mutually exclusive sets of rules: they collectively form a continuum of formal requirements. Fairness has become a general minimal requirement for all types of public decisions affecting rights, as well as interests not representing legal rights. It now represents a general principle of law mandating a form of participation which espouses an "adversarial" dimension between at least two protagonists having different points of view. The doctrine of procedural fairness enunciated in the 1987 *Nicholson* case implies a "right to present one’s point of view" when some interest is threatened. This right reflects a relationship which may not be adversarial as in a trial but which nonetheless posits two opposing sides or points of view about a matter and is premised on the *audi alteram partem* rule.

The paradigmatic character of these rules must be emphasized: natural justice and procedural fairness do not embody specific operational regimes. Both embody ideals, what we may call a "a different way of governing" or, perhaps, a degree of "democracy" in the administrative process. Both have a purposive, or teleological, nature: they serve a function and structure relationships in any process governed by them.

The predominantly functional nature of those rules is underlined by the fact that they apply, depending on the circumstances, as was stated in the *Irvine* case, "[f]airness is a flexible concept and its content varies depending on the nature of the inquiry and the consequences for the individuals involved". Furthermore, their structural nature and purpose mean that only broad procedural requirements are derived from them. Limited in scope, these requirements basically amount to timely notice of an action, exchange of basic facts and allegations and a right to present contrary facts and arguments. This elementary "right to be heard" does not include, for instance, a right to obtain reasons for a decision, or a right to counsel or to cross-examine a witness. Hence, natural justice and procedural fairness give public actors broad procedural latitude and control over their process.

In the end, the function of both doctrines is to establish and safeguard general relational and procedural patterns. They do not purport to lay down practical and detailed rules of procedure or adapt rules of court to activities of administrators. Thus, despite the "adversarial" dimension which permeates

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55 *Supra*, note 49 at 231 (per Estey J.).
both natural justice and procedural fairness, the similarity between those relational patterns and court processes, especially the trial model, cannot be stretched too far. The functional nature of the right to present opposing facts and arguments, which is underpinned by these notions, relates more to the preservation of the decency and integrity of the administrative process and the process of informing decision-making than to a blank cheque for indulging in trappings and formality.

The *Canadian Charter of Rights and Freedoms* does not apply to inquiries, insofar as its provisions are specifically concerned with the criminal law and process.56 This was one of the holdings of the *Robinson* case.57

In spite of this, it is worth noting that a result which cannot be reached through a direct application of a provision of the *Charter*, can be obtained by application of the doctrine of procedural fairness. In a recent Québec case dealing with the alleged right to be heard without undue delay by a commission of inquiry, a Superior Court judge has stated, *obiter*, that it could be possible to prohibit the inquiry on the basis of procedural fairness where the continuance of the inquiry would be unjust.58

It could also be argued that the *Charter* offers a framework for an approach to the procedural question in that it leads to developing the notions of unifying concepts and continuums of legal requirements.

The trend towards the rejection of the adversarial/inquisitorial dichotomy is evidenced in the various legislations, be it federal or provincial. A review of various statutes indicates no radical departure from modeling regimes on the basis of the "right to defend one's case or point of view", or a right to a variable degree of participation. The evolution of judicial review also shows clearly that the tendency is toward a decisive rejection of categories; although the label *quasi* still is in usage, its importance has greatly diminished; so has the distinction between rights and privileges. Further, the placing of proce-

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56 I do not consider section 7 of the *Charter* to be a provision which is exclusively concerned with the criminal law and process.

57 See *Robinson, supra*, note 37, (B.C.S.C.) at 747-750 (per Legg J.). The Supreme Court of Canada, however, expressly noted that when a province sets up such an inquiry, it may not (1) interfere with federal interests in the enactment of and provision for a uniform system of criminal justice in the country as embodied in the *Criminal Code*, and (2) infringe the rights of Canadian citizens . . . [as those are] embodied in the common law, various acts of both levels of government, including the *Canada Evidence Act* R.S.C. 1970, c. E-10 [now R.S.C. 1985, c. C-5], and, more recently, the *Charter*. (Supra, note 37 (S.C.C.) at 611-12).

