


10-28-2016

The Role of Judicial Discourse in Distorting the Public Inquiry Image: Is the Inquiry Becoming an Endangered Species?

Diana Morokhovets

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**THE ROLE OF JUDICIAL DISCOURSE IN DISTORTING THE PUBLIC
INQUIRY IMAGE: IS THE INQUIRY BECOMING AN ENDANGERED
SPECIES?**

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A THESIS SUBMITTED TO
THE FACULTY OF GRADUATE STUDIES
IN PARTIAL FULFILLMENT OF THE REQUIREMENTS
FOR THE DEGREE OF
MASTER OF LAWS

GRADUATE PROGRAM IN LAW
YORK UNIVERSITY
TORONTO, ONTARIO

SEPTEMBER 2016

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ABSTRACT

The goal is to explore the construction of the Public Inquiry image and its “persona” via judicial decision-making and legal discourses that are utilized to justify the final product of an inquiry. For instance, while the commissioner is generally equipped with extensive coercive and discretionary powers, there is scarcely any research on *why* these powers are exercised the way that they are and *how* (or *if*) the decisions that are made condition the public image of the inquiry and their ultimate impact on the survival of the institution. Specifically, it will be argued that despite the fact that a judge-commissioner is generally imbued with broad discretionary powers and given (in theory) access to flexible, independent and virtually unrestrained process, the discourses utilized around and inside the inquiry construct and reinforce a specific image of the process (and the commissioner), one that upholds the paradigm of the traditional (adversarial/adjudicative) legal culture while endangering the unique nature of the public inquiry and what it originally was designed to achieve.

DEDICATION

I dedicate this Thesis to my husband, Orest Kostiv. Without his love, patience, and support the completion of this work would not have been possible.

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INTRODUCTION

The Public Inquiry (or Commission of Inquiry)¹ as an institution has expanded in recent years as both the government and public have come to rely on its policy-creating and fact-finding potential. To date, there has been extensive research into the role and function of public inquiries in uncovering the truth, resolving disputes, encouraging policy changes, and “restor[ing] public confidence in the industry or process being reviewed.”² In fact, a significant amount of this research focuses on the issues of why inquiries work, how they function, their utility and the guidelines that could be set out to ensure the proper functioning of this institution in the future.³ In other words, the bulk of academic literature on the subject of Public Inquiries addresses mainly the external aspects of the institution – the process, function, and the overall premise for its existence. However, this same literature often ignores the very process of conceptualizing, discussing, and evaluating those external aspects that ultimately dictates what the Public Inquiry is imagined to be, its “proper” function and whether it achieved its institutional objective.

¹ While the reference to “Public Inquiries” or “Commissions of Inquiry” (used interchangeably throughout this paper) encompasses a variety of instruments, such as “government-appointed commissions, task-forces, parliamentary committees, statutory investigative and advisory agencies, and departmental studies”, this paper is concerned solely with inquiries that are appointed by the executive government and have a member of the judiciary serving as the inquiry chair. See Jeffrey R. Stutz, “What Gets Done and Why: Implementing the Recommendations of Public Inquiries” (2008) 51:3 Canadian Public Administration 501 [Stutz] at 501. For a more detailed definition of the “Commission of Inquiry” see Allan Manson & David Mullan, “Introduction” in Allan Manson & David Mullan, eds., *Commissions of Inquiry: Praise or Reappraise?* (Toronto: Irwin Law, 2003) 1 at 3-4 [Manson & Mullan, “Introduction”].

² Justice John H. Gomery, “The Pros and Cons of Commissions of Inquiry” (2006) 51 McGill L.J. 783 [Gomery] at 783. See also: Allan Manson & David Mullan, eds., *Commissions of Inquiry: Praise or Reappraise?* (Toronto: Irwin Law, 2003) [Manson & Mullan, *Commissions of Inquiry*]; Neil Bradford, “Writing Public Philosophy: Canada’s Royal Commissions on Everything” (1999) 34:4 Journal of Canadian Studies 136 [Bradford]; Robert Centa & Patrick Macklem, “Securing Accountability Through Commissions of Inquiry: The Role of the Law Commission of Canada” (2001) 39:1 Osgoode Hall L.J. 118 [Centa & Macklem]; Peter J. Carver, “Getting the Story Out: Accountability and the Law of Public Inquiries” in Coleen M. Flood & Lorne Sossin, eds., *Administrative Law in Context*, 2nd ed. (Toronto: Emond Montgomery, 2013) 541 [Carver]; and A. Paul Pross, Christie Innis & John A. Yogis, eds., *Commissions of Inquiry* (Toronto: Carswell Publications, 1990) [Pross, Innis & Yogis, *Commissions of Inquiry*].

³ See e.g., Stutz, *supra* note 1; Gus Van Harten, “Truth Before Punishment: A Defence of Public Inquiries” (2003) 29 Queen’s L.J. 242 [Van Harten, “Truth Before Punishment”]; Pross, Innis & Yogis, *Commissions of Inquiry*, *supra* note 2; Jasminka Kalajdzic, “Outsiders: The Sources and Impact of Secrecy at the Iacobucci Inquiry” (2010) 36 Queen’s L.J. 161 [Kalajdzic].

Given this gap in research and analysis, it is not surprising that when it came to evaluating the Public Inquiry's efficacy, the institution did not fare well.⁴ In fact, the inquiry has endured criticism from all sides - the academia, legal professionals and the public at large. Interestingly, most of the concern is directed at either the inquiry becoming too adversarial and adjudicative in nature or not enough. For instance, MacKay & McQueen addressed some of the issues surrounding Public Inquiries, namely the individual rights claims and division of powers challenges, both focusing on the justiciability of the inquiry process rather than its truth-seeking potential.⁵ More importantly, while addressing these issues, MacKay & McQueen saw fit to compare the Public Inquiry to the adversarial process in order to ascertain "if public inquiries are the best mechanism available to achieve the desired goals."⁶ However, despite recognizing that the unique context of an inquiry needs to be accounted for, by pitting the inquiry against the adjudicative model, MacKay & McQueen inadvertently imposed conflicting standards on the conduct of an inquiry and the role of its commissioner thereby distorting the unique Public Inquiry image. Specifically, they separated truth from fairness making it questionable whether truth-seeking could ever come before justice even within an institution that makes truth its ultimate objective and foundation for the inquiry's very existence.

MacKay & McQueen were not the only ones to question legitimacy of the current inquiry model especially as it was being measured against the adjudicative standard. While Centa & Macklem summarized some of the start-up issues involved in calling a Public Inquiry, specifically as they relate to the inquiry becoming more adversarial in nature and less efficient as

⁴ See generally Manson & Mullan, *Commissions of Inquiry*, *supra* note 2; Pross, Innis & Yogis, *Commissions of Inquiry*, *supra* note 2; Kalajdzic, *supra* note 3; Gordon F. Henderson, "Abuse of Power by Royal Commissions" 493 in Law Society of Upper Canada, *The Abuse of Power and the Role of an Independent Judicial System in Its Regulation and Control* (Toronto: R. De Boo, 1979) [Henderson]; and J.E. Hodgetts, "Should Canada be De-Commissioned? A Commoner's View of Royal Commissions" (1964) 70:4 *Queen's Quarterly* 483.

⁵ A. Wayne MacKay & Monica G. McQueen, "Public Inquiries and the Legality of Blaming: Truth, Justice, and the Canadian Way" 249 in Manson & Mullan, *Commissions of Inquiry*, *supra* note 2 at 252 [MacKay & McQueen].

⁶ *Ibid.* at 253.

a mechanism for generating public policy,⁷ Schwartz called on the inquiry to “act more judiciously”, emphasizing the need to correct the inefficiency of the process and the institution’s inadequate civil liberties safeguards.⁸ Describing himself as “being an early and tough critic of the way we conduct public inquiries in Canada,” Schwartz warned that “[t]he dilatory, inconclusive or heavy-handed character of a number of recent public inquiries and Royal Commissions may produce a public backlash...”⁹ Moreover, he urged that “[i]t would be better to find ways to make our inquiries more efficient, productive and respectful of civil liberties” and proposed a list of solutions geared towards making inquiries more “judicious” and compliant with the adjudicative standards of “justice”.¹⁰ In other words, while being held-up to the traditional, adversarial standards of practice and procedure, in recent years the inquiry has been criticized for being an inefficient and even futile alternative to the adjudicative investigation model.¹¹

Nevertheless, it is important to highlight at the outset that these contradictory expectations were not unnoticed and the unique nature of the Public Inquiry institution has its own defenders. For instance, unlike Schwartz, Van Harten recognized that expecting the Public Inquiry to comply with the adversarial values and standards will only undermine the institution’s social function and truth-seeking potential, not to mention the public’s confidence in its utility as it was never meant to resemble the adjudicative model against which it is measured.¹² Specifically, Van Harten sets out to determine how to balance the search for the truth and the protection of individual rights; he examines the circumstances when a public interest can be

⁷ Centa & Macklem, *supra* note 2 at 123-140.

⁸ Bryan Schwartz, “Public Inquiries” 443 in Manson & Mullan, *Commissions of Inquiry*, *supra* note 2 at 457 and 454-455 [Schwartz].

⁹ *Ibid.* at 455.

¹⁰ *Ibid.* at 455-456.

¹¹ See Innis Christie & A. Paul Pross, “Introduction” 1 in Pross, Innis & Yogis, *Commissions of Inquiry*, *supra* note 2 at 1-2 [Christie & Pross, “Introduction”].

¹² Van Harten, “Truth Before Punishment”, *supra* note 3.

prioritized over individual rights issues and the principle of inquiry efficiency can trump that of adjudicative fairness.¹³ However, although Van Harten argued that “[t]here is a legitimate expectation that the commissioner will use his or her powers to ensure that an inquiry is both thorough and independent,”¹⁴ he did not consider *how* the commissioner managed his/her controversial position as the head of a Public Inquiry where he/she is often obliged to choose between the principles of efficiency over those of fairness and vice versa. In other words, while Van Harten was aware of these conflicting expectations he did not investigate their source or the extent to which they compromised commissioner’s role and distorted Public Inquiry’s identity.

Furthermore, given these conflicting expectations, it is no wonder that the Public Inquiry has been struggling to maintain its efficiency and effectiveness as a truth-seeking public institution operating within the confines of adjudicative norms. The tendency to appoint members of the judiciary to commission inquiries has made the struggle twofold. Not only is there a general inclination to measure the inquiry process against the standards of the adjudicative system, but there is also pressure on the judge as commissioner to uphold not only the fundamental principles of Public Inquiries but also the judicial values for which he/she has been prized by the government that appointed him/her and the public that trust him/her to act judiciously. In fact, this pressure is so obvious that some academics began questioning the very propriety of judicial involvement – both, in the sense of individual engagement and as part of the institutional discourse - in commissions of inquiry. For instance, according to Dodek, “[t]he current political culture of independence and accountability has made judicial independence a

¹³ Van Harten, *supra* note 3.

¹⁴ *Ibid.* at 246.

highly valued political commodity that is frequently in demand by government officials.”¹⁵ However, such widespread use of the judiciary for extra-judicial functions has “the potential to undermine the bedrock principle of judicial independence.”¹⁶ Specifically, if the concept of adjudicative independence is imported into the inquiry context without a properly “constructed and proffered” argument for its applicability, not only will the judge-commissioner be at risk of having his/her impartiality questioned, not to mention his/her legitimacy as a commissioner, but the credibility of the Public Inquiry itself will suffer.¹⁷

Similarly, speaking in relation to the British experience with judicially run Public Inquiries, Beatson insisted that “one should be more cautious about the use of judges for this extra-judicial task.”¹⁸ Although it may be instinctual to believe that, because of his/her experience and position, a judge is well suited for the role of the commissioner, conducting an inquiry is not a judicial function and given a judge’s obligation to uphold the standards and values of his/her profession, a judge-commissioner is naturally placed in a very delicate situation.¹⁹ For one, as commissioner, a judge is required to uphold fundamental principles of the Public Inquiry in pursuit of his/her mandate while engaging the very qualities for which he/she was chosen fill the role of commissioner in the first place. However, an inquiry’s fundamental principles are not always in congruence with judicial qualities as both are defined by two very different systems of justice. Accordingly, it is no wonder that Beatson and others like him are worried about potentially compromising reputation of the judiciary.²⁰

¹⁵ Adam Dodek, “Judicial Independence as a Public Policy Instrument” in Adam Dodek & Lorne Sossin, eds., *Judicial Independence in Context* (Toronto: Irwin Law Inc., 2010) 295 [Dodek, “Judicial Independence as a Public Policy Instrument”] at 295.

¹⁶ *Ibid.* at 298.

¹⁷ *Ibid.* at 332 and 298.

¹⁸ Jack Beatson, “Should Judges Conduct Public Inquiries?” (2003-2004) 37:2-3 *Isr. L. Rev.* 238 at 239 [Beatson].

¹⁹ *Ibid.* at 241 and 250-251.

²⁰ *Ibid.* at 256-264.

Others still are worried about the future of the Public Inquiry itself. Why? Because the fact that there is a tendency to resort to judicial values and adjudicative standards in an inquiry setting is often unaddressed by the judge-commissioner – no less those writing on the subject of Public Inquiries – as his/her professional ties to the judicial culture and tradition overshadow the discourse of truth that inquiries were originally designed to employ. Given that the judge-commissioner is the embodiment of the inquiry and all the principles for which it stands, in order to determine the future of the Public Inquiry institution, it is imperative to analyze the use of judicial discourse and its role in shaping the institution’s character, function, and image. Precisely this is the goal of the paper. After all, it is up to the commissioner to utilize appropriate discourses in support of an inquiry’s public purpose and social functions. It is the way in which the commissioner construes his role and the function of an inquiry that influences the structure of the process and the exercise of discretionary powers, which in turn dictate how the inquiry will be perceived by the public.

Perhaps Pross, Innis, & Yogis have come closest to hinting at a need for such analysis of judicial discourse and its role in shaping the Public Inquiry image. According to them, “in recent years the usefulness of commissions of inquiry has been called into question” and it may have something to do with the fact that “both in assessing the functioning of inquiries and within inquiries themselves, an important value conflict between what we have called lawyers’ values and policy makers’ values has served to render commissions more complex, time-consuming and expensive.”²¹ Not surprisingly, a conference on commissions of inquiry “was called to discuss the extent to which this conflict of values has changed – or perhaps even undermined - the work of modern commissions.”²² Most importantly, the conference asked whether these conflicting

²¹ Christie & Pross, “Introduction”, *supra* note 11 at 1-2.

²² *Ibid.* at 2.

values “have dictated so many changes in the procedures used by inquiries” consequently compromising their utility and “[t]o what extent do lawyers’ concerns inhibit the proper discussion of public business by narrowly restricting the scope of a commission’s inquiry and by hemming the public input with elaborate procedural requirements?”²³ Both questions are important to the analysis of the Public Inquiry’s future. The very fact that these are the types of questions that precipitated the need for a conference on commissions of inquiry highlights the inquiry’s current identity crisis and an impending deterioration of the very foundation on which the Public Inquiry had originally been built.

These are also the types of questions that form the basis for this paper and the analysis to follow. After all, the truth of the matter is that the Public Inquiry, as a free-standing and unique public institution, is an endangered species and it is imperative that we investigate the likely sources of its demise if only to understand where the future of the institution is headed. As it currently stands, the circumstances are bleak as the inquiry is faced with a gradual deterioration of its public image, founding principles, functions, and character. Bringing fuel to the fire of an already growing skepticism of inquiry’s legitimacy as an effective and efficient institution is the escalating recourse to judicial discourse by both external and internal factions responsible for defining parameters of the inquiry’s very existence. It is precisely this discourse that serves as the backbone for this paper’s analysis, informing my argument as to the institution’s dire future as a “Public Inquiry”.

Because the Public Inquiry is often analyzed and discussed in terms of the judicial discourse that is part and parcel of the adjudicative system, its true character is often misconstrued resulting in it being criticized as inefficient and ineffective and described as a

²³ *Ibid.*

“controversial public vehicle”.²⁴ Thus, in order to even begin understanding why there is such a high level of dissatisfaction with the Public Inquiry, we need to first become accustomed to detecting the incongruous expectations that are imposed on the institution, its persona, and commissioner in the form of judicial discourse. As such, unlike most of the preceding work on the subject matter, the focus of my research will be primarily on the internal aspects of the inquiry process. Rather than analyzing and evaluating the process itself (or what the public comes to expect from it), I intend to examine *how* the process – and thereby its image - is created in the first place: what role do judges as commissioners play in the construction of the process; how does their “judicial” position and/or legal culture influence their decision-making; do concerns for public expectation/perception of the process (and commissioner) have any impact on the discourses that are utilized during the inquiry; and lastly, what do these discourses suggest about the process and the ultimate image of the inquiry?

In other words, my goal is to explore the construction of the inquiry image and its “persona” via judicial decision-making and legal discourses that are utilized to justify the final product of an inquiry. For instance, while the commissioner is generally equipped with extensive coercive powers²⁵ (not to mention the wide discretionary powers provided under the inquiry mandate), there is scarcely any research on *why* these powers are exercised the way that they are and *how* (or *if*) the decisions that are made condition the public image of the inquiry and their ultimate impact on the survival of the institution. Specifically, it will be argued that despite the fact that a judge-commissioner is generally imbued with broad discretionary powers and given (in theory) access to flexible, independent and virtually unrestrained process, the discourses

²⁴ Manson & Mullan, “Introduction”, *supra* note 1 at 10.

²⁵ For example, pursuant to the *Public Inquiries Act*, R.S.O. 1990, c. P-41, the commissioner may require witnesses to testify under oath or affirmation and can call for production of documents. The commission also has quasi-criminal powers of detention and search and seizure – just to name a few.

utilized around and inside the inquiry construct and reinforce a specific image of the process (and the commissioner), one that upholds the paradigm of the traditional (adversarial/adjudicative) legal culture while endangering the unique nature of the public inquiry and what it originally was designed to achieve.

The paper is divided in to four parts. Part I discusses the analytical approach to the research for this paper, specifically the use of discourse analysis as a mechanism for describing the construction process of the Public Inquiry persona (both the institution and its commissioner). Part II situates the discourse analysis that follows in Parts III and IV of the paper in the context of the general discussion of Public Inquiries. In particular, while Section A of Part II looks at how the institutional ideal is conceptualized in the academic and legal literature, Section B zeroes in on the role of the judge-commissioner in shaping that ideal and contributing to a new, potentially adverse, inquiry persona via judicial discourse. Section C goes one step further to isolate truth and justice as the discourses at the forefront of any discussion about the inquiry, its process, commissioner's role, and its general utility as a public institution. Following this literature review, Part III of the paper examines precisely how these discourses are utilized by deconstructing each and analysing their most common applications. Lastly, Part IV engages in the analysis of two judicial inquiries, the Arar Commission and the Iacobucci Inquiry, in order to illustrate the role of judicial discourse in distorting the idealized character and image of the Public Inquiry and thereby threatening the future survival of the institution.

PART I: METHODOLOGY & STATEMENT OF ANALYTICAL APPROACH

As mentioned above, the goal of this paper is to engage in discourse analysis in order to facilitate the current academic discussion on the future of the Public Inquiry. But first, it is important to be clear about what the concept “Public Inquiry” means within the context of this paper. According to Salter, “[a]n inquiry is any body that is formally mandated by a government, either on an *ad hoc* basis or with reference to a specific problem, to conduct its process of fact-finding and to arrive at a body of recommendations.”²⁶ Although there are a myriad of inquiries in Canada that fall within the scope of this definition, be they public or private,²⁷ advisory or investigatory, provincial or federal,²⁸ this paper is concerned solely with inquiries that are chaired by a member of the judiciary, currently serving or already retired.²⁹ Accordingly, unless specifically stated otherwise, the terms public inquiry, commissions, and/or inquiries may be used interchangeably in this paper, but will always denote those commissions of inquiry that are appointed by the executive government (federal or provincial) and have a member of the judiciary serving as the inquiry chair.

