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The Two Contradictions in Public Inquiries

Liora Salter*

1. INTRODUCTION

Given how frequently they are commissioned, it is surprising how little has been written about inquiries and, more particularly, about the role of science and advocacy within them. The lack of serious attention paid to inquiries may be a product of their diversity. For example, inquiries include royal commissions and consultative committees and risk assessments. Some of these inquiries have wide-ranging mandates, commission extensive research and actively solicit public commentary, while others are more closely akin to legal proceedings. Grouping such different objectives and activities under a single category — namely, inquiries — is intrinsically difficult. Or the reason for the lack of attention paid to inquiries may simply be that the political issues raised by specific inquiries seem more important to commentators.

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than the discussion of how politics is conducted through them. The situation is inexcusable, whatever its origin, for inquiries play a pivotal role in the delineation of public issues and public debate, even when their recommendations are not implemented.

In fact, the inquiry is a particularly complex and interesting phenomenon in the political life of western democracies. It offers the public an unlimited opportunity for experiencing direct democracy, that is, widespread political participation in the formation of specific policies. It offers an opportunity to define public issues, in the public view, with the participation of the clients of those policies. It provides an avenue for a public investigation of public and private conduct, far in excess of that conducted by the ombudsmen. At the same time, of course, inquiries provide governments with the opportunity to delay, obfuscate and defuse political controversy, and with advice that they are free to ignore.

None of these characteristics is particularly noteworthy; none more than conventional wisdom about politics. There are, however, two aspects of inquiries worthy of more discussion, two quite fundamental contradictions in the inquiry process that are much less understood. The first lies in the almost unprecedented opportunity provided by inquiries to expand the discussion of public issues. The inquiry can, as the Berger inquiry did,\(^2\) gather information from those directly affected by particular policies, including those who have no experience with political participation. It can also consider a range of proposals as broad as measures to restructure the economy or government. In other words, an inquiry operates almost without boundaries with respect to the information it can receive and the proposals it can consider. At the same time, inquiries are mandated by and report to government. Perhaps more than any other advisory body, their members are focused on the task of persuasion and the need to create recommendations that are agreeable, or at least feasible, to those who will receive them. The first contradiction, then, lies in the potential of inquiries to incorporate radical debate while maintaining an orientation to the very limited and pragmatic policy goals.

The second contradiction is best captured in an offhand statement by a high profile criminal lawyer who has recently acted for clients in a variety of different inquiries. He noted that inquiries offer the opportunity "to put the state on trial" and, continuing with the same thought, he suggested that inquiries are "a trial in which no one goes to jail". Even the most limited "fact-finding" inquiries often examine how government procedures are put into operation and who is actually responsible for the consequences of public policies or actions. Government officials, departmental spokespeople,

members of parliament and others, who themselves are not "on trial" can be brought before an inquiry and asked to account for their actions. Moreover, the structure of decision-making within which they function can also be introduced as pertinent evidence.

At the same time, inquiries are "trials" in a conventional sense, although this fact is often not recognized or acknowledged. Inquiries almost always deal with the issue of wrongdoing, either in terms of something that has happened or in terms of the potential of harm if a course of action is followed. Also they almost always deal with the question of who is or should be held responsible for the consequences of such "wrongdoing", even when the damages being assessed have yet to occur. Corporate, and even government participants, know this and plan their participation accordingly to protect themselves from the legal consequences of their actions. As such, they function as if they were already facing a court of law, even in informal inquiries with policy mandates.

In other words, the second contradiction in the inquiry process lies in its ambiguous relationship with the legal process. Inquiries are, at once, freed from the constraints of legal proceedings to conduct their investigations in as wide-ranging and open a manner as their commissioners deem advisable. At the same time, inquiries are legal proceedings and at least some of their participants act accordingly.

The title of this paper refers to science and advocacy. Science, in this instance, means both scientists and the type of information they generate for use in an inquiry. Advocacy refers to both the participants and to the recommendations they make in inquiries. The basic contention of this paper is that the characteristics of inquiries have a profound influence on science and advocacy. Indeed, it is suggested, if there are new insights to be found in the experience of scientists and advocates, it is in how such groups situate themselves to deal with the two contradictions in the inquiry process described briefly above.

An inquiry is any body that is formally mandated by a government, either on an ad hoc basis or with reference to a specific problem, to conduct a process of fact-finding and to arrive at a body of recommendations. There are four elements to this definition that serve to limit the kinds of committee deliberations that are included in a study of inquiries.

First, this definition places emphasis on the existence of a formal mandate. Inquiries can be distinguished from most task forces and committees because their tasks, powers and responsibilities are spelled out formally in advance of their operations. Second, this definition limits the study of inquiries to those bodies which have specific tasks which, once completed, require the dissolution of the inquiry or its reassignment. In other words, inquiries have limited and task-related life cycles which are given in their mandates and are related to the particular jobs to be undertaken.
The third element of this definition takes issue with a commonly used method of distinguishing between inquiries — namely, fact-finding and policy inquiries — and places emphasis on the exceptional wide scope of investigation that can be undertaken by inquiries and commissions. I would argue that inquiries — all inquiries — are mandated to conduct processes of fact-finding and to arrive at recommendations. In almost every instance, I suggest, such recommendations contain measures addressed to the broad questions of public policy. Obviously, inquiries differ as to the degree to which either fact-finding or achieving policy consensus is pursued and they probably can be arranged on a continuum with respect to the emphasis given to each aspect of their work. Nonetheless, both activities are always pursued to some extent and neither should be neglected in the examination of inquiries.

Finally, the definition emphasizes the recommendations produced by inquiries as central aspects of their activities. In the final analysis, regardless of the research generated by an inquiry or the policy consensus shaped among its participants, any inquiry must produce a list of recommendations to the government that commissioned it. This requirement — imperative might be a better term — shapes and constrains the research, the response to submissions, the discussion within the inquiry among its staff and commissioners and the scope of its assessment of alternative policies. Even if the recommendations of inquiries are ignored, the pressure to create them is a critical component within the inquiry process.

