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The Forms and Limits of Judicial Inquiry: Judges as Inquiry Commissioners in Canada and Australia

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In both Canada and Australia the conduct of public inquiries draws heavily from the expertise of the legal profession, with judges frequently serving as commissioners and inquiry hearings often reproducing the popular imagery of a courtroom. Despite this affinity between public inquiries and the legal profession, however, jurisprudential and academic authorities repeatedly stress that public inquiries are non-adjudicative. Indeed, the received wisdom is that the investigative focus of public inquiries justifies their divergence from the procedural and substantive commitments of adjudication. This paper challenges that assumption. It argues that the service of judges as inquiry commissioners should be premised on their fidelity to the basic value of adjudication, a commitment necessary both to honour the due process rights of inquiry participants and the constitutional principle of separation of powers. Drawing from constitutional jurisprudence, practical examples of judicial service on inquiry commissions in Canada and Australia, and an understanding of adjudicative processes from the perspectives of their participants, I propose an analytic method to resolve the unique dilemmas faced by judges as inquiry commissioners. This method speaks directly to the ethics of judges, reinforcing a connection between their skills, procedural methods, and commitment to honour the basic principles of a just legal system.

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Introduction

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Introduction

Public inquiries are an important feature of the political landscapes of both Canada and Australia, yet their legal character defies easy classification. Formally, they are ad hoc administrative bodies constituted by the executive branch of government to investigate matters of public concern or controversy. Their conclusions are not binding in a legal sense, although public inquiries may be armed by general statutes with a range of coercive powers, including the power to compel the testimony of witnesses, and may engender significant consequences for individuals, such as damage to their reputations, the loss of livelihood, or the instigation of civil or criminal proceedings against them. The very term “public inquiry” is something of a moving target, and can denote processes ranging from a straightforward departmental investigation to a complex, free-standing institutional body with its own budget, staff, terms of reference, and methodology for gathering and assessing evidence. Inquiries of the latter sort tend to draw heavily from the legal profession, as active or former
judges are frequently their heads, and public hearings in which testimony is led and cross-examined by lawyers their most visible feature.\(^1\)

Despite this affinity between public inquiries and the legal profession, legal and academic authorities often stress a categorical distinction between inquiries and the procedures and methods of courts. Commenting on Australia’s recent establishment of a federal public inquiry (or royal commission) into institutional responses to child sexual abuse, Scott Prasser remarks,

> a royal commission is not a “judicial inquiry”. There is no such thing in our system of government. There are courts separated from executive government and presided over by judges and magistrates to hear cases based on law. By contrast, royal commissions, although often carried out by current or former judges, are not courts of law. They are appointed by executive government, report to executive government, and are instruments of executive government. Executive government decides their terms of reference, timeframes and resources. So a royal commission is not about making judgments, but about clarifying the facts and making recommendations on a broad range of issues.\(^2\)

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1. The Law Reform Commission of Canada’s 1979 report on public inquiries offered a classificatory distinction between inquiries that are “investigative” and those that are “advisory,” and recommended that Canada’s *Inquiries Act*, RSC 1985, c 1-11 be amended to confer separate powers on each (see Law Reform Commission of Canada, *Report 13: Advisory and Investigatory Commissions* (Ottawa: Minister of Supply and Services Canada, 1979) at 3). A similar approach was more recently advocated by The Australian Law Reform Commission in its 2009 report on the *Royal Commissions Act* 1902, albeit in a form that would create more than one tier of inquiry possessing the statutory power to compel witnesses (see Austl Commonwealth, Law Reform Commission, *Making Inquiries: A New Statutory Framework* (Sydney: Australian Law Reform Commission, 2009) at 96). Yet a neat distinction between advisory and investigative inquiries belies the fact that many (and perhaps most) public inquiries pursue these functions simultaneously: they investigate “what happened” in respect of a public controversy and advise the executive on policy reforms that flow from investigative conclusions. The task of classifying public inquiries is further complicated by the fact that in both Canada and Australia, in addition to statutory inquiries, the executive may establish public inquiries as a matter of crown prerogative, although these inquiries do not have the power to conscript witnesses or evidence (see Law Reform Commission, *ibid* at para 3.2 and Ed Ratushny, *The Conduct of Public Inquiries: Law, Policy, and Practice* (Toronto: Irwin Law, 2009) at 24-25).

Both countries also use a variety of terminologies—“public inquiry,” “commission of inquiry,” “royal commission,” “judicial inquiry”—to denote various inquiry processes, sometimes interchangeably, sometimes implying important substantive differences. At the risk of imprecision, I use “public inquiry” in this paper to denote a process that resonates most with popular understanding: that of an ad hoc institution independent from the political branches of government, constituted to investigate a subject of public concern, using coercive powers and public hearings that involve the examination and cross-examination of witnesses by lawyers, and typically presided over by an active or former judge.

For a considered definition of public inquiries from a political science perspective, see Scott Prasser, *Royal Commissions and Public Inquiries in Australia* (Chatswood, NSW: LexisNexis Butterworths, 2006) at 15, Fig 2.1.

This view is echoed in Canada by Simon Ruel in his text, *The Law of Public Inquiries in Canada*:

> On the nature of the decision and the decision-making process, despite some similarities with the judicial process, commissions of inquiry cannot be equated with trials. They are inquisitorial, not adversarial, and their reports and recommendations are entirely different from judicial decisions, having no legal consequences and not being binding in any way. Those considerations suggest a lower duty of procedural fairness.3

Indeed, the distinction between public inquiries and adversarial litigation is central to much of the Canadian jurisprudence defining the rights of inquiry witnesses, appropriate standards of due process, evidentiary principles, and the application of the *Canadian Charter of Rights and Freedoms*4 to inquiry proceedings.5 As put by Létourneau JA of the Federal Court of Appeal,

> There is a world of difference in terms of significant impacts between a commission of inquiry and an adjudicative tribunal....

> By definition, commissions of inquiry investigate rather than adjudicate. It must not be forgotten that the commissioners chairing such commissions do not have evidence establishing the facts, causes and circumstances of the events being investigated. It is the very role of commissioners to seek out that evidence and then analyze it.

> Good investigators, just like fine bloodhounds, are driven by suspicions which they seek to confirm so that the file can be closed, or to dispel so that the search can pursue other tracks.6

The characterization of public inquiries as non-judicial may differ from the popular impression they convey, prompted no doubt by the familiar imagery of witnesses being cross-examined in public hearings, that such inquiries decide questions of guilt or innocence. In the court of public opinion at least, the distinction between legally enforceable findings of criminal or civil liability and mere factual findings of misconduct—so central to the jurisprudence delimiting the powers of public inquiries—

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5. See, e.g., *Canada (AG) v Canada (Commission of Inquiry on the Blood System)*, [1997] 3 SCR 440 [Krever], concerning the scope of witness rights to notice of possible findings of misconduct, and the prohibition against inquiries reaching findings of civil or criminal wrong; and *Phillips v Nova Scotia (Westray Mine Inquiry)*, [1995] 2 SCR 97 (per Cory J, concurring), concerning the application of ss 7 and 11(d) of the *Charter* to inquiry proceedings.
may be illusory. It may also be illusory to inquiry participants themselves, both individuals who seek standing at an inquiry so that an alleged injustice against them may be redressed, and those who fall within the scrutiny of a public inquiry, who are no doubt keenly aware of the serious personal consequences this may entail.

The distinction between public inquiries and the adjudicative medium of judges raises an important prudential question: is it appropriate that judges be used to conduct public inquiries in the first place? More specifically, is judicial leadership of inquiries an appropriate role under the constitutional separation of powers, and does that leadership contribute meaningfully to the underlying purposes that inquiries are intended to serve? Both Canada and Australia would benefit from clearer guidance concerning the use of judges as inquiry commissioners, and a comparison of their respective approaches and experiences would help further this objective.

In this paper I attempt such a comparison. I begin by introducing the Australian doctrine of incompatibility, which subjects all extra-judicial activities of judges to the requirement that they cohere with the overall integrity of the judiciary. This doctrine, which Canada lacks due to its more relaxed observance of the separation of powers, helps illuminate purposive constitutional values relevant to the service of judges as inquiry commissioners in both countries. The doctrine of incompatibility does not, however, resolve some of the most challenging dilemmas that confront judges in the conduct of public inquiries, exposing them to subtle interference with their independence and inflicting possible unfairness on participants. To resolve these tensions, it is necessary to more closely reconcile the work of judges as inquiry commissioners with judicial methods and procedures. This can be achieved by clarifying the distinct social value generated by adjudication, and considering the extent to which it is relevant to the work of public inquiries.

Put simply, the thesis advocated in this paper is that judges are suited to serve on those public inquiries that demand reproduction of the basic value of adjudication. This value can be expressed as the opportunity for participants to be treated with structural equality, for them to receive the opportunity to influence the outcome of a proceeding by presenting proofs and reasoned arguments to a neutral arbiter, thus instilling a high level of confidence in the justice of that official’s decision-making. Not all public inquiries demand the enforcement of this value, and for those that do not the service of judges as inquiry commissioners may contribute to an improper judicialization of proceedings and weaken their substantive outcome. Many public inquiries do, however, demand adjudication—not
exclusively, but to an extent appropriate to assure procedural fairness. Recognizing this requires subverting the accepted wisdom that public inquiries are non-adjudicative, and thus not beholden to many of the procedural and substantive commitments of courts. Some public inquiries are adjudicative, albeit in contexts where adjudication is blended with other procedural forms. The key is to distinguish one type of inquiry from the other, and thereby discern the proper forms and limits of judicial service within them.

I. The separation of powers and the assumption of extra-judicial functions by judges

In Canada, judges are used prolifically to conduct public inquiries. Anecdotal evidence alone bears out this trend. Quebec’s Commission Charbonneau into collusion and corruption in the provincial construction industry has been led by a judge of the Superior Court. The recently completed Cohen Commission into the decline of sockeye salmon in British Columbia’s Fraser River was similarly led by a provincial Supreme Court judge. The Oliphant Commission into business dealings between Karlheinz Schreiber and former Canadian Prime Minister Brian Mulroney, the Gomery Inquiry into the sponsorship scandal, the Cornwall Inquiry into child sexual abuse, and the Walkerton Inquiry into e-coli contamination of a regional water supply each drew from the bench to staff their respective commissioner’s roles. The list is further expanded if one is to include former or retired judges. Wally Oppal, a former judge of the British Columbia Court of Appeal, recently completed that province’s Missing

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Women Commission of Inquiry. John Major, a retired justice of Canada’s Supreme Court, completed the Air India Inquiry in 2010. Ontario’s Elliot Lake Inquiry into the fatal collapse of a shopping mall was conducted by Paul R Bélanger, a former judge of the Ontario Court of Justice.

In Australia, too, judicial leadership of public inquiries is not uncommon, although the appointment of active judges to this role is more restrained. No doubt this is due in part to the relatively strict separation of powers imposed by Australia’s federal Constitution, and to consequent restrictions on the assumption of extra-judicial offices by serving judges. In this Part, I explain the Australian approach to this issue. Although focusing for the moment on Australia, my intention is to underscore a basic constitutional dimension to the question of whether judges should serve as inquiry commissioners, one that I argue is relevant in Canada too despite its gentler approach to the separation of powers.