This is not to discount the importance of other public inquiries, hearings, and tribunals. Rather, this limited focus is intended to facilitate a discussion of the unique role of the judge-

²⁶ Liora Salter, “The Two Contradictions in Public Inquiries” 173 in Pross, Innis & Yogis, *Commissions of Inquiry*, *supra* note 2 at 175 [Salter, “The Two Contradictions in Public Inquiries”].

²⁷ Interestingly, according to Robardet, “[a] public inquiry will be thought of as being more formal and legal in nature than an informal and private investigative inquiry. This is not due to the formalities that can be implied, but to the consequences generally associated with public inquiries, that is, prejudice, prosecution or deprivation. Clearly, therefore, patterns of attitudes about the process are engaged by definitions of the types of inquiry.” See Patrick Robardet, “Should We Abandon the Adversarial Model in Favour of the Inquisitorial Model in Commissions of Inquiry?” 111 in Pross, Innis & Yogis, *Commissions of Inquiry*, *supra* note 3 at 115 [Robardet].

²⁸ Sometimes commissions of inquiry are referred to as “Royal Commissions” but “[p]rereogative or true ‘royal commissions’ are no longer utilized. The basic structure of federal commissions of inquiry is established by Part I of the *Inquiries Act* although such inquiries are still often referred to as Royal Commissions. Legislative provision is now made for such inquiries in the provinces as well.” See Frank Iacobucci, Q.C., “Commissions of Inquiry and Public Policy in Canada” 21 in Pross, Innis & Yogis, *Commissions of Inquiry*, *supra* note 3 at 23 [Iacobucci, “Commissions of Inquiry and Public Policy in Canada”]. See also Carver, *supra* note 2 at 544 for another examination of the differentiation between a “royal commission,” “judicial inquiry,” and “public inquiry”, which are very often used interchangeably.

²⁹ Please see *supra* note 1 for a definition of “Public Inquiry” and what it may encompass in other contexts and academic literature.

commissioner and the effects of his/her professional upbringing, as well as the obligations imposed on him/her by the academic community by virtue of his/her judicial status, on the nature of the discourse ultimately utilized within the inquiry setting. More importantly, because judicially lead inquiries are almost certain to engage in the discourses of justice that are native to the adjudicative/adversarial system, limiting the analysis to only the judicial inquiries will give a better idea of the extent and nature of the effects of judicial discourse on the Public Inquiry and its future identity.

Although a judge-commissioner's decision-making is subject to a variety of legal and institutional constraints – including those imposed by the jurisprudence, the *Inquiries Act*³⁰ and the inquiry's mandate itself - as will be argued throughout the paper, it is the judicial discourse that presents the biggest challenge and obstacle to how a commissioner exercises his/her power, no matter its legally or institutionally mandated scope. And it is this very discourse that imposes a particular framework of thought and practice which in effect structures what the Public Inquiry can or cannot accomplish, its public utility, and more importantly, its institutional image and reputation. Accordingly, the intention here is to identify and analyze discursive patterns as they dictate what ultimately becomes of the Public Inquiry.

After all, the power of discourse should never be underestimated. In fact, our external reality – a “particular way of organizing thinking, talking and doing about some selected topic” – is mediated through discourse/language.³¹ According to Lugosi, discourse is “a universe or framework of ideas, with particular terms, concepts, language and practices used for making

³⁰ R.S.C. 1985, Chap. I-11, s. 2.

³¹ Alan Hunt & Gary Wickham, *Foucault and Law: Towards a Sociology of Law as Governance* (London: Pluto Press, 1994) [Hunt & Wickham] at 7 (emphasis added).

sense of the world. From each discourse, different truths and facts are derived.”³² Moreover, Hunt & Wickham specified that:

[d]iscourse provides a means of designating the different forms of communication, but also reminding us of the institutional, cultural or constitutive place of language. The term remind us that words work for us because they are part of some wider phenomenon. While the more important forms of discourses are speech or writing (text), discourse can also be non-verbal, physical acts (shaking hands) or visual symbols...

What the concept captures is that people live and experience within discourse in the sense that discourses impose frameworks which structure what can be experienced or the meaning that experience can encompass, and thereby influence what can be said, thought and done. *Each discourse allows certain things to be said, thought and done and impedes or prevents other things from being said, thought and done.*³³

It is this discursive process of structuring meaning, experience, thought and deeds that this paper intends to study. By dismantling the discursive patterns it is possible to identify the framework that a particular set of thoughts, words or practices relies on for its meaning and relevance and ultimately, the institution to which that framework belongs. For instance, as will be argued throughout this paper, a judge-commissioner’s thought process is structured by the adjudicative/adversarial discursive framework that draws its authority and meaning from the legal/judicial institution and culture. This legal culture encompassed how a judge experienced and reacted to his/her surroundings (and in the process defined those very surroundings according to his/her experience of those surroundings) prior to his/her role as commissioner. The effect of this legal discourse does not disappear by virtue of simply a judge assuming the role of a commissioner because a judge is him/herself is part and parcel of that legal discourse and culture. Specifically, a judge is a visual representation of the legal/judicial discourse affecting not only how he/she experiences or reacts to a particular context but also how others engaged in that context define their experience, practice and most importantly, their surroundings.

³² Nicole V.T. Lugosi, “‘Truth-telling’ and Legal Discourse: A Critical Analysis of the Neil Stonechild Inquiry” (2011) 44:2 Canadian Journal of Political Science 299 at 302 [Lugosi].

³³ Hunt & Wickham, *supra* note 31 at 8.

As will be argued below, when it comes to the context of Public Inquiries the effects of judicial discourse can be far reaching on how the values, principles, foundation, and practices of this particular institution are structured and defined. After all,

[d]iscourses have real effects; they are not just the way that social issues get talked and thought about. They structure the possibility of what gets included and excluded and of what gets done or remain undone....In its most obvious sense discourse authorizes some to speak, some views to be taken seriously, while others are marginalized, derided, excluded and even prohibited. Discourses impose themselves upon social life, indeed they produce what it is possible to think, speak and do.³⁴

In other words, discourse dictates how a Public Inquiry is experienced, thought and talked about. Moreover, a commission of inquiry presents a judge with different notions of truth and justice than he/she is traditionally informed by. This poses a challenge for a judge-commissioner as it goes against his/her own current understanding and experience of truth and justice.

According to Foucault, “[d]iscourses must be treated as discontinuous practices, which cross each other, are sometimes juxtaposed with one another, but can just as well exclude or be aware of each other.”³⁵ A judicial member at the head of a Public Inquiry creates an environment for the proliferation of such discursive competition and clash, which in effect poses as a threat to the stability and continuity of Public Inquiry’s own original discursive practices as the preferred form of discourse takes over defining the practices, principles, and narratives/truths that matter. For instance, focusing on the notion of law as a hegemonic form of truth-telling, Lugosi applied discourse analysis to Justice Wright’s final report of the *Commission of Inquiry into the Matters Relating to the death of Neil Stonechild* to show “how, in such a judicial forum, specific narratives were framed as more legitimate than others.”³⁶ He also recognized “law’s privileged

³⁴ *Ibid.* at 8-9.

³⁵ Michel Foucault, “The Order of Discourse” in Robert Young, ed. *Untying the Text: A Post-Structuralist Reader* (Boston: Routledge & K. Paul, 1981) at 67 cited in Hunt & Wickham, *supra* note 29 at 9.

³⁶ Lugosi, *supra* note 32 at 301.

position as the dominant, most competent discourse by which to determine truths and facts”³⁷ thereby legitimizing specific practices that make it difficult to imagine another way of seeing and doing things.³⁸ Accordingly, Lugosi insists that inquiries “warrant critical examination because, as illustrated with the Stonechild case, a great deal can be missed.”³⁹ The goal of this paper is to conduct a similar discourse analysis “paying particular attention to what is being said in what way and what is omitted”⁴⁰ in order to understand the impact of judicial discourses on the type of values, narratives, and functions deemed legitimate for Public Inquiries to assume and ultimately, the type of institution that the inquiry is allowed to become.

To be more precise, the discourse analysis that follows will look at patterns of thought, language use, and behaviour of judge-commissioners and the academia as they pertain to the (study of) internal workings of a Public Inquiry. After all, judges and legal scholars are active members of a “community of legal discourse”;⁴¹ its creators and enforcers. This community is comprised of legal language, style, and argumentation, which “are not just a matter of form, they hide concepts and world views.”⁴² More importantly, this legal discourse “functions as an important legitimating forum for judicial decisions,”⁴³ including those that are made within the realm of Public Inquiries. As such, judicial discourse is bound to influence how a Public Inquiry is perceived, experienced, and defined. According to Van Hoecke,

[o]ne should not underestimate the importance of such shared understandings. It is mainly these paradigmatic theories that strongly limit the number of interpretation problems, interpretation discussions and possible alternatives for the meaning and the scope of the law. Explicitly or implicitly, it is to an important extent legal doctrine that co-determines, refines and structures these theories and their mutual coherence.⁴⁴

³⁷ *Ibid.* at 307.

³⁸ *Ibid.* at 302.

³⁹ *Ibid.* at 312.

⁴⁰ *Ibid.* at 304.

⁴¹ Mark Van Hoecke, *Law as Communication* (Portland: Hart Publishing, 2002) at 46.

⁴² *Ibid.*

⁴³ *Ibid.* at 189.

⁴⁴ *Ibid.* at 185.

In other words, the normative discourse that the judge-commissioner and/or legal scholars engage in order to describe the inquiry process and its functions imposes limitations on the original discursive practices relating to the Public Inquiry institution, thereby threatening the stability of its paradigmatic framework and identity. This is precisely why the paper will attempt to disentangle discursive patterns utilized within the inquiry context by judges and academics as a means for making sense of the institution, its fundamental principles and functions.

In order to study these patterns and thus, understand how the commissioner structures and shapes the public inquiry image, the analysis will focus on what Foucault called “discursive formation” – a system for describing a group of verbal performances and patterns of concepts and themes such as in the discourse of law - and “epistemes” – that give rise to the discursive forms of thought and “impose a framework of categories and classifications *within which* thought, communication and action can occur.”⁴⁵ Specifically, the paper will examine two “broad constellations or patterns of thought,”⁴⁶ their coexistence and effect on one another: the justice-centered adjudicative framework informing adversarial proceedings and the truth-centered inquisitorial framework according to which the Public Inquiry was modeled.

Before going any further, it is important to clarify that this paper does not argue that there is or must be a strict dichotomy between the adversarial and the inquisitorial models and the discursive formation attached to each. As implied above, the two systems coexist and interact within the same realm and as concerns the function of a Public Inquiry, flexibility is its

⁴⁵ Hunt & Wickham, *supra* note 31 at 9.

⁴⁶ *Ibid.*

hallmark⁴⁷ and as such, it is only fitting that it “favour a spectrum of procedural requirements rather than a series of procedural dichotomies.”⁴⁸ According to Robardet,

[b]ecause inquiries are able to perform tasks which are unsuitable for either the courts or the adjudicative model, there is a case against the judicialization of certain types of inquiries....some would argue that the multitude of functions for which inquiries are used puts in question the appropriateness of the adversarial, adjudicative model for all of them. Although it can be said that an inquiry ‘necessitates a major issue of considerable contentiousness for its establishment’, it does not follow that the inquiry thereby established must be adversarial *and* adjudicative....Furthermore, a given inquiry does not have to adopt a single procedural model.⁴⁹

Although, from time to time an inquiry (especially one concerned primarily with fact-finding) may need to employ practices and/or processes that are adversarial in nature, that does not and should not mean that the inquiry ought to adopt the value preferences and discourses of the adjudicative model to which those practices relate. However, it is often very difficult to separate a particular process model/system from the values, standards, preferences and expectations attached to that model. In other words, they are value laden and anything but neutral and should be treated as such. Even Robardet recognized as much when he insisted that one must consider:

[f]irst, there is the absence of a common understanding of inquiry, both formally and functionally. Second, there is the issue of whether we can dispense with definitions of the terms and techniques used in relation to these models and simply content ourselves with their assumed common notions of the adversarial and the inquisitorial models, these notions are probably assumed to be understood more than they are actually understood. Finally, we must take into account the value preferences and the images we hold of social processes and institutions associated with these different models.⁵⁰

Therefore, it is important to examine where on the continuum between the adversarial system on the one end and the inquisitorial model on the other the Public Inquiry is being situated as it will enable a better understanding of the current legal and academic discourse practices and their role in shaping the institution’s public image. To do otherwise is to perpetuate the “absence of a

⁴⁷ Christie & Pross, “Introduction”, *supra* note 11 at 14.

⁴⁸ Robardet, *supra* note 27 at 131.

⁴⁹ *Ibid.* at 130.

⁵⁰ *Ibid.* at 112.

common understanding” of what an inquiry is, to ignore its essential nature and function, and to compromise its true identity.

As such, this paper will focus on analyzing discourse use and its effect on the function and character that the Public Inquiry ultimately assumes. In order to ascertain which discourses are at the forefront of any discussion about the inquiry, this paper will first look at the relevant academic literature and analyze the terminology, concepts and descriptors commonly utilized by the academia in studies, research and debates on the topic of Public Inquiries. After all, the academia has a significant influence on how authorities, professionals, and consequently the general public view and discuss the role of public institutions. In addition to examining academic commentary, relevant jurisprudence and legislation (e.g., *Inquiries Act*), this analysis includes two case studies: the Arar Commission,⁵¹ and the Iacobucci Inquiry⁵². Specifically, this paper will look at commission reports, commentary, and rulings made by the commissioner with the goal of extracting discourses that drive inquiry processes (the decision-making, deliberations, justifications, explanations, and definitions, etc.) These documents will facilitate an understanding of how the commissioner defines his/her role and the role of the commission, his/her justifications for specific decisions and use of discretion, as well as his/her priorities and preferences for specific narratives, ideas, issues and assumptions. In other words, the case studies offer a glimpse not only into the commissioner’s thought process, views and interpretations, but also into the intricate process behind the construction of an inquiry’s public image.

⁵¹ Commission of Inquiry into the Actions of Canadian Officials in Relations to Maher Arar (5 February 2004), online: <http://epe.lac-bac.gc.ca/100/206/301/pco-bcp/commissions/maher_arar/07-09-13/www.ararcommission.ca/eng/index.htm> [Arar Commission].

⁵² Internal Inquiry into the Actions of Canadian Officials in Relation to Abdullah Almalki, Ahmad Abou-Elmaati and Muayyed Nureddin (11 December 2006), online: <http://epe.lac-bac.gc.ca/100/206/301/pco-bcp/commissions/internal_inquiry/2010-03-09/www.iacobucciinquiry.ca/en/documents/final-report.htm> [Iacobucci Inquiry].

PART II: LITERATURE REVIEW

Before moving onto the discourse analysis, it is important to examine why there is such public demand for and reliance on commissions of inquiry in the first place. More specifically, which norms, values, processes, and language are often associated with a Public Inquiry and make it a unique public institution for which there is a public need and demand? In other words, what are the ideal characteristics of a Public Inquiry?

A. Ground Zero - Conceptualization of the Ideal “Public” Inquiry

Although it is arguable whether the true (organic and unbiased) nature of a Public Inquiry as a separate institutional entity, uncontaminated by external normative assumptions and expectations can ever be discerned, it is worth the attempt nonetheless if only to provide a starting point for the analysis of the role of judicial discourses. As such, it is important to begin this paper with a closer look at the very basic functions of an inquiry and slowly progress towards an examination of the ideal inquiry process as it is conceptualized within academic literature. Only after such analysis will it be easier to grasp the full extent of the effects that external discourses have on the construction of the Public Inquiry “persona” that is currently generating significant government, academic, media and public attention.

(1) The “Public” Essence of an Inquiry

Accordingly, it is interesting to note at the outset that on the surface, the functions of a Public Inquiry seem to be very basic and unassuming. In other words, there seem to be no hidden agendas or qualifiers behind the true purpose of an inquiry. For instance, virtually every time an inquiry is created it is described as either a government’s response to a public controversy,

educating the public, serving a policy advisory function or a fact-finding and investigative role, and/or as assisting the government in taking remedial action and restoring public confidence in the institution or events under investigation.⁵³ According to Salter, an inquiry:

...offers the public an unlimited opportunity for experiencing direct democracy, that is, widespread political participation in the formulation of specific policies. It offers an opportunity to define public issues, in the public view, with the participation of the clients of those policies. It provides an avenue for a public investigation of public and private conduct, far in excess of that conducted by the ombudsmen.⁵⁴

Justice Gomery summarized these public functions into three categories: "...to investigate, to educate and to inform".⁵⁵ So far, the conceptualization of an inquiry performing at its optimum as well as its quintessential constituents is simple enough to grasp.

The essence of an inquiry can be further narrowed down to its "public" components. For instance, notice that all of the above references to the primary functions of an inquiry have the term "public" as either a joint descriptor or an underlying facet. In addition, one should not overlook the significance of the fact that most, if not all judicially-led inquiries place an emphasis on the public nature of their proceedings – either via the title "Public Inquiry" or specifically underscoring the social functions of their mandate/agenda.⁵⁶ Even truth-generating or fact-finding and policy-creating aspects of an inquiry investigation are public in nature. As such, it should not come as a surprise that out of all of the inquiry functions, getting to the truth of the matter via *open, transparent* and *public* forum and restoring *public* confidence - at least on

⁵³ See *supra* note 2.

⁵⁴ Salter, "The Two Contradictions in Public Inquiries", *supra* note 26 at 174.

⁵⁵ Gomery, *supra* note 2 at 792.

⁵⁶ This is true even in situations where a commissioner is obliged to conduct private hearings and withhold information from the public in order to safeguard national security confidentiality, as in the case of the *Arar Commission* and *Iacobucci Inquiry* to be discussed in Part IV of this paper.

the surface - are considered an inquiry's core obligations with all other functions being subsidiary to its social/public obligations.⁵⁷

Viewed from this perspective, any discussion of the organic and true nature of an inquiry should begin from the analysis of its public qualities and virtues. Similarly, any assessment or evaluation of an inquiry's efficacy and efficiency in dealing with matters under its mandate should first and foremost focus on the degree to which the process caters to the needs of the society/public. For instance, Justice Cory of the Supreme Court of Canada summarizes the centrality of the "public" concept in an ideal inquiry process as follows:

One of the primary functions of public inquiries is fact-finding. They are often convened, in the wake of public shock, horror, disillusionment, or scepticism, in order to uncover "the truth"...Yet, these inquiries can and do fulfill an important function in Canadian society. In times of public questioning, stress and concern they *provide the means for Canadians to be apprised of the conditions pertaining to a worrisome community problem and to be a part of the recommendations that are aimed at resolving the problem*. Both the status and high public respect for the commissioner and *the open and public nature of the hearing help to restore public confidence* not only in the institution or situation investigated but also in the process of government as a whole. *They are an excellent means of informing and educating concerned members of the public.*⁵⁸

In other words, an inquiry is not true to its nature if it does not perform for and with the public in the exercise of its mandate. According to Cory J., even the fact-finding function of an inquiry begins and should end not only with the public in mind but also with its collaboration; an inquiry begins with an event concerning majority of the citizens and should ideally conclude only when those citizens' needs (i.e., information, resolution, reform, etc.) have been addressed.

Similarly, when evaluating the effectiveness of a commission, Justice Iacobucci posed this series of questions: "Did it get the facts and get them straight? Did it raise consciousness

⁵⁷For a list of core inquiry functions see Simon Ruel, "Creation of Public Inquiries" 1 in *The Law of Public Inquiries in Canada* (Toronto: Thomson Reuters, 2010) at 2-4.