The inquiries used for the analysis include the six discussed extensively in Public Inquiries in Canada, the Federal Consultative Committee on IBT Pesticides, of which I was a member and the special inquiries of the Canadian Radio-Television and Telecommunications Commission on a variety of matters related to broadcasting policy. In addition, I have done research for the Royal Commission on Uranium Mining in British Columbia, the Porter Commission on Electric Power Planning in Ontario, the West Coast Oil Ports Inquiry, the MacDonald Commission and the Task Force on Broadcasting. In the case of the MacDonald Commission, I participated in evaluating its legal

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4 This concerned the new risk assessments used to evaluate potentially dangerous pesticides.
research. I have also conducted a lengthy series of interviews with inquiry participants in conjunction with a study on standard setting, discussed in the book Mandated Science, and I will make reference to the Berger Inquiry because it has been discussed so frequently in the press. None of these inquiries deals with cases of individual wrongdoing, but all were "fact-finding" as well as policy-making in orientation.

2. THE FIRST CONTRADICTION: RADICAL AND REFORMIST DIMENSIONS OF INQUIRIES

The first contradiction of the inquiry process lies in the capacity of inquiries to incorporate quite radical debate, while oriented to the quite limited, highly pragmatic and, indeed, reformist goal of producing specific recommendations for policy. The reformist nature of inquiries is easiest to demonstrate. In a commentary on the MacDonald Commission, Richard Simeon provides a rare insight into the pragmatic and reformist nature of the inquiry process.5

Simeon acknowledges that the MacDonald Commission's "logic... is consistently market-based and explicitly rejects not only the muddle and inconsistency of the industrial policies of the sixties and seventies, but also the proposals for a more activist industrial policy, such as those advocated by the Science Council".6 He provides a number of reasons why this should be so. First, he notes that the organization of the MacDonald Commission, into sections and by disciplinary specialization, became "tyrannical" in the later stages of the inquiry, and that "(o)nly a tiny coterie of senior commission officials,. . . and some of the Commissioners themselves, had a grasp of the whole." Acting under extreme time pressure, those working within the Commission had trouble seeing the forest for the trees in a process he describes as "complex and messy".

Second, Simeon notes that commissions are bound by conventional wisdom and the political pressures under which they operate (in the case of the MacDonald Commission, also by the election of a new government). Third, he suggests that commissions rely upon disciplinary norms to locate their researchers and are thus likely to reflect the prevailing paradigms in those disciplines. In the case of the MacDonald Commission, this meant that neoclassical economists, who are currently regarded as the "best" within their discipline, were likely to be chosen as its economic researchers and that their

6 Ibid. at 168.
7 Ibid. at 168.
willingness to include frankly prescriptive comments in their research studies was neither unusual nor unacceptable. It also meant that given the organization of the research by discipline — economics, political science and law, specifically — research problems not addressed by the chosen disciplines are likely to be ignored. Simeon cites the example of the MacDonald Commission’s neglect of studies of technology. Fourth, Simeon notes that those who write different sections of the report view those sections as their “property” and are thus disinclined to seek out interdisciplinary work.

Simeon argues that these and other structural constraints in the way inquiries are organized results in their fundamentally reformist orientation. As he states:

[I]t should occasion no surprise that the Macdonald Commission did not propose a fundamental, radical reorientation of Canadian society and economy. Royal Commissions are appointed by governments in power. By their very nature, they can be no more than meliorative and reformist, rather than revolutionary. Members are representatives of established elites. Commissioners are also creatures of their times; perhaps the best that can be expected is that they collect, and then express, a shifting conventional wisdom, tilting it in one direction or other way but working well within the bounds of the existing order.8

In this conclusion, Simeon is perhaps mistaken. To understand the radical dimension of inquiries, or at least their potential for radicalism, it is useful to examine the Berger inquiry which took a very different direction from that of the MacDonald Commission.9 The Berger inquiry’s radicalism was of a particular type, of course. The Berger inquiry did not provide a blueprint for revolution or democratic socialism nor did it encompass issues concerned with class or the economy. Yet, the Berger inquiry was radical in the sense of redefining its task to encompass the aspirations of indigenous people and in its attention to democratic participation. It was radical in as much as it shifted the government’s agenda from the immediate problem of which pipeline to approve, or what measures to take to ameliorate environmental damage, to much broader social issues.

According to its original mandate, the Berger inquiry dealt with two proposals to construct a gas pipeline through the MacKenzie Valley. Anyone who has read its final report, released in 1977 after extensive public hearings in native communities, knows that the Berger inquiry in fact addressed the problem of native sovereignty as its primary concern and that it incorporated not only the insights of academics and policy-makers, but those of the actual

8 Ibid. at 169.
population affected by a decision about the pipeline. In other words, by its procedures and in its handling of issues, the Berger inquiry made explicit the potential of an inquiry as a locus of radical debate.

How did it do this? First, the Berger inquiry dealt explicitly with questions about the necessity and desirability of constructing the pipeline, seen from both a technical and a broad policy perspective. Using “necessity and desirability” as the focus of its investigation, the Berger inquiry was able to widen its investigation to include matters of economic planning and social development related, only indirectly, to the potential damage constructing a pipeline might cause. Second, the Berger inquiry was among the first to provide funding for its public intervenors, thus encouraging a new level and kind of participation in the public formation process.