1. The separation of powers in Australia

The Australian judiciary is composed of both federal and state courts, each appointed by their respective levels of government and responsible for the

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16. The state bench of Victoria prohibits the service of its members as inquiry commissioners, a practice dating back to a 1931 letter from then Chief Justice Irvine of the state Supreme Court to the Attorney General. The so-called “Irvine Memorandum” is considered in detail in Sir Murray McInerney et al., Judges as Royal Commissioners and Chairmen of Non-Judicial Tribunals (Canberra: Australian Institute of Judicial Administration, 1986) at 11 and 17-18. Enid Campbell and HP Lee suggest that a similar position has long been taken by judges of the High Court, and that most state benches view service on commissions of inquiry as warranted only in “exceptional” circumstances: see Enid Campbell & HP Lee, The Australian Judiciary (Cambridge: Cambridge University Press, 2001) at 171. Nevertheless, the Australian Law Reform Commission has observed that most modern public inquiries appointed under the Royal Commissions Act 1902 have been chaired either by a judge, a retired judge or prominent lawyer (Law Reform Commission, supra note 1 at 68), and that the New South Wales and Australian Capital Territory statutes governing public inquiries provide that certain powers may only be exercised when a commissioner is a judge or lawyer (ibid at 80). Debate about the propriety of Australian judges serving as inquiry commissioners abounds: see, e.g., the Hon DG McGregor, QC, “The Case For,” in McInerney et al., ibid; Sir Murray McInerney, “The Appointment of Judges to Commissions of Inquiry and Other Extra-Judicial Activities” (1978) 52 Austl LJ 540; Tom Sherman, “Should judges conduct royal commissions?” (1997) 8 Pub L Rev 5; and George Winterton, “Judges as Royal Commissioners” (1987) 10 UNSWLJ 108. Geoffrey Lindell provides an excellent overview of constitutional and other issues surrounding the appointment of judges as inquiry commissioners in Tribunals of Inquiry and Royal Commissions (Law and Policy Paper 22) (Annandale, NSW: The Federation Press, 2002) at 5-13, comparing practices in Britain and Australia.
resolution of legal disputes within their respective areas of jurisdiction. A formal separation of powers between the executive, legislative, and judicial branches of government exists only under Australia’s federal, Commonwealth Constitution, and consequently the case law delimiting restrictions on the extra-judicial functions of judges pertains mainly to judges of federally appointed courts. There is scope for the application of these restrictions to state courts, however, to the extent that such courts may be delegated authority to enforce federal laws and thus form part of an integrated, federal system of justice.

Formally, the powers and limits of Australia’s federal judiciary are drawn from Chapter III of the Constitution. Section 71 provides that “The judicial power of the Commonwealth shall be vested in a federal Supreme Court, to be called the High Court of Australia, and in such other federal courts as the Parliament creates, and in such other courts as it invests with federal jurisdiction.” As Cheryl Saunders explains, s. 71 has been interpreted by the courts to be both exclusive and exhaustive; that is, “only the courts listed in section 71 may exercise federal judicial power” and “federal courts may not exercise any other types of power.” These principles have been applied strictly. The High Court held in the landmark 1956 Boilermakers’ Case: “A federal constitution must be rigid. The government it establishes must be one of defined powers; within those powers it must be paramount, but it must be incompetent to go beyond them.”

Accordingly, many functions that are routinely exercised by the Canadian judiciary would be considered constitutionally impermissible in Australia. For example, the provision of judicial reference opinions has been found in Australia to violate the separation of powers, as it engages the judiciary in providing “advice” rather than adjudicating legal disputes.

A longstanding exception to Australia’s strict separation of powers is that judges acting in a personal capacity—as personae designatae—may assume extra-judicial functions that vest in them as individuals rather than as judges. An illustrative example is the use of judges to authorize certain investigative techniques employed by the police, such as wiretaps. These authorizations, which are common, core duties of Canada’s criminal bench, and which take place within the physical offices of the judiciary even in

17. Australian Constitution (Cth), s 71.
19. Ibid. See also Victorian Stevedoring & General Contracting Co Pty Ltd & Meakes v Dignan (1931) 46 CLR 73 (HCA).
20. R v Kirby; Ex Parte Boilermakers’ Society of Australia, (1956), 94 CLR 254 (HCA) [Boilermakers’ Case].
Australia, are nevertheless considered there to be personal, administrative functions of judges as opposed to judicial functions of courts. The notion of such *persona designata* appointments has only limited application in Canada. In *Canada (Minister of Indian Affairs and Northern Development) v. Ranville*, Dickson J (as he then was) straightforwardly declared that "whenever a statutory power is conferred on a s. 96 judge or officer of a court the power should be deemed exercisable in an official capacity as representing the court, unless there is express provision to the contrary.

The same principle would appear to apply to Canada’s provincially-appointed judiciary. Accordingly, the conferral of new authority on judges in Canada will be assumed to vest in them *qua* judges, absent express intention to the contrary; in fact, the service of judges on commissions of inquiry is among the most visible instances in which such an intention is clear. Even in that context, few Canadian scholars would use the term “*persona designata*” to refer such appointments, and the concept receives scant attention in Canadian texts on constitutional law. The fact that it is retained in Australia is significant, not simply because of formal differences between how Australians and Canadians define “judicial” functions, but because it draws specific attention to separation of powers concerns that arise in the conferral of new roles on judges. Those concerns find expression in an important caveat to the *persona designata* exception: the so-called doctrine of incompatibility.

The incompatibility doctrine is intended to ensure that when judges do assume extra-judicial duties, their conduct will not impugn the integrity and proper operation of the judiciary as a whole. In *Grollo v. Palmer*, Australia’s High Court found that incompatibility arises under the following three circumstances: (1) where a judge assumes “so permanent
and complete" a commitment to a non-judicial function that his or her judicial duties are disrupted, (2) where the nature of the non-judicial function is such that the judge's ability to perform his or her judicial duties with the requisite integrity is impaired, and (3) where the non-judicial function is "of such a nature that public confidence in the integrity of the judiciary as an institution or in the capacity of the individual Judge to perform his or her judicial functions with integrity is diminished."

The Court also added that the assumption of extra-judicial duties must be voluntary, meaning a judge cannot be required to assume them under statute or by administrative direction.

The incompatibility doctrine was further refined in Wilson v. Minister for Aboriginal and Torres Strait Islander Affairs, in which Brennan CJ set out an analytic test to determine the conformity of an extra-judicial appointment with the third branch of Grollo—that is, with preserving public confidence in the judiciary. The courts will ask:

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

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

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

Wilson concerned the appointment of a Federal Court judge under the Aboriginal and Torres Strait Islander Heritage Protection Act 1994 to investigate the potential impact of a bridge development on Aboriginal heritage interests in Hindmarsh Island, a region of South Australia, and to provide an advisory report to the responsible minister. The High Court held

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27. Ibid at 365.
28. Ibid.
29. [1996] 189 CLR 1 (HCA) [Wilson].
30. Ibid at 17.
31. Ibid.
32. Ibid.
that this appointment failed to accord with the incompatibility doctrine and thus violated Chapter III of the Constitution. The Court characterized the appointee’s extra-judicial function as a “condition precedent” to the exercise of political discretion by the Minister. It was not an institutionally independent appointment because the Minister could intervene at any time to direct or interfere with the appointee’s discretion. Importantly, the High Court in Wilson also drew a strong connection between procedural fairness and the separation of powers—and, in particular, preserving the independence of the judiciary. The Court held that although presence of procedural fairness alone was not conclusive of compatibility with Ch III, its absence is fatal: “if a judicial manner of performance is not required, it is unlikely that the performance…will be performed free of political interference or without the prospect of exercising political discretion.”

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

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

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33. Ibid.
34. Wanohu v New South Wales, (2011) 85 ALJR 746 (HCA).
the need for inflexible formalism. Sir Anthony Mason has taken such a view in arguing that

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

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

- The separation of powers is purposive. The third branch of Grollo draws a connection between respect for the separation of powers and public confidence in the judiciary. The test from Wilson elaborates this concept, indicating that confidence in the judiciary involves preservation of independence, even where the judge assumes a non-judicial duty. The independence principle embraces freedom from outside interference or political direction in the exercise of such a judge’s discretion.

- Judicial independence is not the only value protected by the separation of powers. Wilson provides that a persona designata judge not exercise discretion on “political grounds,” or those not “expressly or impliedly prescribed by law.” While the exclusion of judges from political decisions intrinsically reinforces independence, it also honours the correlative principles of representative and responsible government: that political decision-making be confined to officials accountable to an elected legislature and thus to the citizenry. As noted elsewhere in the


Wilson decision, the appointment of a persona designata judge should not be used to “cloak” controversial political deliberation with the symbolic independence of the judiciary.40

Finally, preservation of the separation of powers is intimately linked to procedure. At minimum, the persona designata judge must honour the requirements of procedural fairness (or, in Wilson’s words, behave “judicially”). Procedural fairness is obviously intended to protect individuals against the arbitrary exercise of power. By making it a necessary feature of compatibility with the separation of powers, however, Wilson underscores the role played by due process in intrinsically reinforcing judicial independence and the insulation of judges from political decision-making.

Patrick Monahan and Byron Shaw have argued that Canada requires stronger governance of the extra-judicial activities of judges.41 Placing emphasis on problematic examples of judge-led inquiries—such as the Somalia Inquiry,42 which was prematurely terminated following a protracted conflict between its commissioners and the government concerning document production and extensions to its reporting deadlines—the authors suggest “that governments have far too frequently capitalized on the credibility and authority of the judicial office at the expense of public confidence in the judiciary.”43 This confidence is weakened when extra-judicial tasks force judges into politicized roles, cast them as adversaries to the government or as advocates for particular causes, expose them to allegations of unfairness, or make their decisions subject to review by their judicial colleagues.44 Although Monahan and Shaw advocate the prohibition of judges serving as inquiry commissioners, they argue that at minimum stronger guidelines are required to steer judges away from problematic assignments.

The Australian guidelines on incompatibility may help to fill this gap. They are especially valuable in drawing an explicit connection between the professional boundaries of judges and purposive values embodied in the separation of powers; that is, in making respect for those values a central tenet of judicial ethics. However, it is not clear that they address the

40. See Wilson, supra note 29 at para 7, citing the United States Supreme Court’s decision in Mistretta v United States, 488 US 361 (1989).
41. Monahan & Shaw, supra note 24.
43. Monahan & Shaw, supra note 24 at 428-429.
44. Ibid at 439-445.
dilemmas that may confront judges in the conduct of inquiries, threatening constitutional values even where the incompatibility criteria are satisfied. In the next section, I consider some of these dilemmas in detail, and suggest the need for a clearer analytic test to guide the conduct of judicial commissioners in both jurisdictions.

II. Dilemmas confronting inquiry commissioners

It is relatively straightforward to imagine inquiry terms of reference that would violate Australia’s doctrine of incompatibility. Terms that stipulate that an inquiry commissioner heed direction from the executive in focusing his or her investigation, for example, would clearly lack the requisite quality of independence. So too would terms that contain an obvious defect in procedural fairness—for example, by directing a commissioner to opine on the alleged misconduct of an individual without providing that person an opportunity to be heard. Yet these obvious examples belie the complexity of dilemmas that commissioners face in the actual execution of inquiries, many of which fall into grey areas left unresolved by the incompatibility criteria. For example, at what point does the work of a commission become too “closely connected” to political questions, and thus call the original validity of its appointment into doubt? Is a commissioner’s discretion properly “governed by law” if the appointing government duly enacts terms of reference that fetter the commissioner’s discretion in subtle ways—for example, by limiting the commissioner’s ability to accord standing to interested parties?

The aim of this section is to present these more subtle and challenging cases using practical examples drawn from public inquiries in both Australia and Canada. In each case, the incompatibility concerns raised by the examples are framed as dilemmas confronting the judge as inquiry commissioner. It should be acknowledged that, in a general sense, these dilemmas are not unique to judicial commissioners; they may be confronted by any individual serving as the head of a public inquiry. They nevertheless pose distinct challenges for the judicial commissioner because they conflict with the adjudicative methodology in which he or she has been inculcated and raise the special concern that failure to resolve them effectively could adversely affect public confidence in the judiciary.