⁵⁸*Phillips v. Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)*, [1995] 2 S.C.R. 97 at para. 62 [*Phillips v. Nova Scotia*] (emphasis added).

about and understanding of the issue? Was the public consulted and was the best information obtained?”⁵⁹ In addition, Manson & Mullan, citing Justice O’Connor in the Walkerton Commission of Inquiry, emphasized that the backbone of the foundational principles of an inquiry are its public aspects – thoroughness, expedition (making public engagement more likely), openness to the public, and fairness.⁶⁰ Simply put, all of the judicial members cited above recognized public accessibility, comprehensibility and inclusiveness of an inquiry as being essential to its organic nature. It seems fair to deduce from the above that if any of these qualities are absent or where other concerns (e.g., such as those prevalent in the adversarial system) take precedence over the public aspects, the inquiry will not function at its full potential, neither will it produce satisfactory results. If such is the case, an inquiry would be no different than the criminal or civil trials that it was originally meant to replace; it will lose its unique character and place in Canadian society.

Before going any further, it is important to address the fact that not everyone would agree with the proposition that the “public” is an essential characteristic of an inquiry. For instance, according to Robardet, “[o]ne strength of a public inquiry is its open and democratic character; however, publicity cannot be said to be a fundamental basic characteristic of the inquiry process since statutory regimes generally provide for inquiries to be *in camera*. Public inquiries are then the exception and not the rule.”⁶¹ While it is true that the legislation provides for *in camera* hearings, it does not follow that the inquiry thereby relinquishes its “public” essence or character. In fact, as will be argued below, even in the context of a private hearing, the inquiry could and should be guided by its publicly oriented virtues, values and standards.

⁵⁹ Iacobucci, “Commissions of Inquiry and Public Policy in Canada”, *supra* note 28 at 27-28.

⁶⁰ Allan Manson & David Mullan, “Lessons from Walkerton” 499 in Manson & Mullan, *Commissions of Inquiry*, *supra* note 2 at 513-515 [Manson & Mullan, “Lessons from Walkerton”].

⁶¹ Robardet, *supra* note 27 at 130.

Moreover, although it is “useful to note”, as Salter does, that inquiries “have both a public and a private process”, it is the public aspect that enables the inquiry to achieve its “radical potential.”⁶² In other words, an inquiry has the potential for being an “exceptionally public process....used to solicit new kinds of public participation in public life and to debate issues in greater detail than is possible in parliament...”⁶³ On the other hand, the private component of the inquiry process has a constraining effect on the commissioner’s/inquiry’s scope, focus and its ultimate contribution to the “public” issue(s) under investigation.⁶⁴ First, the “private component of the inquiry process resembles a negotiation more than an assessment”; second, the government to whom the report is addressed serves to limit the contents and scope of the final recommendations; third, public submissions are under a threat of being lifted out of context; and lastly, “the capacity of any individual to negotiate for a particular objective is diminished considerably.”⁶⁵ Thus, it comes to the public aspect to mediate against the restrictive and censoring effects of the private component. Even Robardet recognized the significance of “public” inquiries when he stated that they “exhibit a high degree of flexibility in their methodology and are conducive to in-depth analysis.”⁶⁶ However, the public aspects of an inquiry are much more than mere exposure to publicity or public participation – although both are significant and should be advanced whenever possible. The “public” of a Public Inquiry, provides the institution with its foundation and value system, defines its function, and is that with respect to which the inquiry builds its character and identity.

Accordingly, it is important to emphasize that the unique nature of an inquiry is directly related to its social function. The significance of this social function should not be

⁶² Salter, “The Two Contradictions in Public Inquiries”, *supra* note 26 at 182.

⁶³ *Ibid.* at 181.

⁶⁴ *Ibid.* at 183.

⁶⁵ *Ibid.*

⁶⁶ Robardet, *supra* note 27 at 130.

underestimated either; it serves as a precondition for understanding how the public/society perceives the role and purpose of an inquiry and hence how the inquiry is ultimately conceptualized as an institution. This is ground zero. Understanding the backbone of the Public Inquiry institution will in effect expose the discourses that should properly be within its domain and consequently allow for drawing a distinction between discourses that reinforce and those that threaten the unique nature of an inquiry.

According to the Ontario Law Reform Commission, the “social function” of inquiries is its symbolic value and should not be ignored.⁶⁷ The Commission defined the “social function” in the following terms:

[A] commission...has certain things to say to government but it also *has an effect on perceptions, attitudes and behaviour. Its general way of looking at things is probably more important in the long run than its specific recommendations. It is the general approach towards a social problem that determines the way in which a society responds to it.* There is much more than law and government action involved in the social response to a problem. The attitudes and responses of individuals at the various places at which they can effect the problem are of profound importance.

What gives an inquiry of this kind its social function is that it becomes, whether it likes it or not, *part of this ongoing social process. There is action and interaction....The decision to institute an inquiry of this kind is a decision not only to release an investigative technique but a form of social influence as well.*⁶⁸

What is important to take away from this definition is that an inquiry is first and foremost a social process; it has an impact on social “perceptions, attitudes and behaviour”.⁶⁹ More significantly, the inquiry shapes these social responses more so by *how* it conducts its

⁶⁷ Ontario Law Reform Commission. *Report on Public Inquiries* (Toronto: The Commission, 1992), online: <<https://ia600706.us.archive.org/32/items/reportonpublicin00onta/reportonpublicin00onta.pdf>> at 11 [*Report on Public Inquiries*].

⁶⁸*Ibid.* at 12, citing G.E. Le Dain, “The Role of the Public Inquiry in Our Constitutional System” 80 in Jacob S. Ziegel, ed., *Law and Social Change* (Toronto: Osgoode Hall Law School, 1973) at 85 (emphasis added).

⁶⁹ Also see Centa & Macklem, *supra* note 2 at 129 for a discussion on how inquiries play a role in shaping public opinion:

Commissions of inquiry can prepare public opinion for changes in public policy where such change is otherwise unlikely. In fact, the very appointment of a commission of inquiry performs an important signalling function by stamping the commission’s focus as one worthy of social attention. In this way, commissions can play an important catalytic role in stimulating public awareness of pressing social problems.

proceedings rather than by *what* it discovers and reports. For instance, Salter used the concept of “deliberative democracy” when discussing the “public” aspect of Public Inquiries in order to emphasize the “ways that members of the public become part of the policy process” of an inquiry.⁷⁰ She argued that:

...inquiries are exemplars of deliberative democracy; they are the *public sphere in action*....*Their primary function is to get issues out into the open, to bring evidence to light in a very public domain. They encourage participation from a broadly interested public, stimulate free flowing discussion among people whom they treat (at least in theory) as equals, and they provide informed recommendations to government.*⁷¹

Thus, there is no question that the social process rather than the outcome dictates how an inquiry is ultimately perceived *and* received by the public.⁷²

Furthermore, Salter’s detailed examination of “how various conceptions of the public affect what inquiries do and say” is indispensable to a meaningful analysis of the discourses that surround and permeate an inquiry - ultimately shaping the interpretation and conceptualization of an inquiry’s social/public functions - by addressing the unspoken assumptions that guide each and every inquiry.⁷³ For instance, according to Salter, “[i]nquiries orient themselves around their own particular conceptions of *the public*. They encourage the kind of participation that matches their conception of *the public*’s role. They seek out some kinds of public input, while barely acknowledging others.”⁷⁴ In other words, the notion of “public” in a public inquiry may take on a different shade depending on the inquiry, its goals, and the norms and principles it subscribes to. Thus the importance of conducting discourse analysis, if only to understand how the inquiry “persona” is currently conceptualized and the degree to which it conforms to the unique public

⁷⁰ Liora Salter, “The Public of Public Inquiries” 291 in Laurent Dobuzinskis, David Laycock & Michael Howlett, eds., *Policy Analysis in Canada: The State of the Art* (Toronto: University of Toronto Press, 2007) [Salter, “The Public of Public Inquiries”] at 292.

⁷¹*Ibid.* at 293 (emphasis added). See also Salter, “The Two Contradictions in Public Inquiries”, *supra* note 26 at 174.

⁷² Salter, “The Two Contradictions in Public Inquiries”, *supra* note 26 at 182.

⁷³ Salter, “The Public of Public Inquiries”, *supra* note 70 at 294 and 298.

⁷⁴*Ibid.* at 304 (emphasis in original).

character of the Public Inquiry institution. While a full discussion of such discourses and their underpinning assumptions will be undertaken in Section 1.3 below, for now, it suffices to say that the public aspects or the social processes of an inquiry are its essence. As such, in order to stay true to its “public” nature and thus function at its full potential, an inquiry should be conceptualized in terms of its capacities for truth-seeking, accessibility, comprehensibility, and transparency rather than its compliance with external, adjudicative norms and standards.

(2) Signs of External Threats to the Inquiry Ideal – Symptoms and Causes

According to Salter, an inquiry is fully capable of incorporating radical alternatives and debate and more importantly, encouraging “genuinely democratic participation.”⁷⁵ However, as the circumstances currently stand, an inquiry achieving its full potential is easier said than done. Consider for instance, Salter’s argument above that each and every inquiry is guided by its own “ideas, values and philosophies”⁷⁶ and thus have different conceptions of their essential nature and function. Although, at least in theory, an inquiry should be guided by its social/public functions (that are in turn governed by the discourses internal to the inquiry’s inquisitorial character), the unique nature and function of an inquiry gets muddied and infected by external threats. One of the most predominant threats to the institution is the flagrant preference for judicial leadership and discourses that come attached. This is not to suggest that judges make a poor choice for a commissioner - although such argument has been made on multiple occasions elsewhere in the academic literature.⁷⁷ The attempt here is to merely point out that there are

⁷⁵ Salter, “The Two Contradictions in Public Inquiries”, *supra* note 26 at 182.

⁷⁶ Salter, “The Public of Public Inquiries”, *supra* note 70 at 297.

⁷⁷ Phrased more as a warning rather than a critique, the following are examples of claims made against the use of judge-led commissions: Dodek, “Judicial Independence as a Public Policy Instrument”, *supra* note 15; and Beatson, *supra* note 18.

certain risks involved when those from a different institutional culture are asked to guide the proceeding of another institution.

As will be argued in Part II, Section B of this paper, members of the judiciary are often shrouded in an aura of adversarial and adjudicative values, practices and discourses (i.e., independence, impartiality, individual rights protections, etc...) even when performing extra-judicial functions, such as that of a commissioner. Thus, although procedural simplicity, expediency, transparency and flexibility – all necessary for the fulfillment of the public aspects of an inquiry - are some of the primary reasons why governments (and the public) call for an inquiry rather than a criminal or civil trial,⁷⁸ all of these aspects are under the threat of extinction in the presence of external judicial discourses. The likely result of this is an inquiry with a vastly different persona than originally intended and conceptualized.

This threat to the unique character of an inquiry is not a secret. In fact, many have attempted to distinguish and separate inquiry processes from those common to the adversarial/adjudicative system. For instance, Cory J. has emphasised that “[a]s *ad hoc* bodies, commissions of inquiry are free of many of the institutional impediments which at times constrain the operation of the various branches of government” and that “[i]nquiries are, like the judiciary, independent; unlike the judiciary, they are often endowed with wide-ranging investigative powers.”⁷⁹ Similarly, Salter also described that “[a]n important reason why inquiries are commissioned is that they permit investigation of problems in a more informal, less legalistic setting than the courts.”⁸⁰ Ideally, they also have recourse to broader truth-seeking functions and, unlike in the adversarial system, the pursuit of truth takes centre stage. For

⁷⁸ See Manson & Mullan, “Lessons from Walkerton”, *supra* note 60 at 513-515; Iacobucci, “Commissions of Inquiry and Public Policy in Canada”, *supra* note 28 at 26.

⁷⁹ *Phillips v. Nova Scotia*, *supra* note 58 at paras. 60 and 62.

⁸⁰ Salter, “The Two Contradictions in Public Inquiries”, *supra* note 26 at 185.

instance, according to Van Harten unlike with the inquiry proceedings, a criminal process has “...narrow and retrospective orientation...”⁸¹ In other words, it is generally expected that the inquiry setting is more conducive to the process of truth-seeking. It is envisioned as being flexible, accessible, broad in its perspective, and unconstrained by evidentiary procedures. In contrast, Hughes argued that in an adversarial setting, “...our rules of evidence and trial procedure aim at a fact-finding process that constructs truth as the absence of things that are untrue rather than attempting to capture the richness of augmenting, mutually informing and mutually challenging narratives.”⁸²

Perhaps Iacobucci J. captured the essential character of an inquiry best by stating that:

A real assessment of whether the commission was effective will require not only an appreciation of the *flexible nature* of its role and attention to its objectives, but also some assessment of *how it interacted with its environment*. Central to any evaluation of the activities of a commission are issues of procedure. This requires an awareness of the fact that, *functionally, the basic nature of the inquiry is generally inquisitorial and not adversarial and that the basic focus must be the search for truth and not the defeat or subjection of opposed interests.*⁸³

Thus, important to the effective and efficient function of an inquiry is being free of impediments that often constrain adversarial proceedings. According to Centa & Macklem, “[w]hile appropriate to traditional forms of private and public litigation, adversarial stances will only frustrate the work of an inquiry.”⁸⁴ They argue further that:

A commission of inquiry can exercise wide-ranging investigative authority to uncover facts concerning matters of substantial public importance...*At their best, commissions of inquiry generate ‘innovative discourses of development that merge public philosophy with pragmatic ideas unlike those attempted, much less produced, by any other institution or organization in the Canadian political system.’*⁸⁵

⁸¹ Van Harten, “Truth Before Punishment”, *supra* note 3 at 249-250.

⁸² Julia Hughes, “Home Truths about Truth Commission Processes: How Victim-Centred Truth and Perpetrator-Focused Adversarial Processes Mutually Challenge Assumptions of Justice and Truth” in Laverne Jacobs & Sasha Bagley, eds., *The Nature of Inquisitorial Processes in Administrative Regimes: Global Perspectives* (Surrey: Ashgate, 2013) 271 [Julia Hughes] at 272.

⁸³ Iacobucci, “Commissions of Inquiry and Public Policy in Canada”, *supra* note 28 at 26 (emphasis added).

⁸⁴ Centa & Macklem, *supra* note 2 at 159.

⁸⁵ *Ibid.* at 120 (emphasis added).

As will be shown in greater detail in Section C of this paper, this potential for generating “innovative discourses” is becoming a relic due to gradual seeping of adversarial and judicial discourses into the very roots of the Public Inquiry ideal.

The symptoms of such infiltration are not a secret either. For instance, although Salter acknowledged the unique nature and function of an inquiry (see above), she argued, nevertheless, that “...inquiries are themselves ‘trials’ and that their legal substratum shapes both their participation and their capacity to inform and stimulate debate.”⁸⁶ Even the Ontario Law Reform Commission warned that “...the inquiry process can fall prey to the assignment of fault based on pre-existing standards” such as the tendency of the judicial process to “...fragment issues into a limited set of categories established by existing norms.”⁸⁷

These arguments are substantiated by comments such as that made by Cory J. who after praising the inquiry institution for its unique social function went to say that: [there] is the risk that commissions of inquiry, released from many of the institutional constraints placed upon the various branches of government, are also able to operate free from the safeguards which ordinarily protect individual rights in the face of government action.”⁸⁸ In other words, it is all nice and well that inquiries have such flexible and “wide-ranging investigative powers”, *but* it must still remain within the bounds prescribed by the traditional normative approaches to conflict resolution. Traversing beyond the boundary that separates the virtually unconstrained inquiry processes from those of the highly structured adversarial, pushes at the comfort level of persons cultured, trained and socialized to perceive adversarial as the norm (i.e., the legal community, government members and even the media). Consequently, although considered

⁸⁶ Salter, “The Two Contradictions in Public Inquiries”, *supra* note 26 at 187.

⁸⁷ *Report on Public Inquiries*, *supra* note 67 at 11.

⁸⁸ *Phillips v. Nova Scotia*, *supra* note 58 at para. 65.

unique and separate from judicial processes, inquiries are still expected to comply with the adversarial procedural, evidentiary and conceptual standards. Thus, it should not come as a surprise that the ultimate threat to the inquiry as a distinct and unique institution is the increasing reliance on legalistic and “judicialized” discourses.

B. The Inquiry “Persona” – The Role of Judge-Commissioner in Shaping and Framing the Public Image of an Inquiry

(1) The Alter Ego and Driving Force behind the Commission of Inquiry

Having identified the symptoms and causes of the threat to the Public Inquiry ideal, it is important to now discuss *how* this threat infiltrates and ultimately defines the public image of the institution. In order to do that, we need to first identify the driving force behind the inquiry process. There is no need to look far. Aside from the influence of social (and media) perceptions – which are shaped by how the institution conceptualizes and presents itself to the public in the first place – the prime agent responsible for setting the tone and character of an inquiry is the judge-commissioner.

For instance, it is the commissioner who ultimately sets the tone for the operation of an inquiry and thus, the process of truth-seeking that is so essential to the functioning of an inquiry.⁸⁹ While the courts have given commissioners “considerable leeway in determining their own procedures”,⁹⁰ the government has granted them wide powers of

⁸⁹ Ed Ratushny, “Role of the Commissioner” 149 in *The Conduct of Public Inquiries: Law, Policy, and Practice* (Toronto: Irwin Law Inc., 2009) at 165 [Ratushny, “Role of the Commissioner”].

⁹⁰ Dodek, “Judicial Independence as a Public Policy Instrument”, *supra* note 15 at 273-274.

discretion in relation to the interpretation of an inquiry's terms of reference.⁹¹ In other words, the commissioner has full control over the shape and structure of an inquiry.

Moreover, according to Manson & Mullan, “[w]hen it comes to inquiries, ‘one size fits all’ does not apply. The commissioner *must shape* the inquiry to fit the mandate.”⁹² Right from the get go, the assumption is that the commissioner is responsible for shaping and molding the inquiry to fit the intended outcome. However, Manson & Mullan do not indicate how the commissioner is to go about it nor do they raise any concerns about the commissioner's capacity to ensure that the character and essential nature of the Public Inquiry be preserved in the process of fulfilling the mandate or the terms of reference. Other than the fact that the investigative/fact-finding process must ultimately fit the dictates of the mandate, there is no road map for doing so within the inquiry paradigm.

More importantly, the academic literature is generally silent about the fact that the commissioner does not merely shape the inquiry process within the bounds of its stated mandate, but that he/she also has the capacity to shift the focus of the terms of reference themselves. As Carver indicated, “[t]he commissioner of an inquiry has an important role in interpreting the terms of reference. The more brief or general the wording of the terms, the more interpretive work is necessary.”⁹³ Similarly, Schwartz argued that “[a]s policy-making involves value judgments, the choice of commissioner can be tantamount to the choice of outcome.”⁹⁴ Consequently, the implication is that the commissioner has power to shape the ins and outs of an inquiry – its structure, process, functions, objectives and goals (mandate and terms of reference), achievements, and ultimately its persona. By affecting a

⁹¹ Tamar Witelson, “Declaration of Independence: Examining the Independence of Federal Public Inquiries” 301 in Manson & Mullan, *Commissions of Inquiry*, *supra* note 2 at 325 [Witelson].

⁹² Manson & Mullan, “Introduction”, *supra* note 1 at 9 (emphasis added).

⁹³ Carver, *supra* note 2 at 557.

⁹⁴ Schwartz, *supra* note 8 at 456.

shift in the guiding paradigm of a Public Inquiry, the commissioner impacts the viability of the institution by shaping its public image.

Before discussing *how* the commissioner is able to have such a colossal effect, it is important to highlight the qualities that make a member of the judiciary so attractive to the executive government in its selection of a commissioner; these qualities ultimately guide *how* the judge-commissioner defines and shapes the process of an inquiry and thus, its public image. It is well known that the public generally has high regard for the judicial office⁹⁵ by virtue of it being associated with judicial independence,⁹⁶ impartiality, responsible decision-making and accountability to the public through positive laws and evolving norms.⁹⁷ Consequently, judges are typically chosen to head commissions of inquiry due largely to (the public perception of) their experience and position:

...Lord Scarman argued that a judge had special qualifications for investigating social disorder and inner city problems: “He is a *trained adjudicator* between differing parties. He is a *trained investigator* of fact. He is by office, and should be by nature, *impartial and detached*.” He also argued that judges would have “an *instinctive understanding of the causes and consequences of injustice*. Above all, a judge has a *passion for righting injustice*.”⁹⁸

⁹⁵ Ed Ratushny, “Establishing a Commission of Inquiry” 105 in *The Conduct of Public Inquiries: Law, Policy, and Practice* (Toronto: Irwin Law Inc., 2009) at 144 [Ratushny, “Establishing a Commission of Inquiry”].