Third, the Berger inquiry gave great credence to experiential data from those most likely to be affected by any pipeline or government action. The report argued that the submissions by Indian elders should be viewed as evidence and treated with as much credibility as the submissions by expert witnesses. The inquiry set out to gather the experiential data in a systematic manner by educating potential participants about the questions to be addressed in their submissions and about the procedures of the inquiry and by visiting each community within the region. Fourth, the Berger inquiry not only commissioned research, but required its own staff to make formal public submissions to the inquiry to discuss their recommendations on the basis of it. Indeed, all of the research submitted to the inquiry was subject to cross-examination, a process that some commentators have compared favourably with the conventional academic peer review process.¹⁰

Fifth, Berger understood that inquiries can be used by their participants for different purposes and that this might be desirable. The briefs addressed to the inquiry, and designed to fashion its recommendations, were also addressed to a wider public made available through media coverage of the inquiry. At the same time, participants also used the inquiry as a forum to address their own constituencies. In this last task, representatives of political organizations, and expert witnesses hired by them, were able to take the diverse and often diffuse comments from the members of their constituencies and shape them into coherent presentations. In other words, the inquiry provided an opportunity to fashion political analysis and programs out of the otherwise raw material of public opinion and individual experience. The Berger inquiry recognized the importance of this process of developing consciousness and of its articulation and it afforded its participants many opportunities to “come

¹⁰ Science Council Committee on Northern Development, In Defense of Accountability (working paper) by A. Thompson.
into their own” as advocate groups through the process of speaking to the inquiry.

Finally, Berger, his staff and many of the inquiry’s participants recognized the importance of language in the creation of political issues and their resolution. The original inquiry had been cast as a debate about the merits of two applications. Inquiries dealing with similar problems, including some modelled intentionally after the Berger inquiry, often focus their attention on a discussion of “development”, as Berger might have done.” Such inquiries have spoken mainly about the “social impacts of development”, about how to handle the negative consequences of corporate activity. In its final report, the Berger inquiry relegated both “development” and its “social impacts” to secondary importance. For Berger, the critical debate was quite a different one.

Berger recognized what is often implicitly understood about inquiries. He recognized that the description of issues adopted by an inquiry foretells the types of proposals that will be evaluated in response to them. Berger used the public submissions to fashion a language that was amenable to the kind of recommendations he was preparing to make. He drew out of submissions the language necessary to describe his mandate so that he could support his recommendations relating to native land claims.

Indeed, although Simeon does not acknowledge the potentially radical aspects of inquiries, he makes the same point about the MacDonald Commission, although in this case, to explain why the Commission was unable to work comfortably with material falling outside the paradigm of neo-classical economics. Simeon notes that the Commissioners “were seized with a sense of urgency”, and that they felt a sense of “threat” that the current policies would no longer suffice in the increasingly competitive world environment. As Simeon states, “[t]hese realities combined to create a sense that something major had to be done”, and that something “must be new and dramatic”. The “crisis”, Simeon notes, was understood to be primarily an economic one and thus submissions focussed on the need for greater equality, social justice, attention to the weak and marginalized were seen to be beside the point since they did not address the problems of economic growth and efficiency. As Simeon states:

Once the terrain for debate on industrial policy was defined as growth and productivity, the social or ethical dimensions of industrial policy were largely irrelevant: policy must be “development-oriented” rather than “distribution oriented”. Moreover, the critique of interventionist industrial strategies mounted

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11 An example is the Bayda Inquiry, Cluff Lake Board of Inquiry, Final Report by Mr. Justice E.D. Bayda (Chairman) (Saskatchewan: 1978).
by the economists . . . was highly persuasive. Given this starting position, to
argue for such policies was to argue for a discredited past.12

The cases of the MacDonald Commission and the Berger inquiry are
different, of course. In the MacDonald Commission, the description of a
"crisis" served to limit the range of proposals that would be taken seriously,
while in Berger's case, the new description of the problem, generated through
the inquiry, permitted it to go beyond the limitations of its original mandate.
That said, the point is an important one, for in each case the struggle over how
to define the problem to be addressed by the inquiry was the most important
moment in its deliberations.

The point of raising the example of the Berger inquiry is not to evaluate it
nor to draw upon the critiques that have since appeared in the literature. What
the Berger inquiry did was present in bold relief the characteristics of an
inquiry that make it amenable to radical debate. Indeed, from the Berger
inquiry, both government and members of the public learned that an inquiry
could be an exceptionally public process. They learned that an inquiry could
be used to solicit new kinds of public participation in public life and to debate
issues in greater detail than is possible in parliament, within government or in
the normal course of media coverage. They learned that an inquiry can be
used as a means of crystalizing public opinion into well-articulated positions
from which a policy consensus could be developed. The Berger inquiry illu-
strated how the language used, in the mandate or by the Commissioners,
could expand or delimit the problem to be addressed. For quite different
reasons, these aspects of the inquiry process appeal to governments, advocate
groups and even industry, irrespective of the radical debate and proposals they
also generated in the case of the Berger inquiry.

The point of the comparison between the Berger and MacDonald
inquiries is not to argue that one was good and the other not or to belabour the
obvious point that Tom Berger and Donald MacDonald had different politics
and priorities. It is instead to use the MacDonald Commission to illustrate one
side of inquiries and the pressure that is put upon their commissioners to ar-
rive at a series of reformist recommendations. And it is to use the Berger
inquiry to illustrate how far an inquiry can go to encorporate radical debate
and genuinely democratic participation.

What are we to make of the contradiction that the comparison of the two
inquiries illustrates? What are we to make of the fundamentally reformist na-
ture of inquiries and their capacity to incorporate radical alternatives and de-
bate? It goes almost without saying that inquiries send out mixed messages.
To the public, inquiries offer the possibility of a discussion about public
policy that knows few limits in terms of its participants, the information it can

12 Supra, note 6 at 175.
gather or the proposals it can entertain. This is not a false promise, although many inquiries fail to deliver upon it.

At the same time, even the Berger inquiry ran up against the reformist limitations of inquiries, primarily through the process of shaping its recommendations in a manner that would be acceptable to government. To the extent that an inquiry promises the opportunity for radical debate — as the MacDonald Commission did, in fact — but produces a report that displays little sensitivity to the submissions it has received, the response is likely to be a cynical or angry one. And if inquiries are commissioned, in part, to defuse controversy, such inquiries succeed only in fueling it further.