Because the Court in *O'Hara* addressed only the division of powers question, Estey, J. made no comment as to the effect of the *Charter* on the proceedings of the inquiry.

58 See *Tougas c. Gosselin*, [1987] D.L.Q. 207 (C.S. Qué.). This case deals with an inquiry under the Québec *Police Act*, R.S.Q., c. P-13, commenced after a complaint had been made to the Québec Police Commission against police officers.
dural requirements on a continuum indicates, without a doubt, that procedural spectrum, not exemption, is the new approach in this area. The distinction between decision and the absence of decision, or the recommendation/decision dichotomy, also is linked with the idea that a process can be approached as being made of different segments or stages linked sequentially together.

In Irvine, the Court emphasized that, although the statutory structure under the former Combines Investigation Act was

\[\text{Complex and extensive, but [it did] not appear to be fully articulated . . . . The operations of the Director, the Commission and the three Minister involved [were] not coordinated in detail or completely.}\]

Importantly, however, the Director, as the actual investigator, as not "the statutory authority which alone [my emphasis] determined the use to be made of material uncovered in the investigation". Therefore there is always the need to identify who is making the determination capable of affecting rights. In the Irvine case, for example, the Director of the Investigation and Research Branch had no power to determine whether an offence had been committed. Since this function was left to the Attorney General of Canada alone, the function of the Director was qualified as "purely investigatory". But what then, about situations where a single actor alone cannot be identified as the real author of an official act or determination?

This question brings the structure of any process into play. Decisions (in the large, non-legal, sense) or acts can be viewed as courses of action and defined as a sequence of acts, seen as both units of action and mutually related means of achieving certain ends. This implies that any procedure can, or must, be looked at as a whole process made of integrated successive steps, not as a sum of discrete and independent elements. Hence, the distinction between acts which legally affect individuals and acts which do not is not clear cut. A sequential perspective means that an act or a decision cannot be viewed as either instantaneous or as the final moment of a process.

59 Irvine, supra, note 49 at 204 (per Estey J.).
60 Irvine, supra, note 49 at 217.
61 Irvine, supra, note 49 at 232.
64 As Simon has noted, common images of decision-makers picture them as [Men] at the moment of choice, ready to plant his foot on one or another of the routes that lead from the crossroads. All the images falsify decision by focusing on its final
Second, the concept of an action as a sequential structure implies that a type of programming has been used. Contrary to the well-known feedback mechanism which pervades decision theory generally, the legal view tends to see a decision as the outcome of a linear process. Admittedly, a linear view of decision-making facilitates the circumscription of the legal effects of an action and the manifestation of authority or power; linearity enables one to identify who is the responsible author of an act. It detracts, however, from the attention that must be paid to interrelations between actions and actors within complex organizations. In that sense, legal accountability assumes that decisions are discrete and a process can be controlled at any given single point, regardless of the feasibility of simple control points. This assumption is facilitated by notions such as administrative law being a law for the vindication of private rights through judicial review. Legal linearity, then, means assuming that an act always has an identifiable author, rather than being primarily the product of the activity of an organization or the product of a complex process.

4. SOME REASONS FOR MAINTAINING A DICHOTOMY BETWEEN THE ADVERSARIAL AND THE INQUISITORIAL MODELS

At this point of the analysis I suggest that we consider some constraints on model selection. At the provincial level, while not directly related to the issue of the choice between the adversarial and inquisitorial models, a distinction must be made between inquiries where federal criminal procedure will apply as opposed to other types of inquiries where provincial administrative or inquiry procedures will be sustained. This distinction is due to a constitutional question based on sections 91 and 92 of the Constitution Act, 1867. The various facets of this constitutional issue were addressed by the Supreme Court of Canada in the appeal of the Robinson decision.