The examples considered here include both active and former judges serving as inquiry commissioners. Australia’s incompatibility doctrine is applicable only to serving judges, and for this reason several commentators have argued that former judges should be favoured for inquiry appointments,
thus circumventing concerns over the separation of powers.\textsuperscript{45} In my view, however, the dilemmas considered in this section should be as concerning for former judges as they are for those still serving on the bench. Advocates for the use of former judges base their arguments on the assumption that these individuals embody the same qualities and skills as their active counterparts. This includes extensive experience scrutinizing evidence and testimony. Crucially, it also includes the impression of independence, fairness, and impartiality associated with judicial office—values necessary to instil confidence in the inquiry process.\textsuperscript{46} If former judges are appointed for the same underlying reasons as serving ones, then one would expect them to observe the same standards of conduct. Moreover, one would expect the same symbolism, and the same vesting of public confidence, to attach to a former judge as it does to a serving judge. This being the case, the notion that former judges can avoid the unique challenges raised by judicial leadership of an inquiry is illusory. Perceived inefficacy or unfairness on the part of a former judge will be just as disappointing to participants and observers whose expectations were informed by the symbolism of a judicial appointee. Consequently, the same damage is likely to be inflicted on public esteem in the judiciary. The dilemmas raised by judicial leadership of an inquiry, and the ethical imperative to resolve them in a way that preserves confidence in the judiciary, pertain whenever judicial symbolism and values are intentionally evoked in service of an inquiry. It matters not that the commissioner’s judicial status may be “former” rather than “current.”

I group the dilemmas confronting judicial commissioners in two broad categories according to the underlying tensions they raise: the first between a judicial commissioner’s independence and the inherently political nature of public inquiries, and the second between a commissioner’s fidelity to procedural fairness and the investigative character of inquiries. Both types of dilemma help to illuminate the limits and potential of judges as inquiry commissioners, a matter explored more fully below.

1. \textit{Judicial independence and the political character of inquiries}

In both Canada and Australia, public inquiries are instigated at the discretion of the executive branch of government under the authority of general empowering statutes. It is trite to point out that political considerations weigh on the constitution of new public inquiries. These considerations may shape important decisions concerning an inquiry’s

\textsuperscript{45} See, e.g., Meyerson, “Judicial Independence,” \textit{supra} note 36 and Winterton, \textit{supra} note 16.

\textsuperscript{46} See Ruel, \textit{supra} note 3 at 13-14.
mandate, including whether the appointing government will allow itself to fall under the inquiry’s investigative lens. Less obvious factors, too, will be affected by politics, such as the budget and reporting deadline of an inquiry. The overall character of an inquiry will be determined in large part by whether the constituting government intends it to be a robust and thorough investigation into a pressing issue, a brief, calculated public relations exercise intended to quell controversy, or something in between.47

When judges accept appointment as inquiry commissioners, they thus step into a forum heavily affected by politics. Assuming that judges may nevertheless protect their personal independence and the integrity of the judiciary when executing an inquiry commission, the key is to ascertain in which instances political influences may be taken too far. The examples below are intended to illustrate the difficulty of establishing this boundary.

On 5 May 1994 the High Court of Australia handed down its decision in New South Wales v. Canellis,48 a case concerning the rights of witnesses compelled to appear before public inquiries. The inquiry in Canellis had been appointed under the Crimes Act49 to review the conviction of Andrew Kalajzich for the murder of his wife. The circumstances surrounding the murder had provoked a public scandal and received widespread media coverage. Kalajzich consistently maintained his innocence and alleged that his prosecution was orchestrated by members of Sydney’s criminal underworld. The Crimes Act, while not a general public inquiries statute, allowed for the appointment of ad hoc investigative bodies to review criminal convictions, empowering those bodies with similar authority to compel witnesses, testimony, and evidence as in the context of a royal commission. Such an inquiry was appointed to review Kalajzich’s conviction, with John Patrick Slattery, a former judge of the Supreme Court of New South Wales, appointed its Commissioner.

The applicants in Canellis were two witnesses summoned to testify during the public hearings of the inquiry. Both had appeared as witnesses at Kalajzich’s trial and given key evidence leading to his conviction. In Kalajzich’s account, however, both were co-conspirators responsible for the murder of his wife and for perverting the course of justice.50 Kalajzich’s claim of wrongful conviction thus rested entirely on imputing criminal responsibility to the two witnesses. Should Commissioner Slattery conclude that Kalajzich had been wrongly convicted, the necessary implication

47. Ed Ratushny astutely observes: “It seems contradictory to describe commissions of inquiry as being both a ‘check on politics’ and a ‘political tool’ but both aspects are a reality” (supra note 1 at 20).
48. [1994] 181 CLR 309 (HCA) [Canellis (HCA)].
49. Crimes Act 1900 (NSW) [Crimes Act].
50. Canellis (HCA), supra note 48 at para 15.
would be that the other two witnesses were responsible and had perjured themselves during Kalajzich’s trial. The inquiry thus engendered serious personal risks for both individuals.

The circumstances in Canellis were further complicated by the fact that both witnesses were indigent. Neither could afford to retain counsel and both were denied support from the state legal aid authority, whose mandate did not include assisting those summoned before commissions of inquiry. All other key witnesses at the inquiry, including Kalajzich, were fully represented by counsel financed by public funds. Following the denial of legal aid funding, one of the witnesses applied to the Commissioner for relief, seeking a stay of the inquiry until such time as appropriate legal funding could be attained. Commissioner Slattery was sympathetic to the applicant’s position, acknowledging that the conduct of the inquiry would benefit from the parties being legally represented. In addition to the obvious obstacles that self-representation posed to the witnesses meaningfully defending their interests, they were practically impeded from reviewing the evidence: all material considered by the inquiry was transmitted electronically, requiring specialized training and computer skills that the applicants lacked. Only counsel (and not inquiry witnesses themselves) were allowed access to begin with. Moreover, none of the represented witnesses shared a common interest with the applicants that could have sustained advocacy on their behalf. Despite these obstacles, however, the Commissioner found that he did not have authority to order either the state or the legal aid commission to provide funding to the applicants, and that a stay of the inquiry would be improper. This prompted the parties to seek judicial review.

The applicants were unsuccessful at first instance but succeeded before the New South Wales Court of Appeal. Kirby P, as he then was, found that the denial of counsel in the circumstances violated natural justice, as the parties were thereby deprived of the opportunity to be heard fully and impartially. Since Parliament could not have intended this result, it followed that to proceed with the inquiry absent representation for the witnesses constituted an excess of the Commissioner’s jurisdiction. The court declined to order that state funding be provided to the applicants, but

51. The Commissioner’s comments in this respect were noted by the New South Wales Court of Appeal in Canellis v Slattery, [1994] 33 NSWLR 104 [Canellis (CA)]. Kirby P observed: “Earlier, the Commissioner had said, in respect of each of the appellants, that he believed they should be represented ‘and represented adequately.’ Indeed, he had assumed that those representing the appellants ‘would be compensated’ for their fees ‘in some way.’” Ibid at 116.
52. See Canellis (CA), ibid at 116.
53. Ibid at 124.
declared that continuation of the inquiry without proper legal representation was prohibited at common law.\footnote{Ibid at 126.}

The High Court overturned the Court of Appeal’s findings. While procedural fairness commanded a common law right to counsel in serious criminal trials, this right did not extend to inquiry proceedings.\footnote{Canellis (HCA), supra note 48 at para 35.} Rather, the applicants’ due process concerns were characterized as predominantly reputational, and capable of accommodation within the inquiry’s existing statutory and procedural framework.\footnote{Ibid at paras 37, 40.} Moreover, the Court found that the Commissioner had no power to issue an adjournment or stay of proceedings, as such a power was not conferred by the governing statute:

[A] Commissioner acting under s. 475 \textit{of the Crimes Act} does not possess express or inherent power to grant a stay. Certainly there is no express power in the section. ... The Commissioner is directed ... to transmit to the Governor, ‘as soon as shall be practicable’ every deposition taken under the section ‘together with his report as to the conclusions to be drawn therefrom’. No other option is available to the Commissioner.

The rules of procedural fairness cannot compel a decision-maker to do what he or she lacks power to do.\footnote{Ibid at paras 32, 38.}

These reasons are striking: they suggest that even had the Commissioner considered it necessary that the witnesses receive legal representation as a matter of procedural fairness, he would not only lack authority to enforce that decision, he would also be obliged to proceed with the inquiry despite the perceived unfairness.

\textit{Canellis} illustrates a subtle, but nonetheless significant, constraint that may be imposed on a commissioner’s discretion. The Commissioner felt that the applicants should be represented by counsel. It was assumed, and not contested even in the High Court’s decision, that the applicants’ due process rights included the opportunity to scrutinize evidence and possibly to cross-examine other witnesses. As such, the argument favouring their representation was not just one of fairness but one of efficiency: rather than contend with the procedural challenges of accommodating unrepresented individuals, the Commissioner would have preferred that their participation be channelled through the professional advice and discretion of counsel. This would also likely have enriched the quality of the Commissioner’s investigation, enabling him to hear full argumentation as to the veracity
of key facts. However, the Commissioner’s empowering statutes—both the Crimes Act and the order-in-council appointing his inquiry—did not enable him to secure funding for the legal representation of witnesses. Funding was a political decision, and the Commissioner was obliged to carry out his mandate within the parameters set by the executive branch of government.

The political decision to provide funding to some, but not all, witnesses at an inquiry may not influence a commissioner’s independence in the sense of directing him toward particular conclusions. It does, however, significantly limit his or her manner of investigation and arguably the substantive quality of the investigative findings. Moreover, it substitutes a political calculation for the commissioner’s own independent assessment of what fairness requires in respect of individual witnesses. It will be recalled that in Wilson, affording due process was equated with behaving “judicially.” While the Court in Canellis held that representation by counsel was not required by due process, the question remains whether a judge behaves “judicially” in denying legal representation to witnesses whose interests are significantly affected by a proceeding when other participants, adverse in interest to those witnesses, are afforded the full benefit of counsel. If we were to accept the Court of Appeal’s characterization that the denial of counsel in Canellis did violate due process, then the execution of the inquiry commission by a sitting judge would presumptively violate the doctrine of incompatibility. Accepting the High Court’s decision, we are still forced to recognize that the independence of inquiry commissioners is conditioned by political considerations that may disrupt a commissioner’s own sense of the most just and effective way to complete his or her inquiry.

A recent Canadian example also illustrates this point. On 19 November 2012, Commissioner Wally Oppal submitted his report for the

58. Lord Justice Salmon, in his 1966 Royal Commission on Tribunals of Inquiry, argued fervently that inquiry witnesses were entitled to legal representation and to public compensation for legal costs incurred (UK, Royal Commission on Tribunals of Inquiry, Report of the Commission Under the Chairmanship of the Rt Hon Lord Justice Salmon (London: Her Majesty’s Stationary Office, 1966) at 23-26). He wrote: “It is a great hardship that a witness should be left to bear the very heavy expenses often incurred in being legally represented before the Tribunal. After all, the inquiry is in the public interest, the witness is the Tribunal’s witness, it is usually just that the witness should be represented, and his solicitor or counsel are assisting the Tribunal in arriving at the truth. It is manifestly unfair that such a witness should be left to face what in a long inquiry is often a crippling bill of costs.” (ibid at 25). See also the discussion in Stephen Donaghue, Royal Commissions and Permanent Commissions of Inquiry (Chatswood: Butterworths, 2001) at 193-194.
Commissioner Oppal’s inquiry had been appointed by the British Columbia government to scrutinize police investigations carried out over a five-year period concerning the disappearance of women from Vancouver’s downtown eastside. It was alleged by friends and family members of the women, together with several community groups, that the disappearances had received inadequate attention and investigative resources. Following the conviction of serial murderer Robert Pickton in 2007 and the exhaustion of his legal appeals, the provincial government capitulated to public pressure and commissioned an inquiry focused on the adequacy of the police investigations. Commissioner Oppal granted standing to a number of individuals and groups whom he considered to have a direct and substantial interest in the subject-matter of the inquiry. This included several community organizations who provided frontline services to survival sex workers and drug users in Vancouver’s downtown eastside, and who thus possessed unique knowledge of the circumstances surrounding the missing women and a strong capacity to express community experiences, perspectives, and concerns.