The experience of the Berger and MacDonald inquiries also helps us redefine the purpose of reformist-radical debate within them. In these quite different inquiries, the primary struggle was over how to define and understand the problem to be addressed. It was a struggle over language because the description of the "crisis" in each case would predetermine the acceptability of proposals to respond to it. This is an important insight. Too frequently inquiries have been faulted because their specific recommendations are not accepted. We would do better if we understood that recommendations are important primarily because the pressure to produce them exerts a powerful control upon the commissioners and forces even the most radically inclined inquiries to be pragmatic and reformist in the final analysis. And even if none of their recommendations is accepted, inquiries are still important because they are the locus, and one of the very few occasions, for a public debate about the definition of public issues, including a debate about reformist and radical conceptions of these issues. Inquiries prepare the ground for public sentiment and policies, even if they themselves do not propose policies that governments accept.

We can return now to Simeon's contention that inquiries are fundamentally reformist in nature. I have argued that Simeon's conclusion is premature and that inquiries do, or can, have the potential to incorporate a radical debate. That said, the Berger inquiry is an exceptional one and, in general, Simeon is accurate in his perception. What is necessary to complement his analysis, and to take account of the exceptions, is a further analysis of why, given their radical potential, inquiries so seldom reach beyond the narrow limits of pragmatic politics.

For this purpose, it is useful to note that inquiries, even the Berger inquiry, have both a public and a private process. Through their hearings and their contracted research, inquiries reach out into the public for fresh insights, information and possible proposals of action. When this public survey and de-

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13 See Daniel Drache and Duncan Cameron, eds., The Other MacDonald Report (Toronto: J. Lorimer, 1985).
bate is concluded, however, the inquiry staff and commissioners retreat to consider the material and to write their final report. Once in retreat, their activities are private ones. Several consequences follow from the private aspects of the inquiry process.

First, as Simeon notes, and I have discussed at length elsewhere, the private component of the inquiry process resembles a negotiation more than an assessment. It is conducted under extreme time pressures so that no one involved has time to absorb, let alone integrate, the vast body of information and the significance of seemingly insignificant revisions from one draft of the final report to the next.

Second, in these private negotiations of the inquiry process, another "party" joins the table. The government to whom the final report is addressed becomes a silent member of the negotiating team. A great deal of the argument discussed among the staff and commissioners is addressed to this silent player as each person casts his or her arguments as "what the government will want to hear" or "what the government will buy". But since the government is not present, except "in spirit", no checks or balances are inserted into the discussion. The appeal to the "silent partner" serves to limit and constrain what the inquiry report will contain and the scope of the recommendations it will make. It creates the classic situation of self-censorship.

Third, in these negotiations, something happens to the public submissions and research that is neither intended nor particularly desired. Because so few people in fact write the report and because their deliberations occur under extreme time pressures and in closed-door situations, material from the submissions, and often from the research studies as well, is lifted out of context and used strategically to advance particular arguments. Words or phrases from the submissions become disconnected from the analysis in which they are generated. They are disassociated from the submission as a whole, either a public submission or a research report, and used simply to support positions in the negotiation.

Finally, because the report-writing activities of an inquiry are conducted in private and because neither commissioners nor staff are genuinely representative of particular interests or constituencies, the capacity of any individual to negotiate for a particular objective is diminished considerably. The point is best made by example. As a member of the Federal Consultative Committee on IBT Pesticides, I saw my own role as ensuring that the commission took into account the actual conditions under which these pesticides were being used. This meant that I was particularly sensitive to the type of information brought forward by treeplanters and farm workers, for these groups were the most likely to be exposed to danger. Although I was in no

14 For a more detailed description of the negotiations, see L. Salter, supra, note 4.
sense a representative of these groups, I undertook to represent their experience in the internal negotiations of the inquiry.

Two factors hampered my efforts. First, because I had been appointed as an expert rather than as a representative, I also felt it was incumbent upon me to consider other aspects of the problem, including, for example, the problems that farmers might have if the pesticide were banned. I had, in other words, to become a generalist while at the same time maintaining an interest in a particular constituency and their problems. This was difficult to do and I suspect that many people in my position choose one side or the other of the dilemma with the result that their contribution as either a representative or as a generalist is compromised.

More serious perhaps, I was engaged in a process of negotiation — I called it “horsetrading” — in which a great deal of “give and take” was necessary if the final report was to be written. As a result of these negotiations, the final reports of inquiries often contain seemingly contradictory recommendations. Ours was no exception. On one hand, the report claimed that studies had not demonstrated dangers to humans while, on the other, it recommended that farm fields should be posted with warnings about the pesticide spraying. In the context of negotiations, it is never possible to win all the issues. Decisions often have to be made about the importance of particular recommendations and about whether they could be “traded” for someone else’s important items.

The situation I was placed in can be compared to a labour negotiation, but there is an important difference between labour negotiations and the negotiations that characterize the report-writing stage of an inquiry. In an inquiry, those who are negotiating are neither accountable nor in a position to discuss the possible “trade offs” with those to whom they are of most serious concern. I could not have known, and I still do not know for example, whether my insistence upon a recommendation that farm fields be posted with notices about pesticide spraying (incidentally, a recommendation that was not accepted by the government) was more important than the recommendations I gave up in order to secure its place in the final report. I had no means to check my perceptions or priorities and, in this, I was no different from the other commissioners who were more prone than I to sympathize with the farmers or the manufacturers.

For those who espouse a reformist politics and a notion of politics as consensus building, seeing inquiries in terms of negotiations probably poses few problems. For those who wish to emulate the Berger inquiry or to make the inquiry a locus of a wide-ranging and, occasionally, radical debate, the inclusion of the government as the “silent partner” to the negotiations, the reduction of public submissions, considered analysis and research reports to a few strategic phrases and the loss of accountability during the period when the recommendations are being negotiated renders even the most radical inquiries
reformist at best, and profoundly undemocratic in the worst cases. If Simeon's insights about inquiries are insufficiently dialectical, they are also correct for the most part in the final analysis.