Because of the division of powers issue, one must determine whether or not an inquiry is criminal in nature or, in other words, whether or not it is oriented towards making findings of criminal liability. Hence, categorization is necessarily part of the discussion. Various tests have been offered in cases...
such as *Di Orio* and others. In making this determination, the issue can be formulated in a number of ways, including, for instance:

1. whether the inquiry should be a trial under the *Criminal Code* because it is directed at a particular crime or act that later may be used in a criminal charge; or

2. whether the inquiry is in fact a trial which evaluates both facts and the application of the law to the facts, as opposed to only a method of determining and reporting facts; or

3. whether or not the inquiry’s purpose is really to try to punish a police officer suspected of the commission of a crime in the course of his or her duties or whether its objective is instead to control and discipline provincial police officers.

In addition, if an inquiry is civil in nature, one still must ask whether the judicial trappings traditionally applied in criminal law settings will also apply to that inquiry. Here, one must engage our accepted notion of justice. Again, as in the case of inquiries of a more criminal character, the tests to be used include a determination of the nature of the mandate of the inquiry, or in other words, whether the inquiring body is in fact a court or the inquiry a trial and whether there is a party suspected of liability or not.

From a more practical point of view, if the accused’s right to remain silent, although based in the criminal law, is extended to civil applications, can we still resort to an inquisitorial model regardless of whether the commissioner can compel attendance? Does not the right to remain silent exclude its invasion by an inquiry?

A more global question involves the prevalence of form over function. Historically, in English law, form did precede function. This is illustrated by the notion of “quasi-judicial” powers and the fact that, traditionally, the justice of the peace was as much an administrator as a local magistrate. The 1977 LRCC paper postulates the primacy of function over form and suggests, therefore, that form should follow substance. If one follows the LRCC approach, one should be able to rationalize and articulate the dichotomy between the two models with great precision. To do so requires that we address both negative and positive aspects of the procedural models. We will commence by looking at some of the negative aspects of the adversarial

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72 *Irvine, supra*, note 49 at 232-235; *Re Nelles*, *ibid*.
model. It can be argued that inquiries require flexibility, and, therefore, the adversarial, adjudicative model should be excluded. To what extent, however, does an inquiry imply a different functional model than other processes? Can we differentiate between processes on the basis that different facts are involved or different types of truth are engaged? It is worth noting that the McRuer Commission in Ontario did argue that different types of analytical and decisional processes by envisaged and concluded that scientific investigations would be better suited in many instances than inquiries based on an adversarial, adjudicative model. This conclusion rested upon the notion that the different sorts of inquiries are addressing different types of truth. Assuming that the purpose of inquiries is to seek truth, then there is certainly a case to be made that adjudication, which only seeks to produce outcomes satisfactory to the parties as opposed to seeking "rational" decisions (as this term is understood in the non-legal disciplines), has a character which is inappropriate for most inquiries.

Hence, we are brought back to decision theory. We know that rationality is bounded and, that in most situations, decision-makers will seek a satisfactory decision or outcome rather than an optimal solution. People do not have the material, time or vision to operate in the manner postulated by the model of rationality found in decision theory. This is illustrated by the comprehensive, adversarial, adjudicative model which makes unrealistic demands on decision-makers because they never have a full range of choices or materials before them.

One important aspect relative to the choice between procedural models is the fact that processes involve conditions that must be treated as fixed because, in the context of attempting to achieve a rational decision or choice, the decision-maker will not or cannot change them. Treating those conditions as fixed should help an actor to know what acts or courses of action are open to him and to recognize other limiting conditions. However, in most situations, regardless of whether they should decide to change a condition if empowered to do so, public actors do not have full knowledge of their options.

It is fascinating that some fixed conditions which limit a public actor's options reflect values relating to the decision-making process. However, values are often sacrificed when specific ends are desired. This can be under-

76 By "different types of truth", I mean that not all "truths" are the same for all purposes. For instance, scientific truth is not the same as religious truth, and legal truth is not the same of philosophical truth.
79 See M. Meyerson and E. Banfield, supra, note 62 at 316.
stood through the distinction made by Meyerson and Banfield between active elements and contextual elements in relation to end reduction or elaboration. Active elements represent the features of desired situation that are the focus of interest, whereas contextual elements represent value conditions to be realized or respected in the attainment of those active elements. Sometimes, in defining a goal or objective, active elements cannot be achieved without sacrificing certain contextual elements. Hence, if contextual elements are valued more than the active ones, the end may be rejected.