The Ministry of the Attorney General, which held discretion over the funding of inquiry participants, declined to fund legal representation for all but one of the groups—that representing surviving family members of Pickton’s victims. This decision significantly curtailed the ability of the groups to participate in the inquiry, which involved the review of voluminous evidence and the ability to examine and cross-examine relevant witnesses. Despite Commissioner Oppal’s attempt to facilitate their participation—both through a separate “Study Commission”

59. *MWCI*, supra note 13. In addition to his judicial background, Oppal is a former Attorney General of British Columbia, having entered politics following his retirement from the bench. The fact that he is a former member of the government that appointed the *MWCI* has been the source of controversy. As Attorney General, Oppal defended the government’s decision not to call an inquiry while Robert Pickton’s legal proceedings were ongoing, as well as the decision to stay an additional 20 murder charges against Pickton following his conviction on 6 charges. These decisions were understandably controversial amongst family members of Pickton’s victims and advocates for a public inquiry. See generally, the British Columbia Civil Liberties Association et al, *Blueprint for an Inquiry: Learning from the Failures of the Missing Women Commission of Inquiry* (Vancouver: British Columbia Civil Liberties Association, 2012) at 50-51 [BCCLA], and Kim Stanton, “Intransigent Injustice: Truth, Reconciliation and the Missing Women Inquiry in Canada” (2013) 1:2 Transitional Justice Review 59 at 71-73.

60. The Commissioner’s own reasons recognizing the special value of these participants are contained in his *Ruling on Participation and Funding Recommendations* (2 May 2011), online: Missing Women Commission of Inquiry <http://www.missingwomeninquiry.ca>.
process, involving less formal hearings which obviated the need for legal representation, and by appointing special counsel to represent “Aboriginal Interests” and “Downtown Eastside Interests” in the formal evidentiary hearings—several of the groups opted to boycott the inquiry. By denying them participation on equal terms with powerful organizational interests, such as the government and police, the groups regarded the inquiry as reproducing the societal prejudices at play in the subject-matter of the inquiry itself.

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

[These are the women who complained to the police about women being missing and were given the back of their hands... the police gave them the back of their hands to these women and disregarded what they had to say. So they can't cross-examine the police, who are of course well-armed with publicly funded lawyers.]

So anyway, I just wanted you to know that, it's how important this all is. And the government is now being seen as funding the people who allegedly done everything wrong and ignored the women, ignored the victims but not funding...will not go and fund the victims, and not fund the women, the poor aboriginal women. That's what the government is seen as. I just want you to know that.

The Ministry of the Attorney General, itself a party to the inquiry’s proceedings through its Criminal Justice Branch, subsequently alleged that this message implied the pre-judgment of material issues. The

61. The appointment of the Study Commission required an amendment to the inquiry’s original terms of reference, which had conceived of the inquiry as a purely “hearings inquiry” under the provincial Public Inquiry Act, SBC 2007, c 9 (see further discussion in text accompanying note 106). This amendment was made before the Commissioner’s ruling on standing, and as such was not a direct response to the denial of funding for certain participants. It nevertheless was intended to facilitate a broader and less formal means of community consultation than the evidentiary hearings process allowed. The Study Commission included community forums in British Columbia’s north and northwest; several expert roundtables; community hearings in the downtown eastside; and direct consultations with the family members of missing and murdered women. For an overview of the Study Commission process, see the MWCI, vol 4, supra note 13 at 24-26.

62. Commissioner Oppal explains the appointment of special counsel, ibid at 10: “Although unique to public inquiries, these appointments were, in some ways, akin to the role of amicus curiae.”

63. See, e.g., BCCLA, supra note 59 at 5 and 25-26. The authors make the stark point that the public funds expended on legal fees for one senior commission counsel would likely have supported legal representation for all of the excluded participant groups combined, or financed the operation of a women’s drop-in centre for a year (ibid at 26). The Commissioner himself addresses the boycott in MWCI vol 4, ibid at 9-10.

Commissioner was forced to disclose the contents of the voicemail and publicly reiterate his impartiality.\(^{65}\)

Unfortunately, these events reduced the credibility of the Commissioner’s report among the very individuals and groups whose confidence it was intended to restore.\(^{66}\) A joint-statement by the Native Women’s Association of Canada and Canadian Feminist Alliance for International Action (FAIFA) powerfully expressed their disapproval:

> “The Native Women’s Association of Canada was shut out of the B.C. Missing Women Commission of Inquiry,” said Sharon McIvor of FAIFA.

> “The inquiry proceeded without Aboriginal women’s organizations, without any Aboriginal organizations, and without the women’s organizations who know about the lives of vulnerable women.”

> “This process was discriminatory, and a betrayal of Aboriginal women and girls. Because the Government of British Columbia refused to provide funding for legal counsel for parties granted standing at the Missing Women Commission of Inquiry, the Inquiry itself violated the rights of the most vulnerable women. It excluded them; it did not listen to them; and it refused to put them on an equal footing with police and government representatives,” said McIvor.\(^{67}\)

In his final report, Commissioner Oppal lamented that the withdrawal of the groups diminished his access to high-quality, representative information and perspectives from members of the downtown eastside community. He reiterated that the denial of funding “was not in the public interest” and presented “a significant hurdle…and no doubt made the work of the Commission more difficult.”\(^{68}\)

Like the inquiry in *Canellis*, the *MWCI* illustrates how politics may affect a Commissioner’s discretion in a manner that will not be readily apparent on an inquiry’s terms of reference. Commissioner Oppal wanted the affected community groups to participate in his inquiry, both so that they might have the dignity of being heard and so that their valuable knowledge and perspectives could contribute to his ultimate investigative task. His lack of authority over the legal funding of participants thus had

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


a significant and negative impact on the manner in which he saw fit to conduct his inquiry. Indeed, it prompted many community stakeholders to reject the authority of the inquiry before Commissioner Oppal had even formulated his report. The decision to deny funding to the community groups was explicitly political: the government, having initiated the inquiry, sought to curtail its costs by limiting legal funding to those it identified as the most crucial participants. By removing this discretion from the Commissioner, the government affected the inquiry’s fairness, the quality of its investigation, and its perceived legitimacy.

2. Due process and the investigative nature of public inquiries
I noted in the Introduction that legal and academic authorities often stress the non-adjudicative character of public inquiries, distinguishing them from courtroom proceedings on the basis that they involve no legal dispute between parties and that their focus is fundamentally investigative. In a classic Canadian statement of this position, the Federal Court in *Beno v. Canada* affirmed:

A public inquiry is not equivalent to a civil or criminal trial. ... In a trial, the judge sits as an adjudicator, and it is the responsibility of the parties alone to present the evidence. In an inquiry, the commissioners are endowed with wide-ranging investigative powers to fulfil their investigative mandate....

It followed, in the court’s view, that public inquiries are not bound by the evidentiary and procedural rules that pertain in a courtroom. Nor are they bound by as stringent safeguards against bias. This perspective has been reinforced by several Australian authorities. In *Karounos v. CAC (SA)*, for example, the South Australia Supreme Court held that because

70. [1997] 2 FC 527 (FCA).
71. Ibid at para 23. See also the Court of Appeal for Ontario’s decision in *Episcopal Corporation of the Diocese of Alexandria-Cornwall v Cornwall Public Inquiry Commissioner* (2007), 278 DLR (4th) 550 at para 26: “[t]he commission is not asked to resolve a bi-polar dispute over a specific legal or factual issue. The Commissioner is not entitled to make findings of civil or criminal responsibility. He is faced, rather, with a broad issue of policy affecting the public at large. His mandate concerns...a ‘polycentric issue’ involving ‘a large number of interlocking and interacting interests and considerations.’” I give detailed consideration to the relationship between public inquiries and polycentric issues in Section 3.
72. See, e.g., Donaghue, supra note 58 at 146ff and Australian Law Reform Commission, supra note 1 at 377.
public inquiries are "purely investigative," "there is...no question of the investigators being judges in their own cause."  

No one seriously questions the fact that due process is owed to inquiry witnesses, however. Moreover, it is clear that most public inquiries borrow heavily from courts in the manner in which they hear and test evidence. The use of legal counsel to gather, lead, and test evidence in public hearings may represent, at least in part, a kind of procedural shorthand borrowed by judicial commissioners from the more familiar context of the courtroom. But one can also appreciate substantive reasons why some of the procedural features of courts are suited to public inquiries. If an important feature of such inquiries is that they be public—so that they can meaningfully restore confidence in an institution of state, for example—then it is appropriate that affected parties be afforded an opportunity to be heard and to contest the views of those whose assertions may be adverse to them. Moreover, assuming investigation requires the use of coercive authority in at least some instances to derive evidence from witnesses, then such witnesses are owed procedural fairness in the face of that authority.

These basic commitments may also reinforce the judicialization of public inquiries, by inviting legal advocacy as the familiar medium through which they are expressed. I consider these issues in further detail in Part III. For now, it suffices to point out that here, too, judges as inquiry commissioners face a tension between their sense of judicial propriety and the investigative focus of their inquiries. This is because the demands of due process, at least as it is traditionally implemented in courts, will not always coincide with the most procedurally effective methods of investigation and fact-finding. This observation may seem commonplace, but it presents judicial commissioners with a range of dilemmas, the solutions to which are far from clear.

One such dilemma arises in a commissioner's relationship with his or her counsel. In most public inquiries, commission counsel serves the dual

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74. Ibid at 488-489. See also the discussion in Donaghue, supra note 58 at 147.
75. In Consortium Developments v Sarnia, [1998] 3 SCR 3, a unanimous Supreme Court of Canada placed special emphasis on the fact that an inquiry constituted under Ontario's Municipal Act, RSO 1990, c M 45 is judicial, owing to the fact that the Act requires the appointment of a superior court judge as commissioner. This, it was felt, gave a special assurance of fairness to compelled witnesses, as judicial commissioners could be expected to strike the correct balance between fairness and the investigative aim of the inquiry (see para 27). The court stopped short of describing particular procedural or substantive commitments flowing from a commissioner's judicial status.
76. A commissioner's relationship with counsel, and the particular ethical dilemmas and imperatives to which it gives rise, has been given valuable treatment by several authors—notably Ratushny, supra note 1 at 215-257; John Sopinka, QC (as he then was), "The Role of Commission Counsel" in A Paul Pross et al, eds, Commissions of Inquiry (Toronto: Carswell, 1990) at 75-85; and Justice Dennis O'Connor, "The role of commission counsel in a public inquiry" (2003) 1 Advocates Soc J 9.
role of advising the commissioner, as well as gathering, leading, and testing evidence on behalf of the commission, both before and during the public hearings of an inquiry. Commission counsel may advise the commissioner regarding the individuals to be summoned as witnesses, meet with witnesses to conduct preliminary interviews, prepare warrants to seize documents and materials, review documentary evidence and determine which materials are to be produced before the commissioner, examine and cross-examine witnesses, advise the commissioner on conclusions to include in his or her final report, and assist the commissioner in drafting the report. It should be clear that each of these functions blends advisory and investigative responsibilities. It should also be clear, however, that the duality of commission counsel’s function in this respect may raise legitimate concerns of fairness on the part of inquiry participants.