3. THE SECOND CONTRADICTION: THE AMBIGUOUS LEGAL STATUS OF INQUIRIES

The second contradiction in inquiries lies in their ambiguous relationship with the legal process. Inquiries are both freed from the constraints of legal proceedings and, at the same time, very much influenced by legal considerations. They can, in fact, be described as trials in disguise. I will deal with the freedom of inquiries first.

An important reason why inquiries are commissioned is that they permit investigation of problems in a more informal, less legalistic setting than the courts. Quite often, even in the case of an investigation of individual misconduct, inquiries set their own rules of procedure. They can design procedures appropriate to the kind of information and participation they seek. Thus, for example, the Dubin inquiry will be different from the Sinclair Stevens inquiry, and different again from the Ocean Ranger inquiry, even though each of these inquiries focuses in part on an investigation of wrongdoing. These inquiries are different, because their commissioners have taken different approaches, but also because the information that they require cannot be fit into a standard structure of investigation.

There are other examples. Berger's community hearings were quite different from his own more formal sessions dealing with the submissions of expert witnesses, yet neither was given more credence. In the LeDain Inquiry into the Non-Medical Uses of Drugs and in Porter's Inquiry on Electric Power Planning in Ontario, scientists made their submissions to other scientists in sessions that resembled academic seminars rather than public hearings. The advantage of their doing so is obvious.

Inquiries also usually operate with a much broader concept of "interested party" than do the courts. Indeed, they must if such interests as the environment or such groups as the National Anti-Poverty Organization are to be included. To the extent that theory underlies this particular aspect of an inquiry, it is the contention that an interest group negotiation, conceived in traditional terms, cannot represent those groups who lack an immediate, personal and financial stake in the decision nor can it attract participation representative of the public good, where few individuals are themselves directly affected. As Emond notes, if environmental concerns are to be raised in an inquiry, either the trees must have court-appointed lawyers (a dubious
proposition at best) or the concept of an interested party must be enlarged to include advocacy groups.\(^5\)

The final point to be made with respect to the freedom of inquiries from the strictures of legal proceedings has been mentioned in the introduction to this paper. A lawyer with experience in several high profile inquiries was quoted as saying that inquiries offer the opportunity to put "the state on trial" in a situation where "nobody goes to jail". The importance of his observation should be stressed. In most of the inquiries about "wrongdoing", the factors that encourage "wrongdoing" are as important as the conduct of the individuals involved. For example, in the Sinclair Stevens inquiry, what was at issue, surely, was not just the conduct of Sinclair Stevens but also the limitations of the conflict of interest guidelines in handling the actual relationships and actions in which any cabinet minister was likely to be engaged. Similarly, one can argue that the officers of companies that pollute should be held individually responsible. If, however, no one at the inquiry also addresses the organization practices that lead to pollution, the financial rewards that follow from it and the regulatory regime that monitors the offence, the problem will not be resolved by the imprisonment of a few people.

Putting the "state on trial" includes examining all of these factors: the organizational practices of companies and governments, the financial incentives for wrongdoing, the regulatory regime that is supposed to monitor conduct and its mechanisms of enforcement. It includes examining the relationships between government contracting, departmental decisions and corporate lobbying that underlay Sinclair Stevens' actions. It also includes, or should include, examining the patterns of development that render native people marginal even on their own land, the historical factors that lead to high unemployment rates in Newfoundland and the investment policies that resulted eventually in the Ocean Ranger disaster.

Inquiries encourage the discussion of broad issues among the public at large. There are few other opportunities to address these broader questions. By virtue of their freedom to define "interested party" widely, to adopted innovative procedures for investigation and to render recommendations that do not necessarily impinge upon the legal rights of individuals, inquiries are also unique and important in policy formation. To create the maximum opportunity for addressing issues of state and governance, however, inquiries need to be freed from the strictures of the legal process. And so they are in most instances.

But the situation of inquiries cannot be described adequately only by reference to the wide-ranging investigations they sometimes conduct. If inquiries are freed from the strictures of the legal process, they are also legal proceedings. In fact, I would argue that inquiries are themselves “trials” and that their legal substratum shapes both their participation and their capacity to inform and to stimulate debate.

To support this second argument, it is instructive to look at a new source of inquiries — the risk assessment process that has been made part of the evaluation of some pesticides. The first such risk assessment — it was not called a risk assessment at the time — was probably the Federal Consultative Committee on IBT Pesticides. Like the advocate groups, I came to the hearings with a strong belief in the importance of public hearings and faith in the process of cross-examination as a means of arriving at “the facts of the case”.

As a member, I made a number of observations, all of which underline the implicit legal content of inquiries. First, I observed that the legal definition of interested party had much more bearing on the course of the inquiry than was acknowledged. Although a variety of interest and advocacy groups had standing in the hearings, it seemed to me, as a commissioner, that their submissions were not viewed as equally credible. It was not the case, as might be supposed, that those who sought to have the pesticide banned lacked credibility. Rather, at least informally among the commissioners, only those with a direct, pecuniary interest were taken very seriously. Thus the farmworkers, whose brief was couched mainly in examples and rhetoric, were credible as were the treeplanters, farmers and pesticide manufacturers. But the environmental advocate groups, whose well-researched briefs left little to be desired, were not. In other words, the importance of having a pecuniary and/or legal interest in the final recommendations of the inquiry should not be underestimated.

Second, I observed that much of the inquiry centered on an investigation of who had legal jurisdiction and responsibility for ensuring safety, rather than on the safety of the pesticide under discussion. This too is more similar to a court than a supposedly free-wheeling inquiry. Moreover, the investigation of responsibility was largely confined to government officials who took the opportunity to delineate in the most formalistic manner their official mandates. From these submissions, I could identify who did not have a formal mandate and responsibility for aspects of pesticide approval. It was considerably less clear where responsibility for the decisions actually rested. In fact, I concluded, at the time, that the inquiry, and indeed each assessment of a controversial pesticide, provided the opportunity to negotiate relationships

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16 For a more comprehensive discussion, see L. Salter, supra, note 4.
among various government departments, each of which sought jurisdiction but no final legal responsibility. In other words, my hoped-for situation of putting the state on trial still lacked an "accused" at the conclusion of the inquiry because all of the parties sought to avoid being "accused" in the same manner as they would have done in a court.