⁹⁶ According to Witelson, *supra* note 91 at 302:

The term independence is a loaded word in the legal context. For judges, it has an individual, institutional, and ethical component. The Canadian Judicial Council, in its ethical guidelines for judges states, ‘[T]he judge’s duty is to apply the law as he or she understands it without fear or favour and without regard to whether the decision is popular or not . . . [judges] share a collective responsibility to promote high standards of conduct. . .Public acceptance of and support for court decisions depends upon public confidence in the integrity and independence of the bench’.

For another definition of “judicial independence” see also Janice Gross Stein, “Going too Far, Too Fast: Judicial Independence and Political Judgment” 580 in Adam Dodek & Lorne Sossin, eds., *Judicial Independence in Context* (Toronto: Irwin Law Inc., 2010).

⁹⁷ Patricia Hughes, “The Significance of Public Pressure on Judicial Independence” 259 in Adam Dodek & Lorne Sossin, eds., *Judicial Independence in Context* (Toronto: Irwin Law Inc., 2010) at 265-266 and 269. See also Willard Estey, “The Use and Abuse of Inquiries: Do They Serve a Policy Purpose” 209 in Pross, Innis & Yogis, *Commissions of Inquiry*, *supra* note 3 at 214 [Estey].

⁹⁸ A. W. Bradley, “Commissions of Inquiry and Governmental Accountability: Recent British Experience” in Manson & Mullan, *Commissions of Inquiry*, *supra* note 2 at 78 (emphasis added), cited in L.G. Scarman, *The Scarman Report: The Brixton Disorders, 10-12 April 1981* (Hammondsworth: Penguin, 1986).

Similarly, the past President of the Supreme Court of Israel, Barak, listed the three preconditions for realizing the judicial role as: (1) judicial independence; (2) objectivity; and (3) public confidence in “judicial independence, fairness, and impartiality”.⁹⁹ Witelson went even further by arguing that “[p]ublic acceptance of and support for court decisions depends upon public confidence in the integrity and independence of the bench.”¹⁰⁰ All of these preconditions are at the very core of what makes a judge the prime candidate for the role of commissioner. Clearly, these qualities of the judicial position lend an aura of independence and impartiality to the commissioner/commission; they assist in creating a perception of a “just” investigation in the public eye (or so the government hopes). Important to notice here is that the key to maintaining credibility and public acceptance is either the pursuit of justice or ensuring that the process is seen to be just (via the focus on independence and impartiality of the judiciary) rather than truth-seeking and getting the facts out to the public.

(2) Infiltrating the System: The Role of Commissioners in the Conception of Inquiry Persona

Although there is nothing wrong with having a “just” inquiry process given that the pursuit of justice as well as the other complementary qualities inherent to the judicial office play an arguably important part in encouraging public confidence in the inquiry,¹⁰¹ the fact that they come to epitomize the virtue of an inquiry should be disconcerting. Why should it matter if this trend enhances credibility and encourages public confidence in the inquiry system? Because in

⁹⁹Aharon Barak, “A Judge on Judging: the Role of a Supreme Court in a Democracy” (2002) 116:1 Harvard Law Rev. 19 [Barak] at 53 and 62. Similarly, Beatson, *supra* note 18 at 256 indicated that “[t]he fundamental reason for using judges to conduct inquiries is that they are independent, in the sense of being absent from direction....They are also said to command respect and authority.”

¹⁰⁰ Witelson, *supra* note 91 at 302.

¹⁰¹Dennis R. O’Connor & Freya Kristjanson, “Some Observations on Public Inquiries”, (Halifax: Canadian Institute for the Administration of Justice Annual Conference, 10 October 2007), online: Court of Appeal for Ontario <<http://www.ontariocourts.on.ca/coa/en/ps/speeches/publicinquiries.htm>> [O’Connor & Kristjanson] (emphasis added); see also Ratushny, “Role of the Commissioner”, *supra* note 89 at 163-164.

the long run it also increases the likelihood of public disappointment and disillusionment when the system fails to first, achieve the social functions (i.e., the pursuit of truth) pertinent to its design and vitality and second, to fully live up to the public's expectation of justice and accountability. In order to stop this cycle and prevent the demise of the Public Inquiry, it is important to examine how the concept of "justice" infiltrates the inquiry process thereby changing its character and operational paradigm.

To begin with, it should be clear from the outset that the judge-commissioner does not simply utilize the qualities of independence, impartiality, and fairness – the essence of justice - for the sake of substantiating the social/public functions essential to an inquiry's optimum performance. The commissioner does more than that; he/she internalizes them. For instance, according to Barak, the influence of the judicial culture is such that "...the legal system limits the scope of the judge's considerations....*Even when the judge is 'with himself,' he is within the framework of society, the legal system, and judicial tradition.*"¹⁰² As such, a judge will scarcely be able to fully distance him/herself from the norms and values of an adversarial system given that they inform and shape a judge's own norms, values, outlook, decision-making and ultimately, the very qualities for which judges are so often chosen for the role of commissioner. In other words, a judge is part of a system – a judicial tradition if you will - and his/her acts will reflect the values of that system.

However, what is most disconcerting about this is that the public's perception (and expectation) of the "judicial" function influences judicial activity, no matter the context in which it takes place. In return, this judicial function shapes the public's perception of the process in the course of which it is implemented.¹⁰³ Accordingly, the image of a judge and his/her role that the

¹⁰²Barak, *supra* note 99 at 58 (emphasis added).

¹⁰³*Ibid.* at 30 and 33.

public is conditioned to expect on the daily basis is the very same image they anticipate to see in action during an inquiry as well. As MacDonald argued, “[n]o doubt, the general view of governance and law that is dominant in any society will influence how inquiries are understood.”¹⁰⁴ . In fact, as Shetreet & Turenne point out, “[i]t is, in practice, difficult to dissociate the figure of the appointed judge in the exercise of his judicial functions from the figure of the judge acting as a fact finder for the purpose of a public inquiry.”¹⁰⁵ Because this is the general expectation (from the society, the government appointing the commissioner, and the judicial office itself), the judge-commissioner seemingly has no choice but to fall back onto the traditional adversarial standards during his/her decision-making, thereby affecting the public image of the inquiry process itself.

Although referring specifically to the adversarial context, Soeharno emphasized that a judge's allegiance is first and foremost to the values of the state - the rule of law, individual rights, and justice. He argued that “[a]s a judge, he must enact values such as impartiality, independence and propriety - not the values of a private citizen, but the values of the state, which should give room to the rights of all citizens.”¹⁰⁶ Notice that consideration for all other values should not even come within the scope of judicial decision-making. As mentioned above, this mentality is expected of a judge no matter the context in which he/she operates. Thus, a judge-commissioner will always bring along these external values to an inquiry and may even refer to them during the decision-making. However, this is just the beginning; the inquiry is yet at the point of infiltration. The full take-over occurs at the point when the judge subsumes the identity

¹⁰⁴ Roderick A. MacDonald, “Interrogating Inquiries” 473 in Manson & Mullan, *Commissions of Inquiry*, *supra* note 2 at 484 [MacDonald].

¹⁰⁵ Shimon Shetreet & Sophie Turenne, *Judges on Trial: The Independence and Accountability of the English Judiciary*, 2nd ed. (New York: Cambridge University Press, 2013) at 251-252 [Shetreet & Turenne].

¹⁰⁶ Jonathan Soeharno, *The Integrity of the Judge: A Philosophical Inquiry* (Surrey: Ashgate, 2009) at 91 [Soeharno].

of the inquiry which according to Soeharno is very likely given that one of the functions of a judge is "...to 'personalize' the institution, to give the institution a 'human face'."¹⁰⁷

To summarize, it is this closed cycle that first acts to constrain a judge's decision-making as a commissioner, in effect limiting his/her ability to undertake and carryout the social functions that uphold the very essence of what makes an inquiry a unique and legitimate public institution. Having set the wheels in motion, the cycle then utilizes the judge-commissioner as the personification of the inquiry process in general. Thus, adversarial (preoccupation with) justice, rather than the inquisitorial pursuit of truth, becomes the image that the public associates with the inquiry while the judge-commissioner comes to personify the institution itself.

This is not to suggest that all hope is lost and that the Public Inquiry will soon become just another subset of the criminal and/or civil trial processes. Although the inquiry is slowly diluted by external standards, practices, and expectations, there is no reason why this course cannot be reversed. According to MacDonald:

What really matters to the character and conduct of any particular inquiry can be found in two other places. Formally, the key issue is the content of the Order in Council by which an inquiry is initiated, its terms of reference set out, and its specific powers established. Who is appointed? What powers are given? For what purposes? And what procedures is the inquiry authorized to deploy? *Substantively, the key issue is the decisions that commissioners make about how they actually intend to go about doing their job. What conception of their role do they have? To whom (to what audience) do they believe their final report should ultimately be addressed? And what conception of the objectives of their recommendations drives their day-to-day activities?*¹⁰⁸

In other words, as the saying goes, the ball is in the commissioner's court: any possibility of reform to the character and conduct of an inquiry shall begin with the commissioner. The commissioner is the persona of the inquiry and as such, his/her actions (or inactions) dictate the image of the inquiry and how the public should assess its accomplishments and/or failures.

¹⁰⁷ *Ibid.* at 127.

¹⁰⁸ MacDonald, *supra* note 104 at 475.

Jamisch summarized the impact that a commissioner can have on the likely success/failure of an inquiry in the following terms:

...I have to admit that the relative success or failure of a public inquiry does seem to turn to a considerable extent on the personal attributes of the individual appointed. This is not to suggest that institutional design is of no importance, but only that a good appointee may be able to make a silk purse out of a procedural sow's ear and that a bad appointee will be likely to botch even a well-designed process.¹⁰⁹

Consequently, the current skepticism as to the utility of commissions¹¹⁰ could potentially be avoided with the employment of discourses – referred to by MacDonald above as a commissioner's decisions, conceptions of his/her role and objectives, and regard for the appropriate audience – that are conducive and complimentary to the inquisitorial, inquiry paradigm.¹¹¹ After all, as MacDonald put it: “[i]nquiries, in other words, are instruments and processes that can (and should) be understood by reference to what they do and how they operate – not just by reference to who establishes them [or who leads them for that matter].”¹¹² But the problem is that not all commissioners may be aware of the extent to which they affect the internal workings of an inquiry and that they must be responsive not only to external pressures (and expectations) but also to what the inquiry was designed to do and how it was meant to operate in the first place. Thus, the commissioner must at all times be conscious of the context in which he/she operates and most importantly, the governing institutional paradigm. On the one hand there is the adversarial system that the commissioner has been cultured into. On the other

¹⁰⁹ Hudson N. Jamisch, “Concluding Comments” 489 in Manson & Mullan, *Commissions of Inquiry*, *supra* note 2 at 491 [Jamisch].

¹¹⁰ See for instance Centa & Macklem, *supra* note 2 at 123-140 for a summary of potential problems that may “seriously hamper the capacity of an inquiry to serve as an effective instrument for the formulation of public policy.” Also see Schwartz, *supra* note 8 at 455 where he makes several suggestions with respect to inquiries so as to avoid a possible “public backlash that leads to their not being used in some cases where they are genuinely required.” See generally, Dodek, “Judicial Independence as a Public Policy Instrument”, *supra* note 15; Pross, Innis & Yogis, *Commissions of Inquiry*, *supra* note 3; and Van Harten, “Truth Before Punishment”, *supra* note 3.

¹¹¹ The subject-matter of conducive and debilitating discourses will be discussed in greater detail below in Section 1.3 of the paper.

¹¹² MacDonald, *supra* note 104 at 484.

hand, the inquiry system to which the commissioner is expected to apply his/her accumulated experience and expertise that were developed in a completely different context. However, this is not as easy as it seems; especially when the judge-commissioner continues to operate within a discursive system that prioritizes “justice” over “truth”.

For instance, according to O’Connor & Kristjanson, public inquiries play a significant role in the delivery of justice to a community.¹¹³ However, there are alternative models of justice that can be generally categorized into two categories: (1) following the traditional adversarial trial format; and (2) inquisitorial model (according to which the inquiry is modeled in theory).¹¹⁴ Each model has a different conceptualization of “justice” and its relationship to truth-seeking. While the search for “truth” is just a means for attaining justice during an adversarial process, truth-seeking should be the ultimate goal of an inquiry. Although, theoretically speaking, the inquisitorial model and the preference for truth-seeking functions should shape and define the inquiry process, the confusion arises in the public eye and, perhaps less obviously, the judges chairing an inquiry, over which process is to dominate during an inquiry. This potential for confusion has been summarized by Gomery J. in the following statement:

The confusion exists in the mind of the public, but there wasn’t any confusion in my mind. But I can’t see any alternative to having a judge preside over a commission of inquiry. First of all, *he comes cloaked with a certain expected autonomy, independence, impartiality, and these things all go together....So judges are ideally suited to fulfill this role. But the trouble is that even if a judge is acting as a commissioner, people say, ‘gee that guy’s a judge’ and they think of judges as dispensing judgments and frankly in commission of inquiry you’re not dispensing justice, you’re doing an investigative role and then making some recommendations.* So, I guess the confusion is inevitable and all that you can do, all that I can do, is to keep on emphasizing that my reports are not judgements, my reports are not findings of fault, well, not civil fault, they may be findings of blameworthy conduct, but it’s not fault in the sense that the word fault is used in our *Civil Code* or in the *Criminal Code*.¹¹⁵

¹¹³ O’Connor & Kristjanson, *supra* note 101.

¹¹⁴ *Ibid.*

¹¹⁵ Gomery, *supra* note 2 at 797-798 (emphasis added).

Although Gomery J. indicates that there was no confusion in his mind as to his proper role as a commissioner or the process to follow, most judge-commissioners are, at least inadvertently, susceptible to the norms and practices of a tradition that has become second nature for them. For instance, a former Justice of the Supreme Court of Canada and a commissioner in the Air Canada, Steel Industry, and Western Banks Inquiries, Estey took for granted that an inquiry ought be conducted in two stages. The first stage consists of “an *in camera* review of the evidence....to clean up the evidence before it goes out; not to censor it, but to protect the public, protect individual members of the public” while the second stage is a hearing in the open forum.¹¹⁶ As such, even in a setting devoid of actual concerns for national security or rights protection, right off the bat truth-seeking becomes a highly structured and controlled process occurring behind closed doors whereby information is “cleaned up” for public’s consideration and acceptance (or rejection) as the truth. Right from the start the pursuit of truth is in competition with a commissioner’s notions of justice/fairness; the pursuit of truth already taking a second seat to justice.¹¹⁷

Ironically, in the same breath Estey realized the potential for "abuse of a judge" - including the qualities that were instrumental to his/her appointment as a commissioner in the first place - by placing him/her in the position of a commissioner. According to Estey, judges "cannot stand the perception the public will have any more than the institution of the inquiry can withstand the terrible perception which has come out of some inquiries, which are essentially criminal investigations running an end run around the Criminal Code's protective processes. The

¹¹⁶ Estey, *supra* note 97 at 211.

¹¹⁷ The competition between truth and justice has also been noted by Justice Grange who observed that "[a] report, if it is any good, is the result of hearing all the sides to the question and balancing the opposing interests as carefully as a commissioner can....and somehow we must struggle to get a fair presentation before the public." See A. Cairns, S. Grange J., & E.C. Harris, "The Commission and Its Report: Public Education, Advocacy and Lobbying" 161 in Pross, Innis & Yogis, *Commissions of Inquiry*, *supra* note 2 at 163.

public, looking at it on television, thinks it is a trial, and a criminal trial at that."¹¹⁸ This, in other words, is the spitting image of "judicialization" of the inquiry process referred to above.

O'Connor & Kristjanson similarly observe that inquiries:

*...tended to overuse the evidentiary, adversarial type of hearing process suited for legal trials to gather information. I think that we have yet to take full advantage of the possibilities for different processes that can be tailored to meet the need of investigating and reporting on the various types of matters set out in inquiry mandates. I believe that greater creativity and flexibility in fact-determining processes will ultimately improve the inquiry process from the perspective of all participants, increasing responsiveness, decreasing cost, and ultimately improving the process and results of public inquiries. In my view, there is a real advantage to directly involving groups and individuals in the inquiry process, rather than having them participate only through lawyers.*¹¹⁹

Thus, the tendency has been to pit the adversarial notions of truth and justice against those expected to guide the inquiry, consequently "judicializing" the process, preventing full public participation, precluding thorough truth-seeking and foreclosing justice in an inquisitorial setting. In other words, the trend is to convert the inquiry into yet another form of the adversarial apparatus thus leading to the eventual demise of an inquiry as a unique public process.

But as argued above, the commissioner has ultimate power – as an insider and leader of the process - to influence how the public perceives and receives an inquiry. To do so, he/she does not need to apply "greater creativity and flexibility in fact-determining processes" as O'Connor & Kristjanson suggest above. All that is needed is an awareness of the social functions essential to an inquiry's survival as a separate and unique public institution and that means a conscious refrain from defining the inquiry according to discourses that pit "justice" against truth.

According to Soeharno, it is the judge "...who decides how the implementation of rituals serves to communicate the ideals expressed in the institution. In his conduct, he makes these

¹¹⁸ Estey, *supra* note 97 at 214.

¹¹⁹ O'Connor & Kristjanson, *supra* note 101.

values concrete."¹²⁰ More importantly, however, he noted that "...public trust is directed at institutional values before it is directed at the office holder..."¹²¹ Thus, it is really crucial that the judge-commissioner conduct the inquiry "in line with the values that the institution symbolizes..."¹²² and because judicial conduct "...becomes in itself the symbol for the values of the institution. It differs according to the situation as to whether this means that judges are to be extra careful in displaying these values or that they can be more relaxed."¹²³ In other words, the judge-commissioner is the persona of an inquiry and plays a primary role in building and depicting the values, essence, virtue and identity of an inquiry. As the creator of the public inquiry image, the commissioner needs to be conscious of the discourses underpinning his/her decision-making so as to avoid presenting the inquiry as something other than it is (i.e., as an adjudicative "justice" seeking rather than a truth-oriented institution) and thereby undermining public trust when the institutional values conflict with the outcome and vice versa.

C. Identity Crisis: Discourse Use and Abuse in the Creation of the Public Inquiry Image

Having identified the qualities and values that make an inquiry tick and the role of judge-commissioner in creating the inquiry persona, it is now only fitting to isolate and discuss the discourses at play during an inquiry in order to fully grasp the effects of judicial decision-making on the inquiry image that is catered to the public. Prior to looking at concrete examples of discourse use by commissioners, it is first essential to ascertain which discourses are at the forefront of any discussion about the inquiry, its process, commissioner's role, and its general utility as a public institution. To that effect, this section of the paper will focus on academic

¹²⁰ Soeharno, *supra* note 106 at 90.

¹²¹ *Ibid.* at 74.

¹²² *Ibid.* at 83.

¹²³ *Ibid.* at 90.

literature regarding commissions of inquiry to identify the discourses commonly used in reference to the institution's role, objectives, functions and results.

Aside from the mass media (a topic that would require a paper of its own), the academia has a significant influence on how authorities, professionals, and consequently the general public view and discuss the role of public institutions. As such, in order to explore how a commission of inquiry acquires its public image, it is necessary to analyze the terminology, concepts and descriptors commonly utilized by the academia in studies, research and debates on the topic of public inquiries. In other words, as will be argued below, the preferred discourses of those considered to be authorities on the subject matter in question (i.e., academics, judges and other legal professionals, government, etc.) ultimately shape and define the type of inquiry that is presented and promoted to the public, which may not always be in the best interest of the Public Inquiry itself.