Consider a witness who is aggressively cross-examined by commission counsel. Aggressive cross-examination will, in many instances, be a vital means of ascertaining the truthfulness of key statements and facts. Yet from the perspective of the witness, who faces the stigma of public scrutiny, the threat of findings of misconduct, and the possibility of indirect legal and personal consequences, this type of examination places him or her in a situation of adversity.77 He or she may be legitimately disquieted by the relationship between commissioner and commission counsel, questioning whether that relationship enables the commissioner to consider the witness’s claims from a position of true neutrality. This is especially so when the witness lacks assurance that commission counsel, having completed an aggressive cross-examination, will not subsequently advise the commissioner about possible findings of misconduct, or even assist the commissioner in drafting such findings.78 In such an instance, the boundaries between judge and prosecutor could be significantly blurred. The commissioner accordingly faces a difficult decision in how to structure

77. As Ed Ratushny observes, “The reality is…that rigorous cross-examination cannot be impartial. It is adverse in interest to the witness. It is adversarial.” (supra note 1 at 222). The Honourable Thomas Braidwood has described his hearings commission into the death of Robert Dziekanski in the following terms: “The hearings were entirely adversarial. Here, it was obvious that the role of various persons as they encountered Mr. Dziekanski at the airport would be under close scrutiny, particularly the four RCMP officers, along with various airport and other staff members”: the Honourable Thomas R Braidwood, QC, “Reflections on the Braidwood Inquiry” in Laverne Jacobs & Sasha Bagley, eds, Nature of Inquisitorial Processes in Administrative Regimes: Global Perspectives (Surrey, England: Ashgate, 2012) 209 at 215.

78. Sopinka writes: “If [counsel] has been regarded as an adversary or a prosecutor and plays a role in the writing of the report, justice will not be seen to be done….A commissioner who intends to enlist the aid of his counsel in preparing the report must, therefore, bear in mind that if he allows his gladiator to thrash about in the arena, the latter’s transition to the dias may evoke a public clamour” (Pross et al, supra note 76 at 85).
his or her relationship with counsel in a manner that balances investigative efficacy and fairness.

In *Canada (AG) v. Canada (Commission of Inquiry on the Blood System)*, the Supreme Court heard an appeal by several inquiry participants who challenged the jurisdiction of a commissioner to issue notices of possible findings of misconduct against them. One appellant, the Red Cross Society, raised the fact that commission counsel had invited all parties with standing at the inquiry to make submissions on findings of misconduct that might be made against particular witnesses. These submissions were reviewed in confidence by commission counsel and not shared with the Commissioner. It was perceived by the appellant that commission counsel would nevertheless assist the Commissioner in drafting those findings of misconduct that would be included in his report. This, they alleged, constituted a breach of procedural fairness, since commission counsel might be swayed by private submissions that were never vetted publicly before the Commissioner.

Justice Cory, writing for a unanimous Court, found that although such an approach could raise legitimate concerns of fairness, the appellant’s objections were premature, since the Commissioner had not yet begun to draft his report. Participants were required to await actual publication of findings against them before challenging their propriety. Discretion as to the appropriate role for commission counsel in developing findings of misconduct was thus deferred to the Commissioner.

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

This issue arose on judicial review of the *Stevens Inquiry*, which was constituted to investigate an alleged conflict of interest of a federal cabinet minister. Sinclair Stevens applied to have the inquiry’s findings overturned for unfairness, basing his claim in part on the involvement of commission counsel in developing findings of misconduct.

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79. *Krever, supra note 5.*
80. *Ibid at paras 59-60, 72.*
counsel—who had conducted a highly adversarial cross-examination—in preparing the final report. Ed Ratushny aptly summarizes the Catch-22 situation in which Stevens found himself:

[S]tevens had difficulty in establishing the factual basis for [his] challenge. He was not able to determine exactly what role commission counsel actually played in writing the report. There was strong circumstantial evidence that this role was substantial....[D]uring the deliberative phase of the inquiry, commission counsel docketed approximately 1,700 hours. However, the legal accounts, provided under access-to-information legislation, expurgated the narrative portions that identified the work performed. This was based on solicitor-client privilege, which was upheld by the Federal Court of Appeal....

An effort to examine the commissioner as a third party also failed on the ground of deliberative secrecy. Although this privilege was not absolute, the prothonotary ruled that there was insufficient evidence of a breach of the rules of natural justice to override the privilege. In other words, Stevens was required to demonstrate unfairness in order to lift the veil protecting the commissioner’s deliberations with counsel, yet it was the very secrecy of those deliberations that precipitated his complaint of unfairness to begin with! Ratushny characterizes the lack of transparency in a commissioner’s relationship with counsel here as “unseemly.” At the very least, it underscores an ethical dilemma surrounding a commissioner’s relationship with counsel: a close working relationship will no doubt lend efficacy to an inquiry and perhaps even facilitate a more robust investigation; yet maximizing fairness to inquiry witnesses may necessitate boundaries limiting that relationship and placing greater administrative onus on the commissioner.

The fact that public inquiries are characterized, at least as a formal matter of law, as investigative rather than adjudicative proceedings thus raises significant challenges for the judge as an inquiry commissioner. If we accept the basic principle flowing from the incompatibility jurisprudence that, in order to maintain the integrity of the judiciary, judges should not assume administrative duties that defy due process, then the judge must be attuned to the ways in which investigation and due process may come into conflict. As with tensions between judicial independence and the political character of public inquiries, these conflicts may be subtle and not obvious on the face of an inquiry’s mandate or terms of reference. A commissioner’s

82. Stevens v Canada (AG), [2005] 2 FCR 629.
83. Ratushny, supra note 1 at 228-229.
84. Ibid at 229.
relationship with his or her counsel is a case in point. At the outset of an inquiry it may not be evident to an inquiry commissioner how future challenges—a recalcitrant witness, the heavy burden of developing factual findings—will necessitate the use of counsel in a manner that engenders concerns of unfairness on the part of certain witnesses. Conversely, it may not be evident how certain measures adopted to maximize fairness, such as a transparent, arms-length relationship with counsel, may affect a commissioner’s investigation when circumstances demand close direction or collaboration with counsel. It should be possible, nevertheless, to establish effective guidelines and principles for how the commissioner might navigate these dilemmas. That is the object of the next section.

III. The forms and limits of judicial inquiry

The tensions outlined above are in many ways produced by a disconnect between the customs, rules, and procedures of adversarial litigation—with which the judicial commissioner will be familiar—and the distinct investigative context of the public inquiry. The refrain in much jurisprudence and academic commentary on public inquiries is that the judicial commissioner must be prepared to dispense with an adversarial, adjudicative format of decision-making so that his or her investigative mandate may be properly fulfilled. If this is the case, though, then why is the procedural imprint of courtroom litigation on public inquiries so strong? Why are witnesses led and cross-examined through counsel? Why are parties with standing represented by lawyers, and their contributions framed as “submissions” to be adjudged by the commissioner? To return to the question posed in the introduction, why are judges, and lawyers for that matter, relied on so heavily to conduct public inquiries in the first place?

Michael Trebilcock and Lisa Austin have queried whether the epistemologies of lawyers and judges lead inevitably to the reproduction of conventionally adjudicative procedures in new institutional settings—that they call a “full court press.” Drawing from Lon Fuller’s seminal essay “The Forms and Limits of Adjudication,” they suggest that those procedures are sometimes detrimental to efficacy and substantive

justice when adopted outside the adjudicative context. Fuller argued that adjudication was ill-suited to the resolution of “polycentric issues”: those engaging diffuse societal interests and perspectives, and thus defying reduction to the binary claims of litigating parties. Many public inquiries confront issues that are starkly polycentric. On this basis, one could surmise that the use of judges and lawyers in public inquiries is fundamentally misguided; that it would be better to conceive of new ways of conducting inquiries, using new actors whose professional training and commitments are better calibrated to inquiry purposes. Perhaps the answer to the dilemmas stated in the previous part is that judges should not accept inquiry commissions at all, avoiding conflicts between independence and politicization, or fairness and investigative efficacy, to begin with.

That would be a premature conclusion. There are valid reasons to employ judges in the leadership of some public inquiries, although closer attention to their skills and epistemologies may—as Trebilcock and Austin suggest—recommend a narrower application of that service than is presently observed. The incompatibility doctrine explicitly connects the propriety of extra-judicial service with judicial fidelity to the separation of powers. This requires maintaining independence, avoiding political decision-making, and observing procedural fairness. We might invert the doctrine and argue that the circumstances where such values are most called for are those that demand judicial leadership. This is not an entirely satisfying justification for the use of judges as commissioners, however, because judges are not the only individuals who can be trusted to act independently, to avoid decisions that are politically-based, and to act fairly. Justifying the use of judges specifically should require a closer reconciliation of their epistemologies and ethical commitments with the work of public inquiries. In this part I undertake that task by reconsidering the account of adjudication presented by Lon Fuller. Like Trebilcock and Austin, I suggest that Fuller’s account of the institutional potential and limits of adjudication serves as a powerful guide for the boundaries of legal actors and procedures in new institutional settings. I also conclude, however, that this account reinforces the service of judges as inquiry commissioners in certain circumstances. Indeed, it suggests that fidelity to

87. Trebilcock & Austin, supra note 85 at 59. An important, related point is made by Liora Salter in her article, “The Two Contradictions in Public Inquiries” in Pross et al, supra note 76 at 173. Salter suggests that inquiries present the potential for radical transformation by brokering dialogue and participation amongst groups traditionally excluded from policymaking. Yet, the orientation of inquiry staff to identify pragmatic conclusions, combined with the perception that inquiries “put the state on trial” and thus invite participants to assume legally contentious, self-interested or adverse positions, can limit their transformative potential.
adjudication may provide a clear, powerful analytic device to distinguish those inquiries suited for judicial leadership from those that are not, and to resolve the types of dilemma outlined in Section II.

1. Fuller's forms and limits of adjudication

Fuller considered that the core, indispensable feature of each type of “social ordering” is the manner in which it engages the participation of affected individuals.\textsuperscript{88} In the case of elections, individuals participate by voting; in contracts, by negotiation.\textsuperscript{89} The distinct mode of participation fostered by adjudication, he argued, is “that of presenting proofs and reasoned arguments for a decision in [one’s] favour.”\textsuperscript{90} Adjudication consists in parties advocating for a particular decision based on factual assertions that corroborate some form of “reasoned” argument, or argument based on principle (as opposed to naked self-interest). This form of participation presupposes a decision-maker charged with hearing and deciding the parties’ claims. For that matter, it presupposes the existence of a dispute, and in this sense is intrinsically adversarial, requiring the translation of parties’ competing interests into a language of rational claims to be adjudged on some basis of principle. This type of adversarialism is to be lauded, because an adversarial contest—in which each affected party has an equal and thorough opportunity to be heard—establishes a sound basis for impartial decision-making. Fuller observed: “[t]he institution of advocacy is not a concession to the frailties of human nature, but an expression of human insight in the design of a social framework within which man’s capacity for impartial judgment can attain its fullest realization.”\textsuperscript{91}

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

\begin{quote}
Adjudication is...a device which gives formal and institutional expression to the influence of reasoned argument in human affairs. As
\end{quote}

\textsuperscript{88} Fuller, supra note 86 at 363.
\textsuperscript{89} Ibid at 363-364.
\textsuperscript{90} Ibid at 364 [emphasis added].
\textsuperscript{91} Ibid at 384.
such it assumes a burden of rationality not borne by any other form of social ordering. A decision which is the product of reasoned argument must be prepared itself to meet the test of reason. We demand of an adjudicative decision a kind of rationality we do not expect of the results of contract or of voting. This higher responsibility toward rationality is at once the strength and the weakness of adjudication as a form of social ordering.92

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

The particular rationality of adjudicative decision-making is also a weakness. This is its inefficacy in managing decisions that are not reducible to competing proofs and reasoned arguments—Fuller’s “polycentric” issues. Fuller described polycentric issues through the metaphor of a spider-web, in which a pull on any single thread will redistribute tensions and affect the entire structure.93 Questions of public policy, engaging diffuse societal interests and effects, are quintessentially polycentric. In traditional litigation, the judge’s role is largely passive, with the parties themselves directing the questions that the judge is ultimately charged with deciding. This accords with an assumption that it is the litigating parties who will bear the received effects of the decision. As such, where decisions necessarily affect diverse stakeholders and interests, relying on the claims of bilateral disputants will prove inadequate. Some issues may demand managerial resolution by an official possessing special knowledge, expertise, and resources to reconcile diverse societal demands. Others may demand the creativity and democratic accountability of elected officials. By advocating different forms of “social ordering” to address a range of

92. Ibid at 366-367.
93. Ibid at 395.
matters, Fuller would seem to have envisioned a heterogeneous state—one in which a range of “social orderings” coincide to address issues for which they are individually suited.