Third, at least some of the parties engaged in activities that were more compatible with a trial than a free-wheeling inquiry. The companies, which might in other circumstances be facing court action as a result of any harm caused by the pesticide, viewed their participation strategically and left little to chance. As well as having counsel present, they did everything they could to fashion a strong defence, although technically speaking, none was required in this inquiry. For example, I observed that the pesticide manufacturers had stationed a woman in the library of the inquiry, whose task involved explaining what was occurring to anyone who used the facility, particularly the media. Moreover, the companies couched their presentation not as part of an investigation of the risks nor as a debate about the scientific merit of particular studies, but as a defence of their product and, more importantly, as a defence of their activities.

Fourth, the legal substructure of inquiries became particularly obvious with respect to the labels on pesticides. It seemed to me, as a consumer in this instance, that the label was singularly uninformative. On one hand, the label seemed to suggest that no dangers had been identified with the product in question, but, on the other hand, the label recommended quite specific precautionary measures. I pursued a line of questioning in the inquiry which went as follows: If the company had no serious concerns about the risks posed by the pesticide, why did it recommend such extensive precautionary measures? And if the precautionary measures were essential to the labelling of the product, might one not also conclude that some question existed about its serious risks? I got nowhere with this line of questioning and, in retrospect, I determined that the cause of my frustration was the significance of the label for legal purposes. I had naively expected that everyone, including the company, sought the most informative label possible, not recognizing that a label is a legal document affecting the determination of negligence and liability. The companies were not so naive.

Fifth, the most recent risk assessment — the first formal risk assessment of its kind in Canada — into the regulatory status of a pesticide concerned the pesticide alachlor. The alachlor case confirms my original observations. Although its purpose was to conduct as wide-ranging investigation as was necessary, this risk assessment resembled a court. This was true even though the board conducting the inquiry was quite sympathetic to health and environmental issues and the environmental groups were funded. On "trial" in this instance was a pesticide that had been in use for many years. The scientific evidence was conflicting. The impact of a decision to ban the chemical might
protect the health of many; the effect of banning it would definitely impinge upon the livelihood of a clearly identifiable group of farmers, not to mention manufacturers.

The outcome of this last inquiry — a recommendation from the inquiry to permit the pesticide to be used — was never in doubt. For to the extent that the inquiry was a trial in disguise, it was impossible to prove conclusively that the danger existed or that such a danger would outweigh the very real consequences to individuals that a ban would impose. In other words, by the standards used in a court, the pesticide could not reasonably be found “guilty” of being dangerous, even if some studies suggested that it might cause harm. Furthermore, after this inquiry filed its report, it was faced with a lawsuit from the company manufacturing an alternative chemical, arguing that the evidence about the alternative chemical was “inadmissible” and that certain rights had been infringed by the inquiry’s investigations. Even though the appeal was denied, this too is further evidence that the companies have treated the inquiry as if it were a legal proceeding.

Almost all inquiries, I would argue, deal with the question of “wrongdoing” and with issues concerning negligence and liability. Inquiries are always “trials” in some sense of the word. In the case of the Sinclair Stevens inquiry, the wrongdoing had already occurred and all participants were cognizant of the need to mount legal defences of their positions. In the Ocean Ranger case, it was necessary to identify the proper “accused” and part of the investigation of the inquiry was focussed upon the issue of where, if anywhere, blame should fall. In these instances, the legal substratum of inquiries is, or at least should be, apparent to all.

Let us return to the example of the Berger inquiry and to similar inquiries that are designed to identify the risks, costs and benefits of a proposed activity such as a pipeline, dam or program of electricity generation. Obviously, in these inquiries, there can be no “accused” in the sense that neither the action nor its possible negative consequences has occurred yet. At the same time, the potentially dangerous aspects of the proposed activity are usually being investigated. These inquiries seek to determine, in advance, not only what might happen, but the costs that would be incurred as a result of any damage and the locus of legal responsibility both for the supervision of the activity and for its consequences. In other words, such inquiries are similar to trials even if no act of wrongdoing has occurred because the questions to be addressed are the same as those that would, and will, be addressed if problems arise, if there is “negligence” and if someone is to be held liable for it. Indeed, such inquiries and the submissions made to them often can be made relevant later in a formal court proceeding.

The inquiries concerned with the re-evaluation of pesticides fall somewhere in between inquiries like the Ocean Ranger case and the Berger or Porter Commissions. On one hand, they deal with damages, negligence and
liability that have yet to occur, in as much as they focus on the future regula-
tory status of pesticides. On the other hand, they put information onto the
public record about the past practices of the manufacturers and government
with respect to their handling of the risks already posed by the pesticide.
These too are "trials" and their participants conduct themselves accordingly.

What about inquiries, such as the MacDonald Commission, whose tasks
are confined to making policy recommendations? Are they also legal
proceedings? One could stretch the analysis and suggest that it was Keynesian
policies that were on "trial" in the MacDonald Commission, but that would be
to miss the point of the argument. Instead, it is useful to return to Simeon's
description. In discussing the role of business interests in the inquiry, he
states:

While at a very high level of generality it might be said that a "business" ideol-
ogy was presented to the Commissioners, the chief impression is of how vague,
undefined and unspecific the business briefs to the Commission were . . . There
was precious little guidance for policy in these briefs, and indeed, many impor-
tant business interests either failed to participate or did so in the most pro forma
way — and then only when prodded. Commissioners were often scathing in
their criticism of the shallowness and predictability of the business contribu-
tions.17

The MacDonald Commission can probably not be described as a trial in
disguise in as much as no particular actions — past or yet to occur — of busi-
ness or government were subjects of discussion. At the same time and probably
for just this reason, the level of involvement of the key players in the policy
debate about the economy was minimal if Simeon's description is accurate.
Business was absent, in body or in spirit, because the inquiry was not a trial
and because its presence in this particular forum was not required.