But before going any further, it is important to emphasize that the focus of the discussion at hand is discourse use (and abuse) and that the power of discourse should not be underestimated under any circumstances as it infiltrates every facet of the inquiry life cycle, from its inception to its final report. The effects of discourse use can be inconspicuous and fleeting or obvious and prevalent. Either way, what is crucial to take away is that the power to alter and/or shape public perception is inherent to any discourse and it is the goal of this paper to analyze discourse patterns and preferences to understand in which direction the Public Inquiry is taken.

Consider for instance Ratushny's summary of the "basic functions" of an inquiry:

In many respects, the journey of a commission of inquiry is as important as the destination. The commissioner becomes the face, and often the name, of the inquiry as its hearings proceed with public visibility and scrutiny. The hearings should represent only a relatively small part of the work of a commission. Yet they are of crucial importance as an opportunity for those most directly affected, and for the general public, to become educated. In this respect, *the hearings should also enhance public confidence in the ability*

*and integrity of the commissioner to come to the correct conclusions in her final report. An important element of such confidence will be the fairness of the manner in which the commissioner proceeds.*¹²⁴

This paragraph is a prime example of the extensive role of discourse by simply highlighting to the reader the qualities that an ideal inquiry *should* possess. Moreover, it is illustrative of the inquiry process and imbued with value judgments. For example, the reader is told that the basic function of an inquiry is to educate the public and instrumental to that is a commissioner's ability to come to a "correct conclusion". As discussed previously in Section 1.1 above, the search for the truth is one of the basic and essential characteristics of a Public Inquiry, so it is only fitting that the public is made aware of this virtue. However, Ratushny qualifies this virtue by redirecting the reader's attention to the values of integrity and procedural fairness as anchors grounding the potentially limitless search for the truth. This is an example of what Lugosi called the law's privileged position in guiding which discourses resonate as truth.¹²⁵ According to Lugosi, "[b]ecause law as a set of institutions, ideas and actors employs a special legal method, language and school of thought to approach problems, this sets law apart from and above competing discourses. The law also maintains and reproduces such power through its basis in liberal values of neutrality and fairness."¹²⁶ Lugosi further argued that the preference for law infused discourses is in part due to it being "(mis)understood as objective and neutral, and therefore the most logical and capable."¹²⁷ This discursive preference is prevalent in other studies and in fact, as will be argued below, the tendency has been to place justice (i.e., fairness, impartiality and integrity, etc.) as a first order value, demoting the pursuit of truth and related social functions of an inquiry to at best the runner-up position.

¹²⁴ Ratushny, "Role of the Commissioner", *supra* note 89 at 163.

¹²⁵ Lugosi, *supra* note 32 at 302.

¹²⁶ *Ibid.* at 302-303.

¹²⁷ *Ibid.* at 303.

(1) Justice versus Truth

Virtually any discussion on the topic of inquiries comes down to a show-down between discourses of justice and truth. The extent to which one discourse takes precedence over the other, when used in reference to a commission of inquiry, has a significant impact on how close on a continuum the said inquiry comes to resemble a true Public Inquiry versus another version of the adversarial system. This is important because in a process obsessed with truth-seeking, commissioners are placed in a position where they are torn between a pull from “justice” and a push towards the “truth”; balancing the public interest in a thorough and open inquiry against the rules of fairness and the dictates of justice.¹²⁸ This contradiction has been summarized by Salter in the following terms: “[i]nquiries are, at once, freed from the constraints of legal proceedings to conduct their investigations in as wide-ranging and open matter as their commissioners deem advisable. At the same time, inquiries are legal proceedings and at least some of their participants act accordingly.”¹²⁹ Thus, at the very least, it seems that both truth-seeking and justice-seeking operate simultaneously; both exerting conflicting pressures on the judge-commissioner and thereby pulling an inquiry in different directions.¹³⁰

Consequently, it is difficult to predict whether truth or justice will take precedence during an inquiry. As argued above, although the commissioner’s role is primarily to get to the truth, judges serving as commissioners continue to rely upon traditional disciplinary norms and are thus likely to reflect paradigms of the system they are accustomed to. Their predicament is real and affects not only the conduct of an inquiry but ultimately the public perception of both the inquiry process and the judiciary in general.

¹²⁸ Van Harten, “Truth Before Punishment”, *supra* note 3 at 272.

¹²⁹ Salter, “The Two Contradictions in Public Inquiries”, *supra* note 26 at 175.

¹³⁰ Liora Salter, “The Complex Relationship Between Inquiries and Public Controversy” 185 in Manson & Mullan, *Commissions of Inquiry*, *supra* note 3 [Salter, “The Complex Relationship Between Inquiries and Public Controversy”].

Moreover, both truth and justice are arguably the building blocks of how the Public Inquiry is conceptualized and perceived; both are important to the viability of the Public Inquiry as an institution but can also be detrimental to its legitimacy when essential virtues of an inquiry are depicted via adjudicative notions of justice. Thus, broadly speaking, an inquiry is a site of discursive struggle between the virtues of justice and truth, both of which are instrumental in discourse construction processes that ultimately influence paradigm shifts in public perceptions of the inquiry image.

Accordingly, the analysis of judicial discourse and its impact on the Public Inquiry image would not be complete without a discussion on how truth and justice are utilized by the academia to justify its functions and procedures, as well as the very existence of an inquiry. Take for instance Schwartz' summary of what should be the expected conduct from an inquiry (and the commissioner, being the persona of the institution):

But even if it is right to carry out policy-making in a judicial mode — issuing definitive pronouncements — *we should at least expect Royal Commissions to act more judiciously*. That means keeping an *open mind*; it means suspending *judgment* until all the *evidence* is in; it means inviting those with differing opinions to present their views, rather than having the judges create the information base according to a preconceived agenda. Too often, Royal Commissions are not even *judicious in their assembling of evidence and argument*. Their research directors have a good idea of what result is required, and the experts who are consulted, and research reports that are commissioned, reflect that preconceived notion.”¹³¹

The language used is saturated with legalistic notions and judicialized conceptions of the inquiry persona. In fact, Schwartz made it clear that an inquiry should be conducted judiciously. As such, right off the bat he prioritized adversarial notions of justice against the truth-seeking virtues of a Public Inquiry. What is even more intriguing is that this particular use of the word “judicious” colours the rest of the paragraph and how it is registered by the reader. For example,

¹³¹ Schwartz, *supra* note 8 at 457 (emphasis added).

taking the word “judicious” as a prime descriptor for all inquiry conduct, the continued reading of the paragraph automatically brings to the foreground images of the adversarial trial and its procedures. In other words, the reader is subconsciously led to accept the adversarial paradigm as the measuring stick for how an inquiry should proceed. As such, although the above paragraph literally states that the inquiry (via its commissioner) is to have an “open mind”, suspend “*judgment* until all the *evidence* is in” and act judiciously in its “*assembling of evidence and argument*”, the discourse use conjures up an image of an impartial and independent judge (rather than a commissioner) presiding over a trial (rather than leading an inquiry), overseeing the collection of evidence (rather than information and truths) and presentation of opposing arguments (rather than a discussion), and dispensing judgment (rather than findings and recommendations).

In the above example, Schwartz adopted the discourse of justice in order to describe the proper conduct of an inquiry. Because zero emphasis was placed on the truth-seeking functions of an inquiry, the reader is lead to believe (or at the very least consider) that adherence to adversarial notions of justice and fairness should be determinative of an inquiry’s success and utility. Given this preference for the adversarial paradigm, it is no wonder that the judge-commissioner often finds him/herself in an environment where he/she seemingly has no choice but to fall back onto the traditional adversarial standards during decision-making, thereby further affecting the public image of an inquiry.¹³² The commissioners are obliged to uncover the truth by hearing all viewpoints while simultaneously judiciously guarding against any unfairness or injustice. It is this expected, and often conflicting, obedience to “judiciousness” that hinders the pursuit of truth for the purpose of which an inquiry is created in the first place.

¹³² See Section 1.2 above for a thorough discussion of the internal and external limits placed on judge-commissioners by virtue of their ties to the adversarial culture.

For instance, because “justice” is prioritized, certain narratives are framed as more legitimate than others depending on how well they fit within the discourse of “justice” and the adversarial conceptions of truth. According to Lugosi, “[i]n Canada, law (as a whole set of rules, institutions and actors, such as police officers, lawyers and judges) plays a key role in formally translating narratives and influencing which stories and discourses resonate as truth.”¹³³ Most conceptions of truth are derived via highly judicialized and adjudicative processes of discourse generation that the commissioner ultimately puts forth as the truth. This “truth-seeking” process limits diversity of perspectives, prevents meaningful dialogue, and stalls the pursuit of truth all the while effectively undermining the legitimacy of a commission and the reliability of the fact-finding process.¹³⁴

Moreover, according to Salter,

*[w]hat makes an inquiry unique is that it combines all four elements [policy, truth-seeking, justice-seeking and value debates], and that none is more important than the other. That is, while, for example, legal deliberations often combine science and law, efforts are made to restrict value debates (not always successfully) and rarely are policy recommendations included in legal judgments. This would be enough to distinguish inquiries from court, but there is more. In the courts, it is clear to all which element (justice-seeking) should prevail in the final judgment. It is never so clear in the case of inquiries, which are simultaneously legal proceedings, quasi-scientific enterprises, value and political debates, and instruments for creating public policy.*¹³⁵

Although the presence of this “amalgam” of elements, as Salter calls it, is what ultimately makes an inquiry a unique public institution, I would argue that given the current, predominantly legalistic pattern of discourse used in the academia to discuss commissions of inquiry, justice-seeking functions of an inquiry seem to prevail. For instance, as argued throughout the paper, even the “truth” discourses are under a threat of judicialization, whereby the inquisitorial

¹³³ Lugosi, *supra* note 32 at 302.

¹³⁴ Julia Hughes, *supra* note 82 at 277 and 281.

¹³⁵ Salter, “The Complex Relationship Between Inquiries and Public Controversy”, *supra* note 130 at 198 (emphasis added).

paradigm is turned on its head and continuously overwhelmed by a stubborn adherence of the authorities to the norms and principles of the adversarial culture. According to Henderson, “[i]t proceeds from the assumption, valid for judicial proceedings, that facts will better emerge from adversarial contest, by counsel and their witnesses than from the diligence and imagination of the commission.”¹³⁶ Therefore, although inquiries “...have an enormous scope of action...[and] access to a wide range of procedures – some drawn from law, some from science, and others yet from politics – precisely so they can address the complicated relationship involved in the amalgam”,¹³⁷ the full potential of an inquiry is rarely realized. As Henderson argued, the reliance on adversarial and judicialized procedures during an inquiry “has created a barrier between the commissioners and the people from whom it expects to collect its facts, data, information and opinion.”¹³⁸ In other words, its truth seeking functions and virtues are seldom applied or accessed to address broad public issues and complex concerns relating to justice, thereby precluding “open public scrutiny” and “new voices” from entering into the inquiry dialogue, in other words, all qualities that justify an inquiry’s existence in the first place.¹³⁹

Furthermore, the over-reliance on legalistic and judicialized discourses is further exacerbated by the fact that the academic literature on public inquiries is lacking in the discourses of truth, at least when it comes to evaluating the success of the process and findings of an inquiry. Sure, there is a lot of reference to truth-seeking being an essential quality and function of an inquiry. However, there is barely any discussion of the nature, source and value of the information (or truth) gathered by an inquiry. Truth is spoken of most often as an abstract concept – an ideal – rather than a guiding principle for how to conduct an inquiry. In other

¹³⁶ Henderson, *supra* note 4 at 497.

¹³⁷ Salter, “The Complex Relationship Between Inquiries and Public Controversy”, *supra* note 130 at 198-199.

¹³⁸ Henderson, *supra* note 4 at 497.

¹³⁹ Salter, “The Complex Relationship Between Inquiries and Public Controversy”, *supra* note 130 at 199.

words, the focus is primarily on the process of getting to the truth versus the quality of the truth itself and how it fulfills the social function of an inquiry, contributing to its success or failure.¹⁴⁰

But the truth discourses are as important if not more so than the justice discourses to the optimal functioning of the Public Inquiry and more importantly to its survival as a unique institution. Therefore, it is crucial to differentiate at the outset between truth and justice discourses. Of assistance here is Salter's description of truth-seeking and justice-seeking processes during an inquiry. Her discussion sheds light into an inquiry's deliberation processes thereby defining the points of discursive struggle between truth and justice. According to Salter,

Truth-seeking in a policy inquiry is something other than fact-finding in a court case. It is more akin to science (social, technical, and natural science) inasmuch as information facilitates a better understanding of complex issues....Very little of this information lends itself directly to recommendations, although some may be included in a final report. *Rather, the inquiry uses truth-seeking to prepare itself for the tasks of assessment, evaluation, and recommendations. Establishing a knowledge base is crucial to a policy inquiry. Justice-seeking is more akin to what occurs in a court of law. It refers to resolution of disputes between parties, to interest group conflicts and, in many inquiries, it also pertains to questions about wrongdoing and possible compensation.*¹⁴¹

In other words, while truth-seeking prioritizes the gathered information itself, justice-seeking focuses on the processes involved in gathering this information. Thus, information or truth plays a different role (and is of a different value) depending on the process utilized by an inquiry. More importantly, citing Thibault & Walker, Salter points out that:

[they] had no question that *inquiries could be both truth-seeking and justice-seeking simultaneously. They argued that it would be very difficult to disentangle one function from the other.* Advocate groups today are equally adamant that all truth-seeking (indeed, all science) is value-laden, and that the situation could not be otherwise. Inquiries do seem to provide a solid amalgam of truth, justice, values, and policy-seeking, such that it is hard to imagine how to separate science from values, or assessment from evaluation.

¹⁴⁰ There is a handful of literature, however, that does look at the nature and quality of the information gathered by an inquiry and how it influences the outcomes of an inquiry and its success/failure: Salter, "The Public of Public Inquiries", *supra* note 70; Kalajdzic, *supra* note 3; John McMullan, "Lost Lives at Westray: Official Discourse, Public Truth and Controversial Death" (2007) 22:1 Canadian Journal of Law and Society 21[McMullan]; and Lugosi, *supra* note 32. For a discussion of each please see further below under the heading "Discourses of Truth".

¹⁴¹ Salter, "The Complex Relationship Between Inquiries and Public Controversy", *supra* note 130 at 189.

*Thibault and Walker were equally persuaded, however, that it was important to perform an analytical exercise, looking at truth-seeking and justice-seeking independently. They saw each function as pulling an inquiry in different directions. However theoretical the exercise, it would be useful to follow their example in order to understand the conflicting pressures placed on inquiries as they go about their deliberations.*¹⁴²

This statement further reinforces this paper's attempt to distinguish between truth and justice discourses surrounding and permeating proceedings of the Public Inquiry. In other words, despite the fact that truth-seeking and justice-seeking functions (and discourses) are most likely intertwined in any given inquiry, it is important to differentiate between the two and, at the very least, endeavor to describe their divergent roles in structuring how the Public Inquiry is ultimately received and perceived by the public.

This is precisely what the paper has attempted to do thus far. However, the ultimate goal is to go one step further and disentangle truth discourses from those of justice in order to comprehend the full extent of the hold that the adversarial/adjudicative conceptions of truth and justice have on the way that the Public Inquiry is conducted, justified, and evaluated. Thus, having identified the discursive struggle between truth and justice within the context of an inquiry, it is now important to examine precisely how these discourses are utilized by deconstructing each and analysing their common application. Only then will we come one step closer to comprehending the totality of the judicial discourses' impact on the construction of the Public Inquiry image.

¹⁴² *Ibid.* at 190 (emphasis added).

PART III: IDENTIFYING JUDICIAL DISCOURSE USES

A. The Discourses of Justice

As argued above, the commission of inquiry has been increasingly scrutinized through the adversarial prism and especially the application of legalistic and judicialized discourses. What are the identifying aspects of these discourses? What form do they take and how are they transmitted? Although it is beyond the scope of this paper to delineate all discourses of justice¹⁴³ pertaining to commissions of inquiry, it is important to identify how they are predominantly utilized by looking at discourse patterns, the message that they generate and the image that they incite. To that effect, the paper will proceed by first examining the use of judicial independence and impartiality discourses to describe and assess commissioner's conduct.

(1) Judicial (Commissioner) Independence and Impartiality

Independence and impartiality go hand in hand¹⁴⁴ and are among the most referenced concepts in academic literature on commissions of inquiry. Specifically, the language of independence (and by inference and association, impartiality) is most often used to evaluate a commissioner's role and stipulate what his/her conduct should aspire to. According to Ruel, "[a] good measure of impartiality should be expected from commissioners of inquiry. Keeping an open mind will not be sufficient. However, commissioners should not be expected to be as impartial as judges."¹⁴⁵ Despite making the last point, Ruel does go on to suggest that the

¹⁴³ It is also debatable whether there is a limit to the various uses of justice for structuring the conversation about public inquiries.

¹⁴⁴ Although judicial independence is considered merely a "second order constitutional and political value" or an underlying condition of judicial impartiality, both independence and impartiality are essential to the credibility of the judiciary and thereby, the legitimacy of the legal system. See Dodek, "Judicial Independence as a Public Policy Instrument", *supra* note 15 at 300-301. Also see *R. v. Valente*, [1985] 2 S.C.R. 673 at 685 for a discussion of the distinction between independence and impartiality.

¹⁴⁵ Simon Ruel, "The Rules of Fairness and Public Inquiries" 131 in *The Law of Public Inquiries in Canada* (Toronto: Thomson Reuters, 2010) at 139 [Ruel, "The Rules of Fairness and Public Inquiries"].

credibility of an inquiry hinges on something more than a mere “open mind”. Rather “a significant standard of impartiality will be required on the part of commissioners”.¹⁴⁶ What that standard should be is left to the imagination of the reader. However, as will be shown below, that imagination is often steered towards adjudicative norms and practices by utilizing discourses of judicial independence and impartiality as a measuring rod against which all inquiry conduct is scrutinized.

For instance, as a cornerstone of the public’s perception of impartiality, independence is by far the most discussed and referred to virtue of the judicial office. According to Justice Cory in *Phillips v. Nova Scotia*, “[i]t is crucial that an inquiry both be and appear to be independent and impartial in order to satisfy the public desire to learn the truth.”¹⁴⁷ More importantly, judicial independence is often used to justify the appointment of judges to the position of a commissioner and “to provide greater credibility for both the process and the outcome of various non-judicial endeavors” despite it being an unwritten constitutional principle that attaches to judges in courts.¹⁴⁸ As O’Connor & Kristjanson observed:

Interestingly, however, in Canada the most common practice has been to appoint sitting judges as commissioners. The reason for this, I think, is obvious. The need to hold an inquiry arises because of *the need to have an independent, credible assessment of whatever the particular problem happens to be. Judges are seen by the public as having the necessary independence from government and bring with them the credibility of the judicial office.*¹⁴⁹

The rationale for this general presumption of judicial “credibility” was summarized by the Federal Court of Appeal Chief Justice Richard, who traced public trust to judicial independence and impartiality:

¹⁴⁶ *Ibid.* at 138.

¹⁴⁷ *Phillips v. Nova Scotia*, *supra* note 58 at para. 175. Also see Carver, *supra* note 2 at 557-558.

¹⁴⁸ Dodek, “Judicial Independence as a Public Policy Instrument”, *supra* note 15 at 297, 299 and 304. See also Shetreet & Turenne, *supra* note 54 at 251.

¹⁴⁹ O’Connor & Kristjanson, *supra* note 101 (emphasis added).