Some value conditions call for proactive measures for their realisation, and therefore for positive attributed of action, others call for abstention from violation, and therefore the absence of negative consequences. The prioritizing of values implies choices, active control and balancing or sacrificing of values. The adjudicative model constitutes a good example of this value priorization.

Adjudication illustrates the importance of contextual elements. It seeks justice through a claim of right or an accusation of fault; demands have to be founded on proof and reasoned arguments and decisions must be reasoned and principled in order to satisfy the parties. The extent to which this model is influenced by value conditions, whether realized or respected (i.e., not violated), is illustrated by the positions and interests of the actors.

First, in the administrative law setting, adjudicative values support mainly the protection of individual parties' interests against governmental actions. Consequently, adjudicative values tend to be treated as conditions that cannot be violated by public actors or decision-makers, although parties can waive protections created to safeguard their interests. Positions would change if legal requirements and values were considered either to support interests larger than those of individuals or to imply proactive roles for actors and decision-makers in the structuring of their processes. So far, arguably, proactive roles have been more easily supported where decisions or actions affecting rights are not pursued. Adjudicative values tend to imply a rather passive role for a neutral arbiter, greater control of process by the parties than by the third party arbiter and a tactical presentation of the facts by the parties. This model, however, is only a model, and does not prevail in most situations.

Whether adjudicative values can be sacrificed depends on the nature of control over a process and the substantive and procedural rationality of that process. Two such sacrifices have been mentioned above. The "neutral arbiter" may want to overcome the limiting conditions of the model and achieve greater substantive rationality by adding his own input to that of the parties. He may also try to simplify issues to make them amenable to a solu-

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80 Meyerson and Banfield, supra, note 62 at 316, view "end reduction and elaboration" as the establishing of goals or objectives and then the prioritizing or "reduction" of them so as to render the accomplishment of the most important goals possible.
tion within the structure of the model and achieve a satisfying outcome within a then acceptable procedure. To effect these "deviations", the arbiter must have certain powers which will permit him or her to modify the conditions of the adjudicative model. These powers may relate, for instance, to control over introduction of facts and arguments. Hence, the issue is who, among the private parties and the public actors, has the power of sacrificing values.

The adjudicative model does not have severe substantive or procedural, limiting conditions. This may be because this model includes few principal ends and contextual elements. Distortions occur, however, when adjudication is used with different contextual elements and for different purposes. It is not designed to achieve, or permit the violation of, a broad range of value conditions because it rests essentially upon a tripartite relationship and focuses on limited private interests and values. Therefore, when polycentricity and value priorization are involved, the appropriateness of an adversarial, adjudicative model is called into question. Given that it is a model premised on individualism, adjudication tends to preclude the ordering of ends by the decision-maker or public actor. Since, in principle, the parties control the process, it is not incumbent on the decision-maker to make value sacrifices as his or her primary function. This means, therefore, that where control over process by the public actor becomes essential, the adjudicative model may be inappropriate.

Finally, before one can make meaningful suggestions about procedural choice in inquiries, the tremendous diversity of inquiries must be strongly emphasized. The actual diversity of inquiries may pre-empt any systematic conceptualization of inquiry procedure. There are two reasons for this. First, the many types of inquiries preclude meaningful classification. Second, too many features used for taxonomic purposes are not precise enough to delineate actual significant differences. Therefore, unless one is content with resorting to intuition to achieve this classification of inquiry procedure, one is left with the impossibility of systematically categorizing such procedures.

Furthermore, inquiries contend with diverse subject matters and purposes. For instance, inquiries have been used quite extensively for the purposes of policy determination, including that of legislative policy. As well, there has been a recent resurgence of their use in resource management. One of the many salient features of inquiries is that they have been used for three different types of planning: normative, strategic, and operational. It is in the realm of inquiries used for normative planning that the adversarial, adjudicative model becomes most inappropriate.