The second contradiction in the inquiry process, then, concerns the
ambiguous status of an inquiry with respect to the legal process. The most
useful aspects of an inquiry stem from its capacity to investigate problems in a
manner that is appropriate to the problem, the participants and the type of
information being sought. To succeed, inquiries cannot become court-like in
their approach, for if they do, and if they fail to protect the rights of the
"accused", they constitute a trial in which legal protections are absent. If they
become court-like, they fail "to put the state on trial" and to locate the struc-
tural or systemic aspects of such problems as corruption, pollution, industrial
accident or the diffusion of toxic substances.

Even the Berger or Porter inquiries were more similar to trials than Ber-
ger or Porter would acknowledge. For at least some of the participants, the
issues were related to potential damages, negligence and liability. For these

17  Supra, note 6 at 170.
participants, at least, the only prudent course was to act as if the inquiry was a court and its deliberations directly transferable to legal proceedings, even if technically speaking, neither supposition is correct.

4. ADVOCACY AND SCIENCE IN INQUIRIES

Virtually everyone who appears before inquiries in their public hearings is an advocate, in the sense of representing a point of view, even when the primary orientation of the inquiry is fact-finding. For, unlike the scientific studies that public inquiries often seek to emulate, inquiries are usually passive with respect to generating their own participation. As a result, their participants come to the hearings not so much because of the important information they may impart, but more because they have a point of view they wish to express. Indeed, one of the most challenging problems faced by commissioners is how to extract useful information from intervenors whose intention is primarily to persuade.

The two contradictions of the inquiry process obviously affect advocacy. In the case of the radical/reformist nature of the process, the contradiction poses quite concrete problems for academics and those whose research is used to support particular recommendations. The radical potential of inquiries originates from the fact that they present an open field to their possible participants. Few, if any, constraints are imposed upon the public submissions and in the example of the MacDonald Commission, some participants even used that inquiry to advance an analysis of capitalism and a socialist vision.

Simeon's contention about the potential of inquiries for radical debate is that it was naive to believe that such contributions would be taken seriously or that they would not be transformed within the inquiry into something much more reformist in orientation. He says:

Faced with a body like the Macdonald Commission, radical analysts are faced with a dilemma. To argue that the problems are profoundly structural . . . is also to argue that they can only be solved by fundamental, sweeping change. More limited reforms are by definition ineffective, so there is little incentive to explore them. The problem with this approach . . . is that it can end up as “defeatism clothed in hope”, generating proposals easily dismissed by the Commissioners as extreme and ideological. On the other hand, to argue for incremental reforms is, of course, to work within the logic of the existing order, and thus, from one perspective, can be seen to be equally defeatist.18

It is useful to look at the problem that Simeon identifies from a different perspective. If it is seen as a reflection of the contradiction that bedevils all inquiries, then the burden that falls upon academics as advocates is clear.

18 Supra, note 6 at 176.
What is demanded of such analysts is an approach which is simultaneously analytical and broad-ranging and, at the same time, quite pragmatic and limited. In fact, Simeon would agree that some analysts in the MacDonald inquiry were more successful than others in addressing the problem he describes. Simeon lashes out primarily at the left-leaning advocates in the MacDonald inquiry — or at least participants who reject neo-classical economic approaches — for not having developed a workable alternative to the models presented by the neo-classical economists and for lacking any new persuasive programs of action. “The issue eventually comes down to ‘you cannot fight something with nothing’”, he says. But he also says that the neo-classical economists, who also espouse a radical critique, were prepared to offer a program of action.

What Simeon’s comments underline is the burden that is placed upon all analysts making recommendations to inquiries to come up with both a new language to describe the issues and a specific program of action. Simeon’s remarks were addressed to the academics who presented briefs or conducted research for the Commission. Although he does not say so, his argument might well be that only if such academics abandon the fundamentally undialectical but common distinction between reformist and radical politics can they expect to make a serious contribution to inquiries. The neo-classical economists understood the point and, indeed, they did advocate a radical restructuring of the economy and political life and yet also did manage to provide a series of quite pragmatic recommendations.

Public advocates carry a different burden than do academics and analysts. Their burden is based on the second contradiction of inquiries, the ambiguous legal status. This burden is incurred not only because of the costs of participation, which can be considerable, but because the interests that public advocates represent are often diffuse ones. For example, in an inquiry on daycare, it will be the interests of “all women with young children”, rather than the problems of specific individuals, that are represented. Unfortunately, however, statements expressing a point of view or representing ill-defined collectivities such as “all women with young children” are likely understood as rhetorical, particularly when contrasted with evidence about specific rights, legal obligations and economic consequences affecting individuals or companies. The legal substructure of inquiries tends to turn all participants into “parties” in the narrow legalistic sense of the term if they wish to be effective.

There is a new kind of participant in many recent inquiries — the scientist. Increasingly, biologists, oceanographers, chemists and chemical engineers, toxicologists, economists and anthropologists are called upon to play a role in inquiries and to offer expert testimony on complex issues to which science is presumed to have some special contribution to make. This is now as true of the policy-oriented inquiries, such as the Berger and MacDo-
nald Commissions, as it is of the risk assessments of potentially dangerous products.

If inquiries are the free-wheeling investigations that they claim to be, we might reasonably expect such scientists to provide a factual basis for a later determination of policy recommendations. We might expect scientists to function as disinterested parties, paying little attention to legal issues that might also arise. Indeed, innovative procedures are often intended to facilitate scientific discussion in inquiries, precisely so that scientists can provide an objective or factual view of the problems at hand. But the effect of the second contradiction, the ambiguous legal status of inquiries, undermines the contributions that scientists can make and their abilities to provide a relatively objective or factual view.