2. Public inquiries and adjudication

Where do public inquiries fit within such a state? To answer this we must consider the issues that public inquiries are intended to address, and in particular, whether those issues are inherently polycentric. The example considered by Trebilcock and Austin—that of the Krever Inquiry into the tainted blood scandal of the 1980s94—appears at first blush to be highly polycentric. Commissioner Krever was tasked to “review and report on the mandate, organization, management, operations, financing, and regulation of all activities of the blood system in Canada, including the events surrounding the contamination of the blood system in Canada in the early 1980s…. ”95 This clearly was a sweeping investigative mandate, demanding that the Commissioner scrutinize the interrelationship of numerous state and non-state organizations and formulate conclusions of policy rather than law. Yet the Commissioner was also directed to make a factual inquiry concerning a specific sequence of events precipitating the blood-contamination crisis. This would no doubt involve hearing from those implicated directly in the events, including victims. It would also involve confronting the possibility of fault on the part of specific individuals and organizations.

These twin considerations—affording affected individuals the opportunity to be heard, and confronting the possibility of wrongdoing—may begin to introduce adjudicative qualities into the inquiry process. This is particularly so when we consider the characteristic features of the inquiry from the perspectives of the participants. For the individual participant—whether an involuntary witness or a party who has sought standing—the opportunity to be heard serves more than the utilitarian, investigative mandate of the inquiry. It is an opportunity to be heard in respect of how that mandate specifically bears on them. For the victim, this may involve seeking vindication in the form of official recognition of mistreatment that has been denied and assurance that appropriate ameliorative steps will be taken. For individuals and organizations implicated in possible wrongdoing, it may involve seeking a different sort of vindication, or at least ensuring that any blame attributed to them does not exceed that for


95. Trebilcock & Austin, supra note 85 at 20.
which they are actually responsible. It is easy to discern in this dynamic the propensity for competing—and even adversarial—viewpoints.

This point is even more pronounced when we consider the Australian and Canadian public inquiries discussed earlier. The inquiry in Canellis charged an official with deciding between two outcomes: either confirming the criminal guilt of an individual or attributing criminal responsibility, albeit in legally non-binding terms, to others. As such, the main parties to that inquiry were directly opposed in interest, and the conduct of the inquiry intrinsically adversarial. The question raised on judicial review in Canellis—whether an involuntary, indigent witness is entitled to publicly-financed counsel—also centrally concerned an interest characteristic of adjudicative proceedings: the assurance that affected parties be granted a generous opportunity to be heard, and allowed to articulate a factual and principled basis on which a decision should be taken, before an impartial decision-maker.

The MWCI confronted difficult issues surrounding the opportunity for affected parties to be heard. Although not constituted to decide between two, diametrically-opposed versions of events, the inquiry bore directly on the experiences of individuals, communities, and groups that had previously felt excluded and ostracized by official institutions. Indeed, one of the inquiry’s central investigative tasks was to determine why the police had not paid greater heed to the concerns of friends, family members, and groups working with vulnerable women in Vancouver’s downtown eastside, at a time when police intervention might have prevented many avoidable deaths. For these community participants, the opportunity to be heard signalled the opportunity to redress previous experiences of exclusion. It was an opportunity to have those experiences publicly recognized, to demand a response on behalf of the individuals and agencies responsible for their exclusion, and to counter any denial of responsibility.96 For the individuals and agencies themselves—notably the Vancouver Police Department, the RCMP, and individual police officers involved in the missing women investigations—the inquiry represented

96. See generally BCCLA, supra note 59.
a setting in which adverse findings could be made against them. This in itself engaged an interest in being fully and fairly heard, even if in some instances this involved acknowledging wrongdoing. These examples too, then, illustrate that for inquiry participants, the opportunity to be heard on procedurally equal terms, to be permitted meaningful advocacy even where this means casting blame or confronting suspicions and allegations, and to be treated with impartiality and fairness by the Commissioner, were paramount considerations. Each of these are values strongly reinforced by traditional adjudicative decision-making.

Pointing out that public inquiries may share features in common with adjudication does not, of course, justify characterizing such inquiries as adjudicative. But it should be enough to question categorical assumptions that they are investigative or non-adversarial, and thereby not beholden to stringent standards of due process. It would be more accurate to acknowledge that public inquiries blend investigative functions with adjudicative ones, the latter deriving from the fact that a public hearing of controversial, contested issues is likely to involve adverse claims, and from the fact that some participants may legitimately demand standards of due process approaching those of a formally adjudicative setting. Defining public inquiries as hybrid institutions is hardly profound, but it serves as an important reminder that adjudicative values should not be dismissed summarily as complicating the process of investigation. For one thing, the accuracy of that assumption is dubious: recall that in both Canellis and the MWCI, hearing more fully from affected parties may have strengthened the basis of investigative conclusions. For another, it places undue emphasis on the utilitarian goals of an inquiry—the pursuit of an investigate mandate—at the expense of its deliberative value as perceived by individuals and groups directly affected.

This point is deepened by referring to a well-known critique of Fuller's account of adjudication, which questions its relevance to judicial expression and enforcement of constitutional values. Writing in 1979, Owen Fiss's archetypal counterpoint to Fuller was America's tortured experience with the desegregation of public schools—a process that required detailed

97. As the Commissioner himself observed: "That critical police failures in the missing women investigations resulted from discriminatory policing or systemic institutional bias is highly contested. It is an issue with an absolute division between the non-police participants and the police in this inquiry. Counsel for the VPD, the RCMP, and the Vancouver Police Union, as well as most of the individual police officers with independent counsel, utterly rejected these arguments, emphasizing the lack of evidence necessary to substantiate these serious crimes." See MWCI, Executive Summary, supra note 13 at 93. Counsel for the families represented at the inquiry went so far as to allege a deliberate cover-up on the part of the police. The Commissioner considered and flatly rejected this allegation (ibid at 105).
judicial oversight of the administration of certain school districts in order to enforce compliance with the constitutional guarantee of equality. Had judges limited themselves simply to declaring the winner of bilaterally litigated disputes, and not grappled with the polycentric exercise of enforcing structural remedies, their rulings would have had no meaningful effect. These remedies, and the constitutional values which necessitated them, demanded that judges take account of societal interests and effects beyond those raised by the parties; that is, the judges were required to look beyond simply the “proofs and reasoned arguments” placed before them.

The duty for judges to look beyond the proofs and arguments of disputing parties and to account for broader societal interests and effects would seem to apply generally in the modern context of constitutional adjudication. This is evident in the Canadian approach to determining the legitimacy of limitations on constitutional rights. Proportionality analysis, flowing from section 1 of the Charter, asks that judges consider whether a rights-infringing law has a pressing and substantial objective, whether the measures it employs are reasonably connected to that objective, whether it impairs a constitutional right to only the minimum extent necessary, and whether the benefits secured by the law are proportionate to the constitutional injury they entail. This form of inquiry—particularly the last step, which asks that a court assess the societal effect of a law—seems starkly polycentric. Indeed, it is a familiar practice in Canadian constitutional litigation for intervener parties to be granted standing in order to furnish the courts with a broader societal perspective on which to base their decisions. It is also typical for parties to include social science data, academic commentary, and a host of other “non-legal” materials in their court briefings. Accordingly, it is reasonable to ask whether Fuller’s account of adjudication is unduly narrow in light of contemporary constitutional practice.

It may be that the parties to contemporary constitutional litigation present the courts with a range of complex societal data and considerations, and indeed the courts may even account for these factors on their own initiative in crafting efficacious legal outcomes. Yet the manner of participation by the parties to an adjudicated dispute, and the special assurance of justice they derive from it, remains the same. As TRS Allan points out, the value of adjudication is especially important in the

99. These criteria were stated for the first time in Canadian jurisprudence by the Supreme Court in R v Oakes, [1986] 1 SCR 103, but their origins lie in converging constitutional practices shared by many countries. See Aharon Barak, Proportionality: Constitutional Rights and their Limitation, translated by Doron Kalir (Cambridge: Cambridge University Press, 2012).
context of constitutional litigation. Here, the obligation of both parties (the individual and the state) to present their claims in equivalent terms (via proofs and reasoned arguments) before an impartial adjudicator (the independent court) structures them as equals. This serves as an important source of assurance for an individual forced to comply with official authority: having been heard on equal and impartial terms by the judge, a reasonable basis for compliance with the judge’s decision is thereby established; participants are given a special assurance that the outcome is not arbitrary.

This also helps to illuminate why adjudicative procedures may be important to certain types of public inquiry. If the rule of law is taken to be a bulwark against the arbitrary exercise of state authority, then by implication it demands that the state account for the received effects of its laws on individuals. Indeed, the section 1 analysis discussed earlier is centrally oriented to ensuring that the individualized effects of laws are fair and just. Constitutional adjudication is thus a means of satisfying individuals of the justness of laws as they individually affect them, just as it is a source of vindication for those individuals who have suffered under unjust laws. Do certain public inquiries not serve a strikingly similar purpose?

Consider again how the public inquiries discussed in this paper are viewed from the perspectives of their participants. Kalajzich sought the opportunity to challenge his criminal conviction before an authority charged with conducting a thorough and impartial review. While the state was the initiator of the inquiry in Canellis, it was also a party acting through the Ministry of the Attorney General, and sought to persuade the Commissioner of the veracity of Kalajzich’s conviction. The compelled witnesses, whose claims sparked an application for judicial review, sought both to rebuke Kalajzich’s accusations and to insulate themselves against the harsh effects of the inquiry. The latter required, in their view, that they be afforded access to counsel and to meaningful advocacy. The public inquiry thus established a procedural means by which the justness (that is, the non-arbitrariness) of a legal effect on Kalajzich could be confirmed. The compelled witnesses, in claiming rights to counsel, sought the opportunity to demand justification for the effects of the public inquiry itself on them. What the parties sought from the public inquiry, in other words, is similar

101. Ibid.
to what parties seek from constitutional adjudication: to challenge (or at minimum, to verify) the justice of official authority.

A similar observation can be made about the participants in the MWCI. For the family members of murdered and disappeared women, the inquiry signalled an opportunity to hold the state to account for its failure to accord their loved ones the equal care and treatment to which they were entitled. The same is true of those community groups who were granted standing but denied legal funding—they too sought official recognition of the experiences of exclusion suffered by their clients and members, and to call to account those state agencies responsible for it. Conversely, individual police officers and the police collectively no doubt expected the opportunity to respond to certain accusations at the inquiry, and to ensure that adverse findings made against them were limited to those with credible factual foundation. This would also involve having the Commissioner recognize the reasonableness of official decisions that have been unfairly subjected to critique. Again, the parties' participation in the inquiry related fundamentally to evaluating the justice of official power.

These observations are significant because they suggest that there is a substantive, principled basis for the use of adjudicative procedural forms in some types of public inquiry. As in the case of constitutional adjudication, an inquiry commissioner does not consider the positions of inquiry participants exclusively in weighing their claims; rather, he or she is forced to consider the relationship between those claims and the broader context and purpose of the inquiry. Attention to these considerations denies participants total control over the basis on which the commissioner will reach decisions, and thus departs from a classic adjudicative model as Fuller likely envisioned it. Moreover, the additional considerations weighed by a commissioner may be polycentric, and the commissioner may instantiate additional processes to gather relevant information and broader societal perspectives that bear on his or her work. Yet, as is the case in constitutional adjudication, mere confrontation with polycentric issues does not alter the fact that a core aspect of the process is adjudicative—that the commissioner owes participants equal procedural opportunity to present proofs and reasoned arguments regarding contested issues that
seriously affect them. We can begin to see the value of judges' and lawyers' professional contributions in this context, and link back to some of the guidance offered by the Australian jurisprudence on incompatibility.