Normative planning can be defined as "a reconsideration of the value premises underlying decisions", as was illustrated by the Mackenzie Valley Pipeline Inquiry (the Berger Inquiry), or as "the definition of desired ends and goals" or the making of "decisions that determine what ought to be done". In such context, inquiries can be compared to such mechanisms as lobbying, advisory bodies, Green Papers and legislative committees. These types of inquiries are characterized by their principally advisory/recommendatory nature and their primarily political character. When constituted as public inquiries, they are used as vehicles for public participation in government, a process which presents both strengths and weaknesses.

One strength of a public inquiry is its open and democratic character; however, publicity cannot be said to be a fundamental basic characteristic of the inquiry process since statutory regimes generally provide for inquiries to be in camera. Public inquiries are then the exception and not the rule. Indeed, when there is a public inquiry, publicity may become one of the inquiry's drawbacks. A high degree of publicity can significantly affect key witnesses' reputations. A second strength would be that public inquiries exhibit a high degree of flexibility in their methodology and are conducive to in-depth analysis. On the negative side, however, two of the weaknesses of public inquiries can be said to be their ad hoc, adversarial, costly and lengthy nature and the fact that they often represent a means of political inaction.

Because inquiries are able to perform tasks which are unsuitable for either the courts or the adjudicative model, there is a case against the judicialization of certain types of inquiries. In any event, some would argue that the multitude of functions for which inquiries are used puts in question the appropriateness of the adversarial, adjudicative model for all of them. Although it can be said that an inquiry "necessitates a major issue of considerable contentiousness for its establishment", it does not follow that the inquiry thereby established must be adversarial and adjudicative. Indeed, political processes which are often quite adversarial in nature do not necessarily call for adjudication. Furthermore, a given inquiry does not have to adopt a single procedural model. To this end, observe the Berger Inquiry on the Mackenzie Valley Pipeline which demonstrated that a mix of hearing formats can be achieved depending upon the objectives sought. It managed to reconcile board participatory and informal community hearings of a political

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82 These examples are taken from L. Graham Smith, ibid. at 562.
83 Witness the effect of publicity in the Grange Inquiry on the nurse, Susan Nelles: see Re Nelles, supra, note 70.
84 See L. Graham Smith, supra, note 80 at 564, Table 2: "Alternative Mechanisms for Normative Participation" which summarizes A. D. Doerr's analysis in her work: The Machinery of Government (Toronto: Methuen, 1980) at 136-164; the discussion in R. A. Macdonald supra, note 75 at 370-371.
85 Smith, ibid. at 570.
nature, with "formal hearings (based on the legal model) for technical debate and the presentation of development proposals". Given that an inquiry must remain flexible as an instrumentality, one must ask which of the two procedural models as adapted would best enable it to achieve its goals.

5. CONCLUSION

In the final analysis, the problem is that inquiries have different functions and goals and are created for numerous and diverse reasons. They can target the solution of a certain problem or they can facilitate policy outcomes or, in the opposite direction, they can be used to legitimize inaction on the part of political decision-makers by burying the issue. To this list of differentiating factors, we must also add the diversity of the issues undertaken by inquiries, the diversity of participants and interested parties in inquiry processes, be they policy-oriented or more focused on particularized facts, and the diversity of what we may call potential victims of inquiries. For greater complexity, we should add diversity in the contextual relations between inquiries and administrative and political processes.

In concluding, I ask, "is there really a case for some kind of differentiation of processes? Should we not call for some kind of a hearing? Should we not favour a spectrum of procedural requirements rather than a series of procedural dichotomies?" A core of principles of general application which transcend the adversarial/inquisitorial dichotomy and which represent a broad continuum of procedural exigencies may be the only way to achieve a practical, yet legal and principled, compromise for inquiries, if not for many types of governmental action.

86 Smith, supra, note 84 at 565.