Public acceptance of, and support for, court decisions depends upon public confidence in the integrity and independence of the bench. *Judicial independence, which is the very essence of judicial function, is a means toward the far more important goal of maintaining public trust in the legal system and in the judiciary.* It is society's confidence in the impartiality of individual decisions that forms the core strength of the judiciary as an institution.¹⁵⁰

Hence the attempt by the Executive government to commodify judicial functions (especially independence) by appointing judges to head commissions of inquiry. The hope is that a judge-commissioner's aura of "judicial independence" will automatically secure public trust and confidence in the inquiry process and outcomes.¹⁵¹ Although this may seem like an efficient and effective use of judges, it precludes the Public Inquiry from establishing its own conceptions and standards of independence and impartiality and thereby securing public confidence in the credibility of its own unique system.

Despite the irony of being a detriment to the very stability and credibility of the Public Inquiry institution, judicial notions of independence and impartiality continue to dominate and inform the discourse on inquiry practices. This was recognized in the iconic statement by Justice Marceau of the Federal Court of Appeal discussing the nature of the administrative and investigative independence of an inquiry:

It has often been suggested, expressly or impliedly, especially in the media but also elsewhere, *that commissions of inquiry were meant to operate and act as fully independent adjudicative bodies, akin to the Judiciary and completely separate and apart from the Executive by whom they were created...No one disputes the necessity of preserving the independence of commissions of inquiry as to the manner in which they may exercise their powers, conduct their investigations, organize their deliberations and prepare their reports.*¹⁵²

¹⁵⁰ John D. Richard, C.J. "The Role of the Judiciary in Canada", online: Federal Court of Appeal <http://cas-cdc-wwww02.cas-satj.gc.ca/portal/page/portal/fca-caf_eng/speeches-discours_eng/speech-discours-sep2000_eng> (emphasis added).

¹⁵¹ Dodek, "Judicial Independence as a Public Policy Instrument", *supra* note 15 at 297 and 317.

¹⁵² *Dixon v. Canada (Commission of Inquiry into the Deployment of Canadian Forces in Somalia – Létourneau Commission)*, [1997] F.C.J. No. 985 at para. 13 (F.C.A.) (emphasis added); rev'd (1997) 146 D.L.R. (4th) 156 (F.C.T.D.); leave to appeal to S.C.C. dismissed January 8, 1998, [1997] S.C.C.A. No. 505 [*Dixon v. Canada*].

Although a high standard of independence, akin to that of the judiciary, is generally expected of an inquiry, Marceau J. also underscored the unique nature of an inquiry in relation to courtroom proceedings in the following manner:

As investigative bodies, they, of course, are called upon to seek the truth, and no doubt they are ideally suited for uncovering facts that could not be discovered otherwise (*precisely because they have broad investigative powers, they are inquisitorial, and they are not subject to the strict rules of evidence that apply to a court of law*). Hence, their prestige. But, nowhere do we find the imposition upon them of a duty to conclude. *On the contrary, their purpose, which is primarily to advise and to help the government in the proper execution of its duties, is not conducive to settling issues and drawing definitive conclusions. It is the legal duty of the commissioners to report, but that report is limited to explaining what they have done, what they were able to draw from their investigations (in terms of findings of fact) and what advice they are in a position to give to the Executive in light of those findings.*¹⁵³

Accordingly, although commissions of inquiry are unique and separate institutions, they are nevertheless likened to and measured against the standards of the Judiciary in that they are meant to be fully independent in the exercise of their powers and deliberation. In other words, both independence and credibility are tied to the judicial office and the judge-commissioner is an extension of that office. It follows that for an inquiry and, by extension, the commissioner to be credible (and make credible assessments) its procedures and conduct must conform to the adversarial standards observed by the judicial office no matter the actual scope of their powers under the *Inquiries Act*. In other words, it is inferred that the inquiry is merely a subset of the traditional, adversarial system rather than a unique, truth-seeking, public institution.

Furthermore, according to Witelson, "...the efficacy of a public inquiry hinges on its independence from the government", however, "[n]otwithstanding this general expectation for independence, the extent of the independence of commissions of inquiry in Canada is not

¹⁵³*Ibid.* at para. 14 (emphasis added). Also see Simon Ruel, "Creation of Public Inquiries" 1 in *The Law of Public Inquiries in Canada* (Toronto: Thomson Reuters, 2010) at 21-22 [Ruel, "Creation of Public Inquiries"] for a summary of the nature and scope of an inquiry's investigative and advisory independence and at 25-46 for an examination of its broad powers.

formally written down in statute nor clearly delineated in case law. Instead, reliance on a tradition of independence for public inquiries appears to have sufficed since Confederation...”¹⁵⁴

Thus, the use of traditional conceptions of independence as a measure of an inquiry’s success (or failure) is taken for granted and rarely questioned as to its suitability in an inquisitorial context.

Moreover, although Witelson’s goal is to examine the limits placed on the independence of public inquiries, her definition of “independence” is yet another example of normalizing the use of judicial discourse as it pertains to commissions of inquiry. As Witelson stated:

The term *independence* is a loaded word in the legal context. For judges, it has an individual, institutional, and ethical component. The Canadian Judicial Council, in its ethical guidelines for judges states, “[T]he judge’s duty is to apply the law as he or she understands it without fear or favour and without regard to whether the decision is popular or not . . . [judges] share a collective responsibility to promote high standards of conduct. . . . Public acceptance of and support for court decisions depends upon public confidence in the integrity and independence of the bench.”¹⁵⁵

Given the widespread acceptance of and reliance on the adversarial paradigm as a benchmark for all legal/judicial conduct, it is not surprising that Witelson adopted the Canadian Judicial Council’s definition of “independence”, thereby further perpetuating the perception that an inquiry is merely a version of an adversarial trial. Witelson also admitted that “[j]udicial and constitutional definitions of independence have, nevertheless, influenced the standards of independence applied to the variety of boards and tribunals within the administrative realm, including government-created commissions of inquiry.”¹⁵⁶ Accordingly, the efficacy of an inquiry is assessed and dependant on the extent to which it conforms to this “tradition of independence” imported from the adversarial system and imbued with the norms and values prevalent within the judicial culture.

¹⁵⁴ Witelson, *supra* note 91 at 301-302.

¹⁵⁵ *Ibid.* at 302.

¹⁵⁶ *Ibid.* at 303.

While the necessity of upholding independence and impartiality of an inquiry is not disputed, it is important to highlight that the language used (and how it is used) to discuss their roles within the Public Inquiry setting imports judicial norms and virtues that are at the risk of becoming the standard for conduct during an inquiry. It is equally important to note that it is more than just the adversarial conceptions of independence and impartiality that are utilized. Transplanted with these conceptions are the culture and tradition from whence they originated. Even Witelson stated that “independence” is a loaded term with an “individual, institutional, and ethical component”.¹⁵⁷ However, she did not hesitate to apply this term (and its individual components) to inquiries, thereby likening their conduct and practices to those of the bench.

This is disconcerting for the future survival of the Public Inquiry as an institution where independence and impartiality do not necessarily carry the same connotations nor impose the same obligations on the presiding commissioner. Generally speaking, whereas independence and impartiality in their traditional sense are contingent upon a strict separation of powers and members of the judiciary maintaining high standards of conduct in accordance with the requirements of their office, within the context of an inquiry they (should) mean more than a blatant conformity to adjudicative standards and norms. According to Dodek,

[w]hen judges are engaged in activities outside of adjudication (“extra-judicial activities”), the premise for their independence – impartiality in dispute adjudication – is removed. While new arguments for the independence of judges engaged in extra-judicial activities may exist, they need to be constructed and proffered as they cannot be based on the adjudicatory functions.”¹⁵⁸

In other words, impartiality is reinforced by observance of adjudicative procedure. Thus, if the concept of adjudicative independence is imported into the inquiry context without a properly

¹⁵⁷ *Ibid.* at 302.

¹⁵⁸ Dodek, “Judicial Independence as a Public Policy Instrument”, *supra* note 15 at 303. The Supreme Court of Canada recognized that even “judicial independence” is a dynamic and contextual concept. Specifically, the Court in *Mackeigan v. Hickman*, [1989] 2 S.C.R. 796 at 826 recognized that the conditions necessary for judicial independence “themselves vary and evolve with time and circumstances.”

“constructed and proffered” argument for its applicability, not only will the judge-commissioner be at risk of having his/her impartiality questioned,¹⁵⁹ but the credibility of the Public Inquiry itself will suffer.¹⁶⁰ For example, given the unique relationship between the Executive and the Public Inquiry – appointed by and responsive to the executive government - an inquiry may not be even considered “independent” in the traditional sense of the word. This does not necessarily mean that the commissioner is therefore biased or that the institution is unreliable.¹⁶¹ As pointed out by Marceau J. above, although an inquiry owes its existence to the Executive, this does not detract from their independence in the exercise of their powers.¹⁶² Similarly, MacKay & McQueen recognized that the unique context of an inquiry needs to be taken into account and that “the findings of a public inquiry, barring any other irregularities, can be considered reliable despite its lack of ‘pure’ independence from the executive branch of government.”¹⁶³

However, given that the public has been taught to equate adjudicative forms of independence with impartiality and thereby credibility, public perception of and expectation from the inquiry may be such as to threaten the underlying framework of the Public Inquiry institution itself. In fact, Henderson questioned the independence of commissions of inquiry and the ability of judicial commissioners to be impartial arguing that “[s]uch qualities are difficult to find since the commission is, institutionally, exposed to the control of its creators and almost always sensitive to public pressure on widely held opinions.”¹⁶⁴ As Schwartz noted, “[t]he dilatory, inconclusive or heavy-handed character of a number of recent public inquiries and

¹⁵⁹ Dodek, “Judicial Independence as a Public Policy Instrument”, *supra* note 15 at 332. According to Shetreet & Turenne, *supra* note 105 at 243, “[c]ertain extra-judicial activities such as chairing public inquiries also tend to politicize the role of judges and detract from their impartial and independent status. See also O’Connor & Kristjanson, *supra* note 101.

¹⁶⁰ Not to mention undermine the principle of judicial independence itself by politicizing its nature and purpose. See Dodek, “Judicial Independence as a Public Policy Instrument”, *supra* note 15 at 298.

¹⁶¹ *R. v. Valente*, [1985] 2 S.C.R. 673 at 685.

¹⁶² *Dixon v. Canada*, *supra* note 152.

¹⁶³ MacKay & McQueen, *supra* note 5 at 276 and 278.

¹⁶⁴ Henderson, *supra* note 4 at 503.

Royal Commissions may produce a public backlash that leads to their not being used in some cases where they are genuinely required.”¹⁶⁵ Moreover, “casting a commissioner in the role of a social reformer may undermine confidence in his or her role as an impartial judge of past conduct.”¹⁶⁶ Accordingly, within an inquisitorial setting, administrative and investigative independence is more than mere freedom from influence of the Executive government. In order for an inquiry to function at its optimal capacity, it ought to be independent from the influence exerted by the adversarial normative framework and standards (including the notions of justice and independence themselves) via utilization of justice discourses (and the expectations that they impose) by the academic and legal authorities.

(2) Discourses of Individual Rights and Procedural Fairness

In addition to discursive judicialization of independence and impartiality, the academic discussion of individual rights and procedural fairness within the inquiry context manifests a similar preference for adversarial modes of justice and truth-seeking. In fact, this attachment to judicial notions of “justice” is most clearly encountered in the form of fair process and protection of individual rights, which are often pursued to the detriment of a thorough truth-seeking process.¹⁶⁷ For instance, in his defence of public inquiries, Van Harten addressed a common criticism of inquiries, namely that the “...existing inquiry procedures are insufficient to protect individual rights...” by arguing that “[t]he exercise of coercive powers, in particular, is an integral part of an inquiry’s capacity for credible fact-finding and forceful recommendations.”¹⁶⁸

It is due to these coercive powers that revelations emerge that otherwise would not be

¹⁶⁵ Schwartz, *supra* note 8 at 455

¹⁶⁶ *Ibid.*

¹⁶⁷ For a description of the rules of fairness operational during an inquiry see Ruel, “The Rules of Fairness and Public Inquiries”, *supra* note 145 at 131-135. Also see Ratushny, “Role of the Commissioner,” *supra* note 89 at 163 and 286.

¹⁶⁸ Van Harten, “Truth Before Punishment”, *supra* note 3 at 242.

forthcoming.¹⁶⁹ In fact, it is because of the need for such revelations that commissions of inquiry are created in the first place.

However, the distrust for other modes of investigation and dispute resolution is so innate that much of the academic literature focuses on preventing or avoiding potential abuse of power in how the inquiry fulfills its truth-seeking functions. According to Henderson, it is the perpetual uncertainty of the procedures and standards that a commissioner may apply given his/her broad powers of discretion that generates this concern for abuse of power.¹⁷⁰ Henderson argued that “[t]he problem of abuse of power arises because a Royal Commission in Canada is a unique, and in fact an anomalous, institution.”¹⁷¹ For instance,

Unlike the courts, which are governed not only by statute but also by fairly detailed rules of court, commissions of inquiry do not have established procedures. Accordingly, persons subject to the inquiry and witnesses do not know in advance how to prepare for the inquiry, the method of establishing certain facts, the challenge that they have to meet and the conditions which must be observed, the role that they are expected to perform and the functions of persons whom they will encounter at the inquiry. *The unlimited freedom of the commission to determine its own procedure and the ad hoc character of its actions preclude thorough preparation to any party and witness.*¹⁷²

He further admitted that much of the attacks on inquiries are “...directed towards the investigatory techniques and powers given to the commission...” and that in order to avoid this potential for abuse of power, an inquiry “must be made protective of rights.”¹⁷³ According to Ruel, “the loose nature of inquiry proceedings and their public nature pose a serious threat to the protection of rights and reputation.”¹⁷⁴ In fact, in *Consortium Developments (Clearwater) Ltd. v. Sarnia (City)*, the Supreme Court went as far as to suggest that any persons involved in an inquiry may become victims of “collateral damage”: “[i]t is a tall order to ask any

¹⁶⁹ *Ibid.* at 257.

¹⁷⁰ Henderson, *supra* note 4 at 494.

¹⁷¹ *Ibid.* at 498.

¹⁷² *Ibid.* at 503 (emphasis added).

¹⁷³ *Ibid.* at 498 and 499.

¹⁷⁴ Ruel, “The Rules of Fairness and Public Inquiries”, *supra* note 145 at 138.

Commissioner to orchestrate this process to further the public interest in getting at the truth without risking unnecessary, avoidable or wrongful collateral damage on the participants.”¹⁷⁵ These comments instill repulsion towards the unique nature and practices of an inquiry by pointing to its inadequate, “loose” qualities and potential for victimization.

More importantly, this is exactly what Salter warned against if inquiries were to become more and more court-like:

[t]o succeed, inquiries cannot become court-like in their approach, for if they do, and if they fail to protect the rights of the ‘accused’, they constitute a trial in which legal protections are absent. If they become court-like, they ‘fail to put the state on trial’ and to locate the structural or systemic aspects of such problems as corruption, pollution, industrial accident or the diffusion of toxic substances.¹⁷⁶

Not surprisingly, MacKay & McQueen argued that “[t]he fear of violation of fundamental rights arises from the ability of a public inquiry to make a finding of wrongdoing or misconduct against a person or corporation.”¹⁷⁷ Although they pointed out that an inquiry has no power to make findings of guilt or impose sanctions, thus making it distinct from an adversarial process, MacKay & McQueen nevertheless explored the possible detrimental consequences (i.e., damage to reputation) to individuals and corporations subject to an inquiry investigation and offered examples of potential legislative protections for such rights violations.¹⁷⁸ As such, right from the outset, they pit truth against fairness making it questionable whether truth could ever come before justice even in an institution where truth is the ultimate objective that also justifies the very existence of a Public Inquiry. It is this continuous comparison of the inquiry to adversarial practices and standards that undermines public’s confidence in the institution; it is this uncertainty regarding the standards to which the inquiry should be held accountable to, rather

¹⁷⁵ [1998] 3 S.C.R. 3 at para. 41.

¹⁷⁶ Salter, “The Two Contradictions in Public Inquiries”, *supra* note 26 at 180.

¹⁷⁷ MacKay & McQueen, *supra* note 5 at 257.

¹⁷⁸ *Ibid.* at 257 and 259-260.

than the uncertainty of how a commissioner would utilize his/her discretionary powers, that threatens the foundation of the Public Inquiry institution. Where uncertainty instills fear, the familiar and conventional adversarial paradigm serves as a guide post against which all other practices are scrutinized and evaluated.

It does not matter that,

...the courts have taken a generally deferential approach to commissions of inquiry and allowed them considerable leeway in determining their own procedures. *So long as affected individuals are treated fairly in respect to presenting their sides of the case....*The courts seem to be aware of the need not to strangle public inquiries with procedures that are more appropriate in an adversarial setting, such as a civil or criminal trial.”¹⁷⁹

As long as “fairness” continues to be defined by the standards of the adversarial system, the inquiry and its commissioner will have no choice but to limit the scope of their discretionary powers. For instance, even in the statement above, MacKay & McQueen discuss “fairness” in relation to its adversarial characteristics as a protected right of an individual presenting his/her “side of the case” rather than being attached to the manner in which the inquiry conducts its truth-seeking functions. Accordingly, there is a continued contest between truth and justice in academic discourse on Public Inquiries. Even MacKay & McQueen recognized this contest by arguing that:

Justice is clearly the goal of a criminal prosecution. In a public inquiry it may be that the individual being scrutinized will be required to give up some of the “justice” associated with complete protection from compelled testimony and other legal safeguards, *but society also gives up some of the “justice” involved in being able to punish a wrongdoer.*

Public inquiries offer a different and less adversarial means to the truth than courts or highly judicialized administrative agencies. *Because these inquiries do not directly affect rights, they can be more flexible in the conduct of their hearings, and less obsessed with the protection of individual rights. Of course, people must be treated fairly but that is a flexible concept and one that leaves room for creativity on the part of commissioners.* In many settings, commissions of inquiry are

¹⁷⁹ *Ibid.* at 273-274 (emphasis added).

valuable mechanisms for striking the balance between truth and justice and they may provide a vehicle for doing it in the classic Canadian way.”¹⁸⁰

In other words, ideally truth should take precedence over adversarial notions of justice. In contrast to courtrooms, inquiries are structured to be less adversarial in their pursuit of truth and more flexible and creative in their conceptualization of justice. In the context of an inquiry, the expectation is that “justice” is to be sacrificed in order to attain the truth rather than *vice versa*. The difficulty, however, is whether this message is being accurately and effectively conveyed to the public; are the potential witnesses and the society at large prepared to relinquish some of the classical forms of “justice”. Given the current tendency to judicialize the discourse of justice and truth, it seems that the battle is being won by the adversarial notions of justice, which the public has been conditioned to expect.

Both MacKay & McQueen agree by stating that:

In our traditional adversarial legal system, the determination of the truth is deemed to have three procedural prerequisites, namely, the exclusion of unreliable evidence, access to all available reliable evidence, and the impartiality of the fact finder....Because of the perceived parallels between a public inquiry that may make findings of misconduct against a person and a criminal trial, *the absence of any one or more of these prerequisites in a public inquiry may be deemed sufficient to threaten the entire proceeding*.¹⁸¹

Similarly, in his summary of the governing principles of fairness during an inquiry, Ratushny pointed out that “the commissioners were expected to follow procedural rules similar to those applied by the courts when they adjudicate legal rights.”¹⁸² Furthermore, despite acknowledging that the unique circumstances of an inquiry justified a different approach to truth-seeking, O’Connor & Kristjanson continued to insist that inquiries observe high standards of due process akin to those present in the adversarial setting. For instance, they argued that:

¹⁸⁰ *Ibid.* at 291-292.

¹⁸¹ *Ibid.* at 258-259 (emphasis added).

¹⁸² Ed Ratushny, “The Legal Framework” 149 in *The Conduct of Public Inquiries: Law, Policy, and Practice* (Toronto: Irwin Law Inc., 2009) at 283.