The jurisprudence on incompatibility requires that judges "behave judicially" even in the setting of extra-judicial appointments. This means, at minimum, that they afford due process to those affected by the exercise of their extra-judicial powers. It also requires that they remain independent. However, it should be clear that judges are not the only officials capable of observing these values. Fuller's theory of adjudication provides an account of what it means to "behave judicially" in a more formal sense—by allowing those affected by a decision to influence its formulation through the presentation of proofs and reasoned arguments to an impartial arbiter, and thus affording them special assurance of the justice of a final outcome. Although judges are not the only officials that adjudicate, this is certainly an area in which they can claim special, distinguishing expertise, and the capacity to instil public confidence at the highest level.

Fuller himself acknowledged that protecting the value of adjudication did not require the carbon-copying of courtroom litigation in all adjudicative contexts. Adjudication can be mixed with other institutional forms. Of particular relevance to public inquiries, Fuller recognized that processes initiated by an arbitral authority rather than by disputing parties, could nevertheless be adjudicative. He even conceded that adjudicators sometimes confront polycentric issues, observing: "It is not, then, a question of distinguishing black from white. It is a question of knowing when the polycentric elements have become so significant and predominant that the proper limits of adjudication have been reached." These limits are determined by asking whether the essential value of adjudication is preserved: "Whatever destroys the meaning of...participation [by proofs and reasoned arguments] destroys the integrity of adjudication itself."

102. A Wayne Mackay has taken up a related point in challenging generalizations about the gulf between lawyers' and policy-makers' values in the inquiry setting. He writes: "There is, of course, some conflict of values between the lawyers and the policy makers but the degree has been exaggerated...[T]he Charter has not been used by the courts to remake inquiries in accordance with lawyers' values. While individual lawyers are oriented towards the rights of particular clients, judges are very conscious of the collective good of the larger society and reflect this in their rulings from the bench and as commissioners. Similarly, administrators are also concerned about the fair treatment of individuals in the broader sense, as well as the efficient execution of public policy." See A Wayne MacKay, "Mandates, Legal Foundations, Powers and Conduct of Commissions of Inquiry" in Pross et al, supra note 76, 29 at 43.

103. Fuller, supra note 86 at 385ff.
104. Ibid at 398.
105. Ibid at 364 [emphasis added].
3. Resolving the tensions of judicial inquiries

I suggested earlier that the analytic requirements of the incompatibility doctrine might be deepened—and the special dilemmas confronting inquiry commissioners resolved—by requiring judges to honour the basic value of adjudication in assuming leadership of a public inquiry. It is now possible to more fully articulate this approach, which can be implemented by judges asking themselves, prior to acceptance of an inquiry appointment: “Can I fulfil this appointment in a manner that preserves the basic value of adjudication?”

There are two parts to this question. The first, “Can I fulfil...” concerns the judge’s ability to effectively carry out the assigned task. Concerning an investigative mandate, for example, the judge must ask whether he or she will be able to gather and assess the evidence necessary to reach accurate factual conclusions. If the judge’s task is also policy oriented, the judge must ask whether he or she can become sufficiently informed of the range of pertinent issues and societal interests to formulate effective proposals. The latter part of the question, “while allowing those affected by my decisions to participate” qualifies the first; it requires that the judge fulfil the investigative or policy goals of an inquiry while allowing those seriously affected by the process an opportunity participate by the presentation of proofs and reasoned arguments, and to receive an impartial hearing at the standard rightly demanded of a judge. In effect, it challenges the judge to consider whether his or her fidelity to independence and due process—and the distinct adjudicative forms to which that fidelity gives rise—are in fact suited to the extra-judicial task at hand. The question reinforces a connection between efficiency and principle: it postulates that those tasks which judges are optimally suited to address are those that appeal to a judicial sense of fair process, requiring the professional discretion and skills such a process entails.

To illustrate the practical applicability of this approach, we may return to the dilemmas outlined in the previous Part. The first concerned a tension between independence and the political character of inquiries. We saw that in both Canellis and the MWCI the political decision to deny financing for the legal representation of certain inquiry participants significantly curtailed the discretion of the respective Commissioners. More specifically, it undermined what the Commissioners viewed as being appropriate to ensure fairness, and what they considered beneficial to the execution of their investigative mandates. In both instances, this form of political intervention diminished the extent to which the inquiries were able to foster procedural equality amongst participants who were significantly affected by the issues concerned, and who legitimately
demanded a high assurance of justice in the final outcomes. Now consider how these issues might have been anticipated, and possibly averted, had the respective Commissioners been required—prior to the assumption of their inquiries—to ponder the question: “Can I fulfil this appointment in a manner that preserves the basic value of adjudication?”

As a threshold issue, this would have involved querying whether the mandates of the respective inquiries were suited to allowing affected parties the opportunity to participate through the presentation of proofs and reasoned arguments (or conversely, whether the subject-matter of each inquiry was too polycentric to be accommodated by this manner of participation). Given that the inquiry in Canellis constituted the review of proceedings that were themselves adjudicative, with directly opposing factual claims on the part of the witnesses, the Commissioner could easily have satisfied himself of this threshold issue.

The MWCI presents a more challenging case. British Columbia’s Public Inquiry Act\(^{6}\) allows for the appointment of “Hearing Commissions”—which exercise coercive powers to attain evidence, hold formal evidentiary hearings, and reach findings of individual misconduct—and “Study Commissions,” which do not possess equivalent powers but are intended to facilitate more flexible and inclusive means of community consultation.\(^{7}\) The MWCI was initially appointed as a hearing commission exclusively. Public concern over its relatively narrow terms of reference, and the possibility that formal hearings would deter participation by socially marginalized individuals and groups, motivated the Commissioner to request, and the government to grant, an extension to his mandate to include a study commission phase. The Commissioner interpreted the hearings phase of his inquiry to concern those portions of his mandate that required him to make investigative determinations: namely, to assess the adequacy of the police investigations and the circumstances surrounding a 1998 decision to stay a prosecution against Robert Pickton. He interpreted the study phase of his inquiry to concern the formulation of forward-looking recommendations to improve the conduct of missing person and suspected homicide investigations in the province. While conclusions drawn from the hearings phase would also inform the Commissioner’s policy recommendations, findings of fact were the exclusive purview of the hearings phase. This bifurcation of proceedings would appear to anticipate that the investigative focus of the inquiry involved highly contested facts and serious allegations necessitating reasonable opportunities for affected

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106. Supra note 61.
107. See ibid, Part 3, Division 3 and Division 2, respectively.
parties to be heard. It would be appropriate for the Commissioner to anticipate that participants in this phase of the inquiry would expect a manner of participation, and an assurance of fairness, equivalent to that of an adjudicative hearing. As such, he might credibly have answered “yes” to the question of whether this aspect of the inquiry could be conducted in a manner honouring the basic value of adjudication, while still fulfilling its investigative mandate.

Having satisfied themselves that their inquiries could be conducted in a manner that honours the basic value of adjudication, the Commissioners would have been obliged to consider what this would require as a practical reality. In both Canellis and the MWCJ, it would not have been difficult to anticipate that those parties eventually denied funding for legal representation were likely to factor prominently in inquiry hearings, and to seek comprehensive rights of standing, representation, and advocacy. In the case of Canellis, the witnesses were inseparably linked to the matter under investigation. Their participation was involuntary, and the inquiry exposed them to a very high degree of prejudice, including the possibility of findings that could eventuate criminal prosecution. In the MWCJ, the parties represented the communities most directly affected by the events precipitating the inquiry. Indeed, it was the allegations of these communities—of having their complaints and warnings ignored by police and justice officials—that served as the central basis for instigating an inquiry to begin with. Moreover, the parties were in a unique position to speak to the experiences of the missing and murdered women themselves, having worked with the women as service providers, advocates, and members of a shared community.

Preserving the value of adjudication would have brought the necessity of affording these participants legal representation into sharp relief. It would have obliged the Commissioners to consider not only that they owed participants impartiality and due process, but impartiality and due process at a level and form expected of a judge. The Commissioners might then have required, as a condition of their appointment, assurance that adequate resources be available to support legal representation and participation by key participants who lacked financial means. This is hardly a controversial suggestion: it simply adds greater specificity to a requirement already stipulated in the Canadian Judicial Council’s Protocol on the Appointment of Judges to Commissions of Inquiry. The latter requires that superior court judges approached to conduct a public inquiry.

carefully scrutinize the proposed appointment, in consultation with the chief justices of their respective jurisdiction, to determine whether the subject-matter of the inquiry is appropriate for judicial service and whether proper budgetary measures are in place. A similar approach is taken by the state bench of New South Wales. Assurance as to proper legal financing for inquiry participants—in the form of an undertaking from the appointing government—should form part of this assessment. An obligation to honour the basic value of adjudication would make such assurances a matter of course, especially where the subject-matter of an inquiry clearly affects individuals and groups who are likely to lack means of independently financing legal representation.

The second tension discussed above—that between due process and the investigative nature of public inquiries—is also brought into sharp relief by the question, “Can I fulfil this mandate in a manner that maintains the basic value of adjudication?” This tension was considered in the previous part through the example of the commissioner’s relationship with commission counsel. Explicit attention to the demands of adjudication might lead a commissioner to a host of procedural innovations tailored to the particular exigencies of his or her inquiry. At minimum, it would underscore an ethical imperative for the commissioner to disclose the nature of his or her relationship with counsel—for example, by making public (rather than private) directions when asking commission counsel to clarify or focus examination on certain key issues; by declaring that commission counsel will not take direction from the commissioner in responding to any interlocutory motions raised during the inquiry, so that the commissioner can hear those motions in an unbiased and adjudicative manner; by divulging the extent of the commissioner’s involvement in directing the gathering and preliminary review of inquiry evidence, and declaring that findings will only be based on evidence and testimony introduced in public hearings; and by declaring that the commissioner will neither discuss nor deliberate with counsel on any findings of individual misconduct, nor involve counsel in drafting related portions of the final report.

109. Ibid at ss 2(c) and 3(f).
110. See Campbell & Lee, supra note 16 at 171.
111. It is intriguing to note that Tasmania’s public inquiries statute empowers commissioners to require that the Crown reimburse legal costs for inquiry witnesses: see Commissions of Inquiry Act 1995 (Tas), s 36. In fairness, it must be acknowledged that the denial of funding to inquiry participants in the MWCI was unprecedented, and the recommendation I offer here is made with the benefit of hindsight. At the time of his appointment, there would have been no obvious reason for Commissioner Oppal to doubt that reasonable funding requests would be honoured.
In inquiries that are especially adversarial, and where it is anticipated that findings against certain witnesses may be severe (as in Canellis), a commissioner might take the further step of bifurcating his or her legal staff into advisory and inquisitorial teams. The former would be responsible for advising the commissioner and assisting him or her in reaching conclusions and preparing a final report, leaving the latter unfettered to conduct cross-examinations in an adversarial context. This is the approach advocated by Ed Ratushny and implemented successfully in the Lamer Inquiry on which he served.\(^\text{112}\) It depends, of course, on strong ethical boundaries limiting communication between the commissioner, advisory, and investigative counsel. It would also rely on the commissioner deferring responsibility for the conduct of hearings largely to his or her counsel, with the commissioner offering only high-level direction. The commissioner’s consequent sacrifice of a measure of control over his investigative mandate—that is, by ceding the direction of hearings to counsel—would be justified by the exceptional prejudice faced by certain participants.