There are a number of reasons why this should be so. First, if some of the participants in an inquiry act as if they were legally on trial, and others fail to participate because they are not on trial, then the scientific data that participants will bring forward are those which fit within their legal strategies. Companies will not discuss scientific literature that demonstrates conflicting opinions about the risk of their chemicals, unless advised by their lawyers that full disclosure is essential for a later defence. The limits of their scientific contribution will be determined by their assessment of its impact on questions about negligence and liability. The significance of this point can easily be underestimated. Inquiries are more dependent upon the scientific expertise of others than is often recognized. Most inquiries that rely extensively upon science conduct little of their own research, but instead simply review the studies that have been submitted by others. The scientific studies being reviewed in most inquiries are usually those conducted by the companies, whose scientific contributions are influenced, at least indirectly, by the interests of those who present them to the inquiry. In other words, although many inquiries pride themselves on their handling of science, their scientific assessment is often short-changed by the source of their data.

Second, scientists often find themselves subject to cross-examination in an inquiry. Believing that inquiries differ from courts and that an adequate science incorporates recognition of its uncertainties, they fare poorly. The reason is that a skillful lawyer can undermine the credibility of a scientific report simply by forcing the scientist who produced it to confess to the areas of uncertainty in his or her research or conclusions. "You don't really know", the lawyer will ask, "that construction of the pipeline will diminish the caribou herds?" or "that the high incidence of birth abnormalities near the canal is the result of chemical exposure?" By emphasizing the methodological limitations of particular studies and pointing out the inconclusiveness of science, a lawyer can raise doubts about relying upon any scientific conclusion. Many scientists find debate within inquiries to be antithetical to their understanding of good scientific practice and are reluctant to participate as a result.
Third, inquiries, like courts, require scientists to reach conclusions that are useful for legal and regulatory purposes. Some types of science are more likely to produce conclusive information than others and, thus, in inquiries, some kinds of science have more usefulness than others. A carefully controlled laboratory study is not different from a sophisticated econometric model in this regard. In both cases, the high degrees of certainty that are required to support legal arguments can be expressed about the conclusions from such studies because the “environment” and variables within them can be carefully controlled. Much less scientific certainty can be expressed in relation to problems such as the effect of violence on television or of pursuing particular economic policies. As a result, this type of scientific research is perceived to be less scientific, less reliable and, in turn, less useful to inquiries. Inquiries often rely upon toxicology, rather than ecology, or econometrics, rather than economic history. Yet, in a genuinely free-wheeling inquiry about policy issues, it is often sociologists, historians and ecologists that have the most to offer, since these sciences take a much broader view of the problems they address.

Fourth, the science in inquiries is seen to be value-free and neutral, as it is in almost every other context, and inquiries rely upon scientists to conform to the norms of the scientific community in this regard. This situation creates a paradox for scientists as participants in inquiries, for a commitment to values other than scientific ones can be both necessary for and counter-productive to their credibility. Scientists are not often called to testify in inquiries unless they are willing to be expert witnesses for one or other “side” in a debate. Moreover, in order to withstand questioning from lawyers, scientists need to conform to legal, not scientific, norms and conduct themselves as if they were in a court, not a scientific debate. At the same time, however, scientists must learn to avoid any references to information or opinions that would make their contribution less than scientific in appearance. Indeed, scientists who openly espouse advocate positions are compromised with respect to their credibility, particularly in comparison with their more careful colleagues who provide no indication of their views.

Finally, I have stressed that inquiries also have a “private” component to their deliberations, one that is characterized by time-pressure, the presence of the government as a “silent partner” and intense negotiation. I made the point, and it should be reiterated here in the discussion of science in inquiries, that those engaged in the negotiations — the inquiry commissioners and staff — tended to become disassociated from the particular interests or concerns that they originally felt and that these individuals lacked any means of being accountable for the “trade-offs” they negotiated. I want to extend the point here.

Scientists who are commissioners or inquiry staff also become disassociated from their academic or disciplinary communities and from the process
of scientific debate. They no longer represent their own research, but are called on to represent the field of expertise or science as a whole. As such, they are no longer in a position to discuss the various complexities of specific research studies, to provide a rounded picture of the academic debate or explain the schools of thought within it. They can provide no more than a passing glimpse of the issues in conflict within their particular disciplines.

Moreover, because they are cast in the position of negotiators, they too draw out of the raw material the particular phrases or conclusions that are useful in a heated debate to support particular rhetorical positions. Were this situation simply the give-and-take of political debate, then the use of facts of rhetorical devices would be common and acceptable. In the context of dealing with scientific or factual materials, such an approach distorts the fact-finding enterprise by eliminating both contextual factors from the research and uncertainties and conflict within science from the discussion.

In other words, it is difficult for even the most dedicated inquiries to maintain a commitment to their scientific objectives during the private component of the inquiry process when recommendations are being negotiated. The ambiguous legal status of inquiries hampers their efforts because it influences the nature and the kind of contribution that scientists will make and because it renders some of the most relevant scientific work less useful than it otherwise should be. It also hampers their efforts because lawyers often taken advantage of the opportunity to impune science or fashion it to their purposes, which they can easily do because of the inherent uncertainty of most properly conducted scientific research. As a result, the science of the inquiry process if often less scientific than the inquiries themselves would wish and the fact-finding component is often short-changed by the pressure to produce acceptable recommendations.

5. CONCLUSION

The two contradictions in the inquiry process undermine both science and advocacy in inquiries. The result is that most inquiries do not have participation from all the possible advocates and that scientific inquiries are seldom as scientific in practice as their proponents claim. It is not uncommon for inquiries to attract participation only from the corporate groups, formal lobby groups and government officials. Nor is it uncommon for people who are unable to deal with the simultaneously radical and reformist nature of inquiries to become cynical about them. Inasmuch as these things happen, the conventional wisdom about inquiries — that they are used to delay, obfuscate and “take the heat off government” — becomes true and their potential to define important public issues, to incorporate scientific information in the public debate and to put “the state on trial” is wasted.