*...there remains a significant danger that those caught up in an inquiry process can have their reputations unfairly tarnished in a serious way....it is essential that commission counsel, in deciding what evidence to call and how to lead it, lean over backwards to be fair and balanced and alert to the potential for unfair damage to reputations. Equally, a commissioner crafting a report should be very careful in the use of language that may have this type of adverse effect. It is important to bear in mind throughout that the primary purpose of an inquiry is not to find fault but rather to find facts, and to report on what happened in order to make recommendations to ensure that there not be a repeat in the future.*¹⁸³

The implication is that the flexible standards of fairness accessible to an inquiry and susceptible to a commissioner's discretion may not be sufficient or adequate enough to secure individual rights; that the potential infringement of individual rights may be too great of a price to pay for the pursuit of truth. Furthermore, O'Connor & Kristjanson insisted that due process or "justice" be given priority over the inquiry's search for the truth. For instance, they encouraged exercise of restraint in decisions respecting which "evidence to call and how to lead it" and most importantly, how this "evidence" was to be conveyed in the commissioner's final report suggesting that for the sake of safeguarding adversarial forms of "justice" an inquiry may be obliged to edit the truth and limit what gets out to the public.

Similarly, Ratushny emphasized adversarial notions of justice and fairness when discussing the adequacy of a commissioner's reasons while saying nothing about the importance of the nature and quality of truth that is ultimately expressed in the final report.¹⁸⁴ According to Ratushny, "[t]he effectiveness of a commission of inquiry will often depend on the strength of the commissioner's reasoning and that will be judged by how it is expressed in the final report."¹⁸⁵ Given that the degree of conformity with adversarial standards of due process seems to be determinative of the strength of a commissioner's reasoning, Ratushny thereby implied that

¹⁸³ O'Connor & Kristjanson, *supra* note 101 (emphasis added).

¹⁸⁴ Ed Ratushny, "Final Report" 355 in *The Conduct of Public Inquiries: Law, Policy, and Practice* (Toronto: Irwin Law Inc., 2009) [Ratushny, "Final Report"] at 363-365.

¹⁸⁵ *Ibid.* at 363.

the effectiveness of an inquiry is to be perceived through the adjudicative lens rather than the truth-seeking, public functions of an inquiry. In this manner, the pursuit of truth is made to compete against the adversarial notions of justice/fairness; the pursuit of truth taking a second seat to justice. Consequently perpetuating a common misconception that inquiries are prone to rights infringements and abuse of power and thereby solidifying the perception that for an inquiry to function properly and fairly it must resemble the adversarial process and its standards.

This is not to suggest that the inquiry and its commissioner ought to disregard due process during the proceedings and deliberations. After all, the federal *Inquiries Act* as well as the individual provincial acts pertaining to the appointment and conduct of inquiries set out specific provisions to ensure that the inquiry carries out its investigation in a fair manner. Moreover, Cory J. made it clear that “[i]t is the commissioner who must be responsible for ensuring that the hearings are as public as possible yet still maintain the essential rights of the individual witnesses.”¹⁸⁶

However, this duty does not mean that a commissioner is to pursue fairness at the expense of an inquiry’s own public functions. Although the procedural protection afforded during court processes offer affected individuals significant guarantees of fairness and transparency, they come at the high price of public access and inquisitorial pursuit of truth. As Carver pointed out, “[t]he fact is, though, that many of the most important things that happen in the justice system take place out of sight of the public, and often under the protection of various immunities and presumptions of good faith that remove them from the scrutiny of the courts themselves.”¹⁸⁷ As an important adjunct to the proper administration of justice, it is essential that the inquiry safeguard its public virtues and functions. To that affect, the Supreme Court of

¹⁸⁶ *Phillips v. Nova Scotia*, *supra* note 58 at para. 175. Also see Carver, *supra* note 2 at 562.

¹⁸⁷ Carver, *supra* note 2 at 575.

Canada has indicated that “the public interest value of investigative inquiries outweighs concerns about their potential harm to individual interests of witnesses and subjects of investigation.”¹⁸⁸

Moreover, it is also important to emphasize, as O’Connor & Kristjanson did above, that “the primary purpose of an inquiry is not to find fault but rather to find facts”.¹⁸⁹ As such, the standards of due process, essential for the proper functioning of an institution tasked primarily with the finding of fault, should not be transferred onto and deemed normative in a truth-seeking context. According to Ruel, “the existence of a duty of fairness does not determine the requirements of fairness that will be applicable in a given set of circumstances. The concept of fairness is variable and its content has to be determined considering the specific context of each case.”¹⁹⁰ Accordingly, it is imperative to allow the commissioner “freedom to report her findings on the basis of whatever standard she considers most appropriate” and “take the initiative to go where the evidence leads and pursue new lines of investigation.”¹⁹¹

Alas, as seen above, despite judicial commissioners being equipped with wide powers of discretion concerning the standards of due process, they are continuously held up to the procedural and substantive commitments that ordinarily characterize their work as judges. The consequences of over-judicializing the inquiry process were summarized by Carver in the following terms:

[t]he need to respect individual rights is the principal explanation for the takeover of public inquiries by lawyers and judges, and the expenditure of time and money follows from the use of trial-like procedures. If public inquiries are intended in part to provide greater public access to government, *it must nevertheless be recognized that this access is now largely filtered through the language and habits of judges and lawyers.*¹⁹²

¹⁸⁸ *Ibid.* at 549.

¹⁸⁹ O’Connor & Kristjanson, *supra* note 101.

¹⁹⁰ Ruel, “The Rules of Fairness and Public Inquiries”, *supra* note 145 at 132. With respect to the appropriate standard of fairness applied during an inquiry also see MacKay & McQueen, *supra* note 5 at 261.

¹⁹¹ Ratushny, “Final Report”, *supra* note 184 at 383.

¹⁹² Carver, *supra* note 2 at 574.

Thus, this preoccupation with individual rights and due process, has not only led to the judicialization of inquiry functions and practices, but also to the judicialization of inquiry discourses that ultimately affect how “truth” is filtered and accessed by the general public, thereby undermining the very essence and purpose of an inquiry.

(3) Discourses of Accountability

Another example of how discourses of justice penetrate into the discussion of an inquiry’s role and function is the concept of accountability. As mentioned previously, one of the most essential functions of an inquiry is to get to the truth and relay it to the public with the ultimate goal of providing closure. This closure is to come in the form of accountability and answers to questions such as *why* the matter under investigation occurred and *how* it can be avoided in the future.¹⁹³ As Salter stated, “[i]n most of the inquiries about ‘wrongdoing’, the factors that encourage ‘wrongdoing’ are as important as the conduct of the individuals involved.”¹⁹⁴ Moreover, an inquiry is not oriented towards discovering the individual, organization or event(s) responsible for the matter under review or answering “who did what to whom”. These findings are merely a by-product of an inquiry’s quest to answer the bigger questions of *why* and *how* of accountability.¹⁹⁵

Specifically, Carver argued that “[a]ccountability means many different things. One meaning is that persons who have harmed others by their actions be found responsible and made to ‘pay for’ the harm they caused, through punishment or paying compensation.”¹⁹⁶ Carver called this “legal accountability”, which the justice system was designed to achieve; it is “coercive in

¹⁹³ Carver, *supra* note 2 at 542.

¹⁹⁴ Salter, “The Two Contradictions in Public Inquiries”, *supra* note 26 at 186.

¹⁹⁵ See Jamisch, *supra* note 109 at 493 and MacDonald, *supra* note 104 at 483.

¹⁹⁶ Carver, *supra* note 2 at 543.

nature” and “involves a retrospective inquiry into past events.”¹⁹⁷ In contrast, the Public Inquiry was designed to pursue “accountability in the sense of ‘getting the story out,’ of finding out who did what and when and *why*, and *how* similar events should be handles in the future.”¹⁹⁸

The difference between these two modes for achieving accountability was described by Cory J. in the following terms:

A commission of inquiry is neither a criminal trial nor a civil action for the determination of liability. It cannot establish either criminal culpability or civil responsibility for damages. Rather, an inquiry is an investigation into an issue, event or series of events. The findings of a commissioner relating to that investigation are simply findings of fact and statements of opinion reached by the commissioner at the end of the inquiry. They are unconnected to normal legal criteria. They are based upon and flow from a procedure which is not bound by the evidentiary or procedural rules of a courtroom. There are no legal consequences attached to the determinations of a commissioner. They are not enforceable and do not bind courts considering the same subject matter.¹⁹⁹

As such, an inquiry should properly be engaged with the “getting the story out” accountability or that of “naming” as Jamisch, MacDonald, and Centa & Macklem conceptualized it.²⁰⁰ Concepts such as liability, retribution, blame or punishment should not enter into the discourse of accountability during an inquiry given that an inquiry is not a proper mechanism for determining the issues of guilt or individual wrongdoing. To label an inquiry’s version of accountability as something other than what it should be is to risk public’s apprehension towards its effectiveness and efficiency as a unique public institution. More importantly, the way in which accountability is conceptualized, influences how the public perceives an inquiry’s function and evaluates its success.

¹⁹⁷ *Ibid.* at 542.

¹⁹⁸ *Ibid.* at 543 (emphasis added).

¹⁹⁹ *Canada (Attorney General) v. Canada (Commission of Inquiry on the Blood System)*, [1997] 3 S.C.R. 440 at para. 34.

²⁰⁰ See Jamisch, *supra* note 109 at 493-494; MacDonald, *supra* note 104 at 483-484; and Centa & Macklem, *supra* note 2 at 133.

Consider for instance MacDonald's observations made during an academic conference on commissions of inquiry:

The overall tenor of discussion about the use of this kind of instrument focused on concern about their *potential not just to investigate, but to attribute blame*. Indeed, some even went so far as to say that, *notwithstanding the apparently investigatory mandate of such inquiries, their real purpose is to fix blame* — at least by implication. All of us, understandably, fear being blamed for something we did not do. *This fear of blame is a subset of an even larger apprehension*. None of us wants to be wrongly considered responsible; Western socio-religious culture sees responsibility as a voluntaristic act — as a confession. For this reason, *it is almost as damaging to our sense of self to be “named” as it is to be “blamed.” Hence, the concern reflected in the obligation to give a section 13 notice. With inquiries, it is preferable that a situation, not a person be “named” and that “blame” be left to another process.*²⁰¹

Thus, MacDonald highlights how crucial it is that concepts such as “blame” not enter the discourse of accountability during inquiry proceedings. The consequences of perceiving an inquiry as an instrument for assigning blame are detrimental to the stability of the institution. Not only does the Public Inquiry become a mere conduit for adversarial dispute resolution, but the public perceives it as such thereby fearing and suspecting those essential public functions that make the inquiry unique. Hence the current pattern of over-judicializing inquiry proceedings and the consequent shift in the Public Inquiry image.

Yet, despite this cautionary tale, discourses of blame seem to be the trend. For instance, MacKay & McQueen conceptualized accountability as a process of assigning blame. According to them, the public is no longer satisfied with mere facts.²⁰² They argue that there is now a growing demand for accountability - an integral part of which is the concept of blaming - and the need to know “what really happened” in terms of “who should be accountable to whom” and the appropriate degree of responsibility to be assigned.²⁰³ By equating accountability with “blame”, MacKay & McQueen tread into the adversarial waters, implying that the search for truth is really about the search for a

²⁰¹ MacDonald, *supra* note 104 at 482 (emphasis added).

²⁰² MacKay & McQueen, *supra* note 5 at 249.

²⁰³ *Ibid.* at 249-250.

culprit who would bear responsibility and consequences for the events under inquiry investigation. Similarly, Shugarman subscribed to the discourse of blame. Although he insisted on avoiding legalization of the inquiry process and went out of the way to distinguish “blame” from “liability”, he nevertheless argued that the inquiry is a proper forum for “[e]stablishing who is accountable to whom, and responsible for what” and most importantly, the “quasi-policing aims of ‘gotcha’ and attaching blame to individuals, understanding and locating the responsibility of particular persons in authority.”²⁰⁴ In other words, Shugarman utilized the concept of “personal responsibility” as a foundation for his view of an inquiry’s primary function as a “fault-finding” institution.

Given this preference for the language of “blame”, it is not surprising that the public is increasingly interested in the “fault-finding” function of commissions rather than a commission’s role in addressing systemic issues.²⁰⁵ As MacDonald argued,

...the attribution of personal blame fits nicely into a model of individual ascription of responsibility. Seeking to allocate blame in situations of wrongful systems is a much riskier and much more difficult endeavour. *Yet the desire to turn an investigation of a system failure into a quest for individual wrongdoers is often what lies behind calls for “who did what to whom” inquiries: find the political actor who sinned; blame him or her; and make him or her take the fall. Acting in such a manner is to waste the opportunity presented by “who did what to whom” investigations.* Public inquiries, like ombudsman offices, furnish us the opportunity to find aggregations and commonalities. *Using the methods of epidemiology and social sciences we can attempt to root out wrongful system issues.*²⁰⁶

Essentially, there is a common desire to turn inquiries into adjudicative trials as the language of blame and individual accountability is one that those within the legal community – judges in particular - feel comfortable with. As Jamisch pointed out, “assigning blame is like a trial; if judges are appointed to inquiries, they will instinctively encourage a ‘who did what’

²⁰⁴ David P. Shugarman, “Commentary” 127 in Manson and Mullan, *Commissions of Inquiry*, *supra* note 2 at 139-140.

²⁰⁵ Centa & Macklem, *supra* note 2 at 153.

²⁰⁶ MacDonald, *supra* note 104 at 483 (emphasis added).

approach.”²⁰⁷ However, this does not encourage the best use of an inquiry’s functions and powers. In fact, the language of blame contributes to the reconceptualization of an inquiry’s true purpose and promotes a misleading image of the Public Inquiry institution.

Moreover, used in this sense, accountability is about more than just “getting the story out” and a means for proposing prospective solutions. Viewed from the liability-based perspective, the discussion of accountability brings concerns for individual rights front and center thereby encouraging apprehension from those engaged with and potentially affected by an inquiry. More importantly, the overuse of such justice-centered discourses creates uncertainty and scepticism amongst the public with respect to the utility and efficacy of the Public Inquiry. According to Jamisch, “[i]f the focus is placed on blame, it is understandable that significant procedural protections will be insisted upon (and the issue of potential criminal sanctions made even more acute), and this, in turn, may well limit the effectiveness of the inquiry process itself.”²⁰⁸ Even MacKay & McQueen recognized this side effect by stating that “[t]he contrast between those who say public inquiries go too far and those who say they do not go far enough highlights the opposing viewpoints on the purpose, effectiveness, and fairness of commissions of inquiry as tools of public accountability in Canadian society.”²⁰⁹ Essentially, the conceptualization of accountability goes a long way in structuring the Public Inquiry image and how the society perceives its functions and thus, success or failure.

Given the prevalence of over-judicialized discourses of accountability, independence and impartiality, as well as fairness, it is not surprising that there is this great divide and uncertainty among the public as to the Public Inquiry’s role and its efficacy. The inquiry and its commissioner are increasingly faced with the need to balance and justify their search for truth

²⁰⁷ Jamisch, *supra* note 109 at 495.

²⁰⁸ Jamisch, *supra* note 109 at 493.

²⁰⁹ MacKay & McQueen, *supra* note 5 at 286.

against the adjudicative standards of justice. The real challenge, however, is to preserve the essence of the Public Inquiry by engaging in discourses of truth and utilizing them to substantiate the inquisitorial model within the inquiry setting.

B. The Discourses of Truth

Having identified the discourses of justice most commonly used to analyze the purpose and efficiency of an inquiry, it is necessary to examine the discourses of truth, their nature, how they are transmitted, and more importantly, the message they send about the social value of an inquiry's public function. But first, what is "truth", how is it conceptualized and what purpose does it serve? It is relatively simple to identify justice discourses, after all the North American society has been taught to accept adjudicative forms of justice as the norm and utilize their paradigm, standards, concepts and language to analyze and evaluate all other modes of justice. In contrast, truth discourses are often illusive as they are influenced by the context and their source and may therefore be confused with discourses of justice.

For instance, according to Jackson, "[t]ruth is a function not of discourse, but of the enunciation of discourse."²¹⁰ In other words, "truth" is largely a matter of presentation and an activity of persuasion.²¹¹ It is a product of judgment that people make with respect to the plausibility and sincerity of claims-making processes such as a trial or an inquiry. More importantly, "[t]ruth itself is to be comprehended as the attribution of social value to specific discourses and meanings."²¹² Thus, truth is a process whereby values and norms dictate the discourses and concepts to be accepted as truths. As Foucault stated:

²¹⁰ Bernard S. Jackson, *Law, Fact and Narrative Coherence* (Merseyside: Deborah Charles Publications, 1988) at 2.

²¹¹ Or as Jackson called it, the process of "narrativisation of pragmatics". See *Ibid.*

²¹² Peter Goodrich, *Legal Discourse: Studies in Linguistics, Rhetoric and Legal Analysis* (New York: St. Martin's Press, 1987) at 157.

Each society has its regime of truth, its ‘general politics’ of truth: that is, *the types of discourse which it accepts and makes function as true; the mechanisms and instances which enable one to distinguish true and false statements*, the means by which each is sanctioned; *the techniques and procedures accorded value in the acquisition of truth*; the status of those who are charged with saying what counts as true.²¹³

Consequently, there may be different versions and discourses of truth (e.g., organic versus legal truth), different mechanisms for analyzing it (e.g., inquisitorial versus adversarial paradigm) and different procedures for acquiring it (e.g., inquiry versus trial).

For instance, Hughes described the process of truth-construction within the adversarial setting as follows:

Of the possible universe of truths, only those parts that pass the filters of relevance, materiality and admissibility become potential components of the constructed truth...*The truth as constructed in adversarial justice is what is left over after we remove from the universe of possible truths all those things that the parties choose not to adduce, all things that are unavailable, all things that are rendered inadmissible at the objection of a party, all things that are found to be unpersuasive, all things that are found to be untrue and all things that, though potentially true, are fundamentally unfair. What remains may appropriately be described as ‘nothing but the truth’, but not as ‘the whole truth.’*²¹⁴

Accordingly, the construction of truth (and the truth-seeking process itself) is governed by the norms and principles of the procedural setting that is in place. More importantly, however, it is highly dependent on the arbiter of truth; the person responsible for the determination and the final conceptualization of truth. As Hughes stated, “[i]nstitutionally, a legal fact-finding is ultimately true because the judge determined it to be so. It should be noted that does not release the judge from his or her obligation to seek the truth.”²¹⁵ In other words, it is up to the arbiter of truth (in most cases, the judge) to decide what facts are relevant, credible, admissible and fair.

²¹³ Michel Foucault, *Power/Knowledge: Selected Interviews and Other Writings 1972-1977*, ed. by Colin Gordon, trans. by Colin Gordon et al. (Brighton: Harvester Press, 1980) at 131 (emphasis added).

²¹⁴ Julia Hughes, *supra* note 82 at 281 (emphasis added).

²¹⁵ *Ibid.* at 276.

Therefore, “truth” is a product of the norms and values of the decision-maker. It is independent of the “truth” available and amenable to be discovered during the process.

In addition, it is important to note that the core elements required for something to be accepted as “truth” are very simple: a story does not have to be the “real” truth as long as it is believed or accepted to be true; it becomes accepted as truth when it is generated by an arbiter of truth who has legitimacy and is well trusted by the society.²¹⁶ As such, the basic requirement is an independent and impartial arbiter in whom the public has confidence and trust – a member of the judiciary. In turn, a judge is given the power to construct facts according to the dictates of his/her professional tradition and governing paradigms; these facts are then presented to be accepted as “truths” by the public that holds judiciary in high regard. Consequently, the accepted “truth” may not be the *whole* truth or even the *real* truth, but it will be the *legal* truth that passes the test of judicial scrutiny.