Again, the merit in honouring the value of adjudication in the inquiry process lies in recognizing that some inquiries legitimately demand standards of impartiality and due process at the high level expected of a judge. It subverts the flawed thinking that because inquiries have investigative or policy mandates, and are formally different from trials, judicial commissioners are liberated to observe relaxed standards of fairness toward participants. In some instances, inquiries demand the special assurance of justice instilled by an adjudicative proceeding. Recognizing this provides a rational account of why judges should lead such inquiries. In turn, it suggests that for those aspects of inquiry proceedings which demand that assurance, judges should behave judicially—that is, they should honour the basic value of adjudication by providing participants the opportunity to be equally and impartially heard by means of proofs and reasoned arguments. I turn finally to consider how this insight may help distil the proper limits of judge-led commissions of inquiry.

4. Discerning the limits of judicial inquiries

In 2012, the B.C. Civil Liberties Association, West Coast LEAF and Pivot Legal Society published a report entitled Blueprint for an Inquiry: Learning from the Failures of the Missing Women Commission of Inquiry.\(^\text{113}\) Taking the shortcomings of the MWCI as its impetus, the report contains a number of valuable recommendations for the improvement of

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112. Ratushny, supra note 1 at 230-236.
113. BCCLA, supra note 59.
future commissions. These include measures to facilitate testimony from vulnerable witnesses and to accord their experiences due evidentiary weight, and a requirement that commissioners and commission counsel be compensated at rates commensurate with service in the public sector so that greater budgetary resources might be available to support community participation. A further theme of the report is that inquiries such as the *MWCI* should serve as transitional justice instruments instilling truth and reconciliation amongst participants.\(^{114}\) This is not to suggest that official accountability ceases to be a central aim of such inquiries; indeed, the *MWCI* was obliged to provide “an opportunity to create a public record and make findings of fact regarding the missing women investigations,” and “to hold those who failed to ensure the safety of vulnerable women accountable.”\(^{115}\) The authors nevertheless suggest these goals are not incompatible: “[inquiries] must find a way to reconcile backward-looking, truth-seeking functions with forward-looking, policy-making functions, all while promoting healing and reconciliation among affected individuals and communities.”\(^{116}\)

The latter claim must be approached with diffidence. The police organizations (and in some cases, individual officers) who participated in the *MWCI* were subject to serious allegations of bias, racism, sexism, cover-up, neglect, and incompetence. The gravity of these allegations necessitated strong procedural rights for participants. It also underscored the importance of securing procedural equality for the individuals and groups who made them, and who were subjected to the indignity of being denied legal representation while their interlocutors were defended with public funds. In his final report, Commissioner Oppal attributed the failure of police to protect women in Vancouver’s downtown eastside largely to systemic bias reflecting broader societal prejudices and misconceptions. He criticized some individual officers—although deliberately focusing for the most part on organizational failures—and vindicated the conduct of others. While the adequacy of these conclusions has been questioned (in part, for the very reason that key participants were excluded) few would doubt that the questions they sought to address—what went wrong? why did this happen?—were important predicates to establishing a more trusting and conciliatory relationship between the affected communities and the police. Provided these questions were to be confronted in a public forum, with witnesses being called to account for their actions and participants

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114. This argument is also made forcefully by Stanton, *supra* note 59.
115. BCCLA, *supra* note 59 at 19.
afforded the opportunity to conduct examinations and make allegations, it is difficult to imagine how some measure of adversarialism could have been avoided. Commissioner Oppal recommended that further deliberative processes, with the exclusive goals of healing and reconciliation, should follow his inquiry. One of the great misfortunes of the MWCI is that this and other recommendations were diminished by a flawed and unequal process. It is also regrettable that those aspects of the MWCI procedure that did broker alternatives to the adversarial hearing of evidence lacked credibility and broad participation due to the shortcomings of the formal hearings.

In weighing the potential for judge-led inquiries to promote truth and reconciliation, it is worthwhile to consider the example of Canada’s Truth and Reconciliation Commission (TRC), which recently completed its last national event and will submit a final report in 2015. The TRC was established pursuant to a settlement agreement between Indian Residential School (IRS) survivors, the federal government and several churches that had been responsible for administering the schools. A non-adversarial, voluntary process of healing and reconciliation was considered a necessary counterpart to the formal acknowledgment of blame embodied in the settlement agreement. The TRC’s mandate is thus markedly different from a commission of inquiry constituted to discern the truth in contested events, as Kim Stanton has observed,

[i]n Canada, where the government and the churches have acknowledged that abuses occurred and that the IRS system was harmful, the evidence that is presented to the TRC is not for the purpose of convincing the Commissioners that the abuses occurred. The TRC is occurring separately from the reparations process and other elements of the Settlement Agreement.  

This is reflected in the TRC’s terms of reference, which are prefaced by a statement of guiding principles:

The Truth and Reconciliation Commission will build upon the “Statement of Reconciliation” dated January 7, 1998 and the principles developed by the Working Group on Truth and Reconciliation and of the Exploratory Dialogues (1998–1999). These principles are as follows: accessible; victim-centred; confidentiality (if required by the former student); do no harm; health and safety of participants; representative; public/ transparent; accountable; open and honourable process; comprehensive; inclusive, educational, holistic, just and fair; respectful; voluntary;

117. See MWCI, Executive Summary, supra note 13 at 161.
flexible; and forward looking in terms of rebuilding and renewing Aboriginal relationships and the relationship between Aboriginal and non-Aboriginal Canadians.\textsuperscript{119}

Consistent with these principles, the TRC has no power to subpoena evidence or to compel the attendance of witnesses, and “shall not hold formal hearings, nor act as a public inquiry, nor conduct a formal legal process.”\textsuperscript{120} It is forbidden from naming names in its account of wrongdoing, and any proceedings in which allegations are made against identifiable persons must be conducted in camera.\textsuperscript{121} In its 2012 Interim Report, the TRC emphasized the centrality of statement gathering, or “truth sharing” to its mandate:

The Commission is committed to providing every former residential student—and every person whose life was affected by the residential school system—with the opportunity to create a record of that experience. \textellipsis Since there are estimated to be at least 80,000 living former students, the magnitude and complexity of the Commission’s commitment are significant.\textsuperscript{122}

At the time of the Interim Report, through public sharing circles, commission hearings, and private sessions conducted by trained statement-gatherers, the TRC had collected over 1800 statements.\textsuperscript{123} It had also hosted two national events reflecting the educative and holistic goals of the commission, including artistic installations, musical performances, the display of archival materials, children and youth programs, and a range of other activities in addition to the formal gathering of statements.\textsuperscript{124}

The point of this example is to show that—at least in the context of Canada’s TRC—healing and reconciliation have been treated as formally distinct from the identification of wrongdoing and allocation of blame. Indeed, healing and reconciliation command an altogether different procedure, and a different underlying notion of accountability that stresses voluntariness and collective responsibility to acknowledge wrongs and build new relationships. One can easily imagine how the introduction of adversarialism would be detrimental to this process.

\textsuperscript{120} \textit{Ibid} at 2(b) and (c).
\textsuperscript{121} \textit{Ibid} at 2(h) and (i).
\textsuperscript{123} \textit{Ibid} at 13.
\textsuperscript{124} \textit{Ibid} at 18-21.
I do not mean to suggest that all processes pursuing goals of healing and reconciliation should mimic the TRC. However, even in contexts where the attribution of wrong is an institutional objective—but is combined with the effort to restore relationships between conflicting parties—the initial starting points and expectations of participants will be key. In a 2003 report on alternatives to the traditional adversarial system of justice, the Law Commission of Canada observed:

[A] consensus-based justice approach requires disputants to reconceive their conflict as one in which certain solutions other than a win-lose outcome are possible. To achieve even the possibility of such solutions, disputants must embrace some of the hallmarks of a consensus-based justice vision, including openness, direct-dealing and longer-term vision.

... Justice as it is conceptualized and practiced in both restorative justice and consensus-based justice traditions is multidimensional. Both approaches reject the idea that a just outcome may only be consistent with pre-existing rules. Instead, the presumption goes the other way—that in almost every case the solution is integrative, rather than winner-take-all. For restorative justice advocates, notions of harm and responsibility are more complex than a simple determination of right and wrong. 125

This shared conception of justice may not be feasible in circumstances where the very existence of a wrong, or its nature and extent, are vigorously contested. Formal alternatives to adversarial disputes are contingent on the motivation and goals of participants. There will likely remain cases where disputes are trenchant and demand a public hearing. For those circumstances, adjudication may be necessary to afford procedural equality and fairness to participants, despite its limitations in brokering consensus and reconciliation.

These will be the circumstances most suited to judicial leadership of an inquiry. A judge approached to conduct an inquiry whose mandate expresses goals of healing and reconciliation must consider whether the adjudicative methods in which he or she has been inculcated would inflict more harm than good. If a different procedural approach is required, reinforcing different goals and expectations amongst participants from the outset, then the judge must ask whether he or she has the requisite skills and abilities beyond the traditional judicial role to complete the task effectively. Moreover, given that such an assignment will lack the intrinsic assurances of impartiality and due process instilled by adjudication, the

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judge will be required to verify that acceptance does not impugn judicial integrity in the manner contemplated by the incompatibility doctrine. Occasionally, as in the case of Justice Murray Sinclair’s leadership of the TRC, a judge may be able to credibly answer each of these questions in the affirmative. The position advocated here is that judges should err on the side of caution, however, and confine themselves to tasks that call for the enforcement of adjudicative values. A principled boundary to judicial service, and proper alignment of procedural forms and functions, is thus assured, guarding against the encroachment of legal epistemologies on improper terrain.

Conclusion

Judge-led public inquiries continue to play important roles addressing matters of serious public concern in both Canada and Australia. No less important than the factual conclusions they reach are the values instilled by the processes leading to those conclusions. In Canada, relatively little attention has been devoted to separation of powers concerns that attend judicial service in such inquiries. This is surprising given the formal classification of inquiries as investigative processes, and the common-sense understanding that inquiries often address highly controversial and politically-charged subjects. The Australian doctrine of incompatibility draws these separation of powers concerns to the fore, stressing that even when judges assume extra-judicial roles, they must still honour values of independence and due process central to ensuring their personal integrity, and the integrity of the judiciary as a whole. While the doctrine will be illuminating to Canadian jurists, it does not resolve the unique dilemmas confronted by judges upon assuming the leadership of a public inquiry. Judicial commissioners face an inevitable tension between their independence and the political character of inquiries, and between the investigative mandates of inquiries and fairness to inquiry participants. These tensions arise in practical ways—for example, in conflicts concerning the funding of inquiry participants, or in establishing appropriate boundaries in a commissioner’s relationship with his or her counsel. Resolving these tensions involves confronting the question of why judges should serve in public inquiries to begin with. The received wisdom is that the judicial commissioner can depart significantly from the procedural and substantive commitments of adjudication; however, a closer examination of those commitments challenges that wisdom.

When we distil the social value that adjudication is meant to achieve—the special assurance of justice it affords to participants through structural equality in the presentation of proofs and reasoned arguments to a neutral
arbiter—we may also identify a place for that value in certain types of public inquiry. These are inquiries that involve conflict as to the existence and nature of wrongs and the appropriate attribution of responsibility. Here, the legitimate fairness demands of participants—both those making and those subject to serious allegations—warrant the instantiation of adjudicative procedures. This is not to say that inquiries are exclusively adjudicative. Rather, it is to say that adjudication should be honoured in their formal, evidentiary hearings, and that recognizing this role would improve their conduct without diminishing the value of parallel inquiry processes, including research and community consultation.

Recognizing the place for adjudication in public inquiries also helps define clearer limits to their judicial leadership. I argue for a cautionary approach in which judges decline to assume commissions that are ill-suited to adjudication, barring special confidence that they possess the requisite ability to develop deliberately non-judicial procedures and to do so in a manner that preserves the integrity of their judicial office. Accordingly, while my thesis supports greater formality in the procedural structure of some inquiries, it also supports a narrowing of instances in which those inquiries should be employed. Where societal goals of restorative justice, healing, and reconciliation are paramount, alternative deliberative processes to the judicial inquiry should be considered. Judges possess a unique set of abilities and procedural understandings that reflect their role under the separation of powers. Their service in non-judicial settings should reflect that role.