What is important to take away from this brief analysis of the adversarial truth-seeking process is that it is also applicable to the public inquiry setting, especially where the inquiry is headed by a member of the judiciary. Given the dual obligations of the judge-commissioner as well as the ongoing conditioning by his/her professional commitments and social expectations, it is not surprising that many, if not most, inquiries will adopt some of the adversarial truth-generating practices described above. However, some inquiries may resort to this legalistic and highly judicialized conceptualization of truth more often than others. This is especially so in cases where there are parallel civil and/or criminal proceedings and more specifically, when the commissioner places protection of individual rights above his/her truth-seeking obligations. In such inquiries, the product is a “truth” that may be the most compatible with judicial notions of “justice” governing the adversarial setting. However, the risk is that the public may not accept

²¹⁶ *Ibid.*

this as the “truth”, or accept it merely as a partial truth, thereby undermining the judge-commissioner’s credibility and reliability and ultimately the public’s notion of justice.

To summarize, there is a “truths” spectrum that ranges anywhere from organic truth, unencumbered by the dictates of the truth-seeking process (i.e., the processing of facts into truths) or judicial decision-making to legal truth, one that is perpetuated by justice discourses. Moreover, it is a matter of the virtues and public functions of an institution to which social value is attached that ultimately determine which version of truth will become publicly affirmed, legitimated, and sanctioned. In this sense, truth discourses are socially and institutionally authorized. As McMullan put it, “[t]ruth is thus a consequence of the way that different claims are given credibility.”²¹⁷ In other words, “truth” is what the inquiry process delivers after information is processed into “facts” whereby certain sources of information are selected over others according to a standard of relevance and credibility – which is itself informed by a commissioner’s perceptions and value preferences. The remaining “facts” are further molded into particular truths that go through a further process of selection and categorization according to the character and dictates of a particular inquiry.

Although a discussion of the different versions of truth that an inquiry is capable of pursuing is beyond the scope of this paper, an analysis of truth discourses (concepts and ideas) most commonly utilized to legitimize the social function of the Public Inquiry, will facilitate a better understanding of the effect that discourses of justice have on its public image. After all, the discourses of truth are a foundation for all forms of truth-telling. As such, there are key concepts and ideas that all inquiry-produced “truths” rely upon to be socially and institutionally accepted as such. The presence of these concepts and ideas in discussions about Public Inquiries highlights the public functions and virtues of an inquiry that are (or should be) of social value.

²¹⁷ McMullan, *supra* note 140 at 26.

Most importantly, the use of truth discourses is telling of the distribution of value among the multiple functions of an inquiry or rather of what the society should value most in an inquiry. As such, it is now important to examine the language and concepts used to describe an inquiry's public functions and the image that they reinforce about the nature of the inquiry process and commissioner's role.

(1) Discourses of Inquiry Functions – Public, Openness, Transparency & Access

Although some of these concepts and ideas have already been explored in Section 1.1 of Part II above, it is important to illuminate their use as discursive tools of legitimation of an inquiry's social utility. One such tool is the concept of "social function" and its main constituents as they pertain to commissions of inquiry, of which Ruel provides an excellent summary:

To achieve its true purpose, an inquiry should be *accessible, open, transparent and public in the fullest sense*. Accessibility and openness not only means ensuring media access to inquiry proceedings. It also means facilitating public attendance at inquiry premises, making available to the media a spokesperson for the commission, *demystifying the inquiry process* through public statements made by commissioners or commission counsel, or generally *using plain language that the public will understand*.²¹⁸

The discourses of inquiry functions – public accessibility, openness and transparency – are frequently utilized in academic discussions in order to idealize the inquiry process; almost as an afterthought about what the inquiry *should* be rather than what it *is*. For instance, Kalajdzic summarized the essence of an inquiry into three functions - information and education; restorative justice; and socio-democratic – which she then used in order to evaluate the

²¹⁸ Simon Ruel, "Inquiry Process" 67 in *The Law of Public Inquiries in Canada* (Toronto: Thomson Reuters, 2010) [Ruel, "Inquiry Process"] at 68-69 (emphasis added). Similarly, Centa & Macklem summarized the functions of an inquiry as: "open, inclusive, accessible, and understandable; multidisciplinary, in the way that the law and legal system is to be viewed in a broad social and economic context; responsive and accountable through partnerships; and efficient and effective when formulating recommendations, taking into account cost-effectiveness and the impact of the law on the different groups and individuals." See *supra* note 2 at 154.

effectiveness of an inquiry.²¹⁹ Nevertheless, what is important to take away from her analysis is the language used to describe each of the unique functions. For instance, Kalajdzic identified the information and education function as essential to the public’s acceptance of inquiry’s findings “as an authoritative, impartial account” (rather than as being subservient to individual rights and due process);²²⁰ the restorative justice function as providing the public with closure or “a type of healing therapy” by acknowledging harms done to victims (rather than by punishing the perpetrators);²²¹ and the socio-democratic function as inspiring public confidence by revealing the truth (rather than censoring or editing evidence based on protection of rights concerns).²²² Similar language was used by Manson & Mullan to describe Justice O’Connor’s four key principles of an inquiry – thoroughness, expedition, openness and fairness – all of which they related back to the public aspect of the process.²²³ Accordingly, these social or “public” functions when utilized form component parts of the truth discourses that the Public Inquiry relies upon in order to be socially accepted as a valid institution.

Note that the discourse of functions places particular emphasis on the “public” nature of the processes that the inquiry should engage in. After all, Carver indicated that “[i]t is through the public nature of inquiry proceedings that the inquiry achieves one of its most important purposes: to assure members of the public that the “full story” is finally coming out, that actions and decisions that were taken behind closed doors will be exposed to the light of day.”²²⁴ Essentially, to be “public” is to relay “the truth, the whole truth and nothing but the truth”. Thus, the “public” concept plays a key role in any truth discourse pertaining to the Public Inquiry.

²¹⁹ Kalajdzic, *supra* note 3 at 185-191.

²²⁰ *Ibid.* at 185.

²²¹ *Ibid.* at 186-188.

²²² *Ibid.* at 189-190.

²²³ Manson & Mullan, “Lessons from Walkerton”, *supra* note 60 at 514.

²²⁴ Carver, *supra* note 2 at 544.

When discussing the “public” aspects of an inquiry, the general focus is on restoring public confidence by “bring[ing] evidence to light in a very public domain,”²²⁵ educating the public and making the process accessible to participation in the truth-seeking process of an inquiry.²²⁶ For instance, Grange described the public’s role in truth-seeking as a right: “[t]he public has a special interest, a right to know and a right to form its opinion as it goes along.”²²⁷ Similarly, according to Manson & Mullan, “...there is a public need not only to find answers, but also to participate in the process of developing those answers.”²²⁸ Clearly, for an inquiry to function at its optimum, the public has to play an active role in the development of “truth”. Thus, the presence of the “public” in truth-seeking processes and discourses is a given, it is a right.

The role of “public” and its significance in structuring the truth discourses engaged in by an inquiry has been thoroughly examined by Salter. Once again, specific attention was given to the social functions of an inquiry that facilitate unfettered discussion inclusive of all the public (and not just a few privileged members given the “party” status) on issues of public importance (rather than merely legal, private and/or restricted to a certain category of the “public”).²²⁹ As such, commissions have an effect on public perceptions, attitudes, and behaviour by engaging in a social process of action and interaction; a process that is itself influenced by the conceptualization of an inquiry’s “public” functions.²³⁰ The conceptualization of the “public”, on the other hand, is structured by the push and pull of a commissioner’s perceptions of “truth” and “justice”. For instance, a commissioner may justify a particular truth by linking it to certain

²²⁵ Salter, “The Public of Public Inquiries”, *supra* note 70 at 293.

²²⁶ Manson & Mullan, “Lessons from Walkerton”, *supra* note 60 at 513.

²²⁷ S.G.M. Grange, “How Should Lawyers and the Legal Profession Adapt?” in Pross, Innis & Yogis, *Commissions of Inquiry*, *supra* note 3, at 155.

²²⁸ Manson & Mullan, “Lessons from Walkerton”, *supra* note 60 at 514.

²²⁹ Salter, “The Public of Public Inquiries”, *supra* note 70 at 293.

²³⁰ *Report on Public Inquiries*, *supra* note 67 at 12.

“public” processes and/or stories that he/she deems legitimate according to the standards he/she prescribes to (i.e., discourses of justice).

Because different inquiries may have different notions of the “public”, the truth-seeking process will also take different form and certain truths will receive more attention from a commissioner than others. This means that not everyone’s story will be accepted as truth by an inquiry; not all participants will be even given a chance to be heard. But the inquiry will claim to be engaged in a public process as it is usually mandated to, generating public truths for the general public despite the fact that some of these truths will be constructed predominantly by the experts to the disregard of the layperson, or by the interest groups to the disregard of the disaffected, and so forth. It is a delicate act to find a balance between all the appropriate public interests, governed no less by a judge-commissioner’s dual obligations to truth and justice. It is this attempt to balance different truths and interests that is very telling of a commissioner’s inclinations, values, and assumptions about the validity of inquiry’s processes. Therefore, in order to understand the significance that the commissioner attaches to certain truth discourses, it is essential to examine *whether* and *how* he/she utilizes such discourses during an inquiry.

Bennett et al. addressed these questions in their evaluation of the Missing Women Commission of Inquiry.²³¹ Specifically, they illustrated that although certain measures were implemented to provide access and ensure openness to public participation – thus, creating the perception of the inquiry performing its social function – there was a lack of meaningful opportunity and protection of participatory rights (via thorough consultation and collaboration, standing and funding, limitations in the terms of reference, failure to utilize procedural

²³¹ Darcie Bennett et al. *Blueprint for an Inquiry: Learning from the Failures of the Missing Women Commission of Inquiry* (Vancouver: British Columbia Civil Liberties Association, 2012), online: BCCLA < https://bccla.org/our_work/blueprint-for-an-inquiry-report/ > [Bennett et al.].

flexibility, etc.) which ultimately undermined those initial measures.²³² For instance, Bennett et al. observed that “the voices of marginalized women were shoved aside while the ‘professional’ opinions of police and government officials took centre stage. The focus of the Inquiry was directed away from systemic issues, targeting instead individual participants in the system who may not have fulfilled their job requirements as expected.”²³³ Clearly, the discourses of justice were prioritized, limiting the quality of an inquiry’s truth-seeking processes and undermining its ability to adequately fulfil its social functions. More importantly, it compromised the legitimacy (and thus, the image) of the Public Inquiry as an accessible and transparent, public institution.²³⁴

As such, the presence or absence of certain truth discourses when examined in relation to a commissioner’s actual application of inquiry functions and processes is informative of the value placed by the commissioner on those social functions. For instance, the social functions of an inquiry assume the existence of a forum for exchange of ideas and “...the capacity of the inquiry commissioners and staff to keep an open mind, to be reflective, to be accessible and to permit the reciprocal exchange of views among people (and groups) treated as equals.”²³⁵ Of course, compromise of interests may need to be negotiated. Nevertheless, in an ideal setting, one where an inquiry’s social function is operating at full and unabridged capacity, the only limit to truth would be the public’s imagination. Where truth discourses show gaps or inconsistencies, it is as a consequence of an inquiry’s prioritizations and a commissioner’s imagination.

More importantly, the ultimate public image of an inquiry (and its social function) is affected by how the commissioner conceptualizes his role in facilitating access, openness and transparency. In other words, it is a question of a commissioner’s attitude which, as Ruel

²³² *Ibid.* at 7-9 and 19-28.

²³³ *Ibid.* at 5.

²³⁴ *Ibid.* at 5, 21, 24, and 54.

²³⁵ Salter, “The Public of Public Inquiries”, *supra* note 70 at 309.

indicated, requires that “commissioners and commission staff should keep an open mind throughout the investigative and hearing phases of an inquiry.... Inquiry proceedings should be transparent and consistent with the inquisitorial role of public inquiries, commissioners and commission counsel should put to rest traditional legal reflexes for an approach favouring cooperation and consultation.”²³⁶ It follows that the attitude of the commissioner or rather, his/her commitment to the virtues of the Public Inquiry will translate through the way in which he/she utilizes (if at all) the discourses of truth, simultaneously dictating the public image of an inquiry, which may not necessarily be embracive of its social functions.

(2) Discourses of Inquiry Processes – Credibility & Accountability

Another key contribution to the discourses of truth is the discussion of inquiry processes and specifically, the concepts of credibility and accountability. Although these concepts were addressed above as part of the analysis of justice discourses, they have a vastly different connotation when utilized for the purposes of legitimizing the *public* virtues of an inquiry process (rather than its similarities to the adjudicative proceedings). When applied with the intent of fostering the unique nature of the Public Inquiry, these discourses reinforce an inquiry’s social functions and public utility.

Specifically, the truth discourses, expressly or by implication, demonstrate that an inquiry attains credibility and accountability through different measures and processes. Unlike when used as part of the judicial discourses, credibility does not hinge upon the qualities and virtues of the judicial office or the judge-commissioner. An inquiry attains true credibility when it adequately performs its social function of being open, accessible and transparent during its truth-seeking proceedings. For instance, Bennett et al., conceptualized credibility as an inquiry’s

²³⁶ Ruel, “Inquiry Process”, *supra* note 218 at 69.

attainment of its truth-seeking potential by fostering reconciliation and credible fact finding that encompasses collaboration and open dialogue.²³⁷ According to Bennett et al., “a public inquiry is both capable of, and essential to, the goals of truth and reconciliation”, which are governed by the procedural structure of an inquiry.²³⁸ Thus, to be credible, the inquiry process must be geared towards truth-seeking (rather than justice-seeking) and reconciliation rather than adjudication.

In particular, the inquiry process must offer meaningful opportunities for public participation, consultation and collaboration and most importantly, be structured towards addressing systemic failures and preventing recurrences.²³⁹ When the process is overburdened by legal discourses that impose adversarial practices, the inquiry loses its public image and sight of its true purpose, and therefore, its credibility as a public truth-finding institution. For instance, Ruel showed concern over the judicialization of the inquiry process by suggesting that “[t]he real or perceived inefficiency, length and costs of public inquiries, attributed in part to a legalistic process with legal overtones, including public hearings, examination and cross-examination of witnesses, and adversarial positions taken by participants, is a cause of concern and should be addressed so that public inquiries can be maintained as a credible instrument of public policy.”²⁴⁰ From a practical point of view, Bennett et al. associated the public’s general disappointment with

²³⁷ Bennett et al., *supra* note 231 at 13-15 and 47.

²³⁸ *Ibid.* at 15.

²³⁹ *Ibid.* at 29, 37 and 45. For example, Bennett et al., *supra* note 231 at 13, argued that the success of an inquiry depends on its process being structured by its public virtues rather than legal rules and adversarial traditions:

Because public inquiries are typically concerned with understanding and addressing systemic failures rather than the attribution of *legal* responsibility to particular individuals, they are not bound by the same legal and procedural rules as more traditional legal mechanisms, such as in civil and criminal litigation. They are often more able to depart from strict evidentiary rules to ensure a complete picture of the events in question and to help foster reconciliation among affected communities; although, they must also ensure procedural fairness to the individuals and organizations whose reputations may be at stake. This task, while certainly presenting challenges, is both possible and necessary to ensuring the success of an inquiry like the Missing Women Inquiry.

²⁴⁰ Simon Ruel, “Conclusion” 177 in *The Law of Public Inquiries in Canada* (Toronto: Thomson Reuters, 2010) [Ruel, “Conclusion”] at 178.

the process and results of the Missing Women Commission of Inquiry with the inquiry being likened to and set up in the image of the adversarial legal system:

The manner in which the Inquiry was set up led to its adversarial nature. Without immunity (which may or may not have been appropriate depending on the witness and community sentiment, which was never canvassed), police officers sought representation by counsel. Without counsel and appropriate supports, witnesses and impacted community members felt betrayed and angry about the process. The goals of community healing and reconciliation appeared nowhere in the terms of reference or procedural set up. A high level of conflict combined with an unmitigated focus on a court-like fact finding process led to the development of more formal rules of evidence than may have otherwise been necessary.²⁴¹

Thus, the discourses of inquiry processes are those that normalize and orient themselves towards the social functions of an inquiry; embracing an inquiry's open and inquisitorial nature and avoiding getting bogged down by legalistic and judicialized language and terminology.

For example, a large part of an inquiry's truth discourses geared towards promoting and preserving its public essence, is the concept of "accountability". According to Kalajdzic, an inquiry offers "accountability of a different sort: it can answer questions about individual and institutional wrongdoing, and it can make recommendations for the future."²⁴² In other words, the Public Inquiry engenders "social accountability".²⁴³ The key word here is "social" and when utilized as part of the truth discourse, it signifies a search for truth rather than facts, prevention rather than detention, and dialogue rather than confrontation. The social nature of accountability was captured by the South African Truth and Reconciliation Commission in the following terms:

Courts are concerned with accountability in a narrow individualized sense. They deal essentially with punishment and compensation. Due process of law relates not so much to truth, as to proof. Before you send someone to jail there has to be proof of responsibility for the wicked details charged. When the penalties and consequences are grave and personalized, you need this constraining mode of proceeding. The nation wishing to

²⁴¹ Bennett et al., *supra* note 231 at 47. Similarly, Kalajdzic, *supra* note 3, argued that the secretive, closed and highly legalistic nature of the Iacobucci Inquiry prevented the inquiry from meeting its broader public purposes such as truth-seeking and educating, restorative justice, and "social accountability".

²⁴² Kalajdzic, *supra* note 3 at 189-190.

²⁴³ *Ibid.* at 190.

understand and deal with its past, however, is asking much larger questions: How could it happen, what was it like for all concerned, how can you spot the warning signs, and how can it be prevented from occurring again? If you are dealing with large episodes, the main concern is not punishment or compensation after due process of law, but to *achieve an understanding and acknowledgement by society of what happened so that the healing process can really start. Dialogue is the foundation of repair. The dignity that goes with dialogue is the basis for achieving common citizenship. It is the equality of voice that marks a decisive start, the beginning of a sense of shared morality and responsibility.*²⁴⁴

Note that the language used to describe the adversarial and inquisitorial process models is very much distinct. While the adversarial model is framed in highly individualized terms, the inquiry model is conceptualized as a holistic social process with the goal of achieving broad spectrum accountability in the form of open dialogue and reconciliation.

The social nature of accountability is also highlighted by the concepts of “naming” and “closure”. For instance, according to MacDonald “closure for victims demands above all else, that the evil be ‘named’”, both closure and naming (or truth) being the goals of a Public Inquiry.²⁴⁵ However, “[c]losure for perpetrators, conversely, does require blame — preferably self-acknowledged blame — prior to absolution. Where blame is externally attributed but not voluntarily assumed, neither the person wronged, nor the wrongdoer achieves real closure.”²⁴⁶ In other words, unlike under the adversarial process model, the process of determining truth and achieving closure does not require blame. In fact, commissions of inquiry should serve the purpose of “divert[ing] people from ‘a desire to assign blame and exact retribution’ into the ‘constructive’ role of participating in an exercise which can lead to both reform and avoiding the recurrence of the event that gave rise to the setting up of the Commission.”²⁴⁷ Consequently, the discourses of inquiry process should be forward-looking and prospective in nature; focusing not on “who did what to whom, but rather on what happened and how can a repetition be

²⁴⁴ As cited in Bennett et al., *supra* note 231 at 14 (emphasis added).

²⁴⁵ MacDonald, *supra* note 104 at 483.

²⁴⁶ *Ibid.*

²⁴⁷ Manson & Mullan, “Lessons from Walkerton”, *supra* note 60 at 513.

avoided.”²⁴⁸ Essentially, the inquiry process is about addressing systemic wrongs rather than a quest for individuals to blame.

As such, the discourses of blame should not enter into an inquiry’s narrative or its truth seeking processes. Doing so would create confusion as to the true nature and function of the inquiry and ultimately the legitimacy of the process used to fulfill them. Consequently, it is important to understand the implications of language use when referring to accountability in an inquiry setting as it can potentially restructure the inquiry process affecting its perception by the public. As MacDonald puts it:

Because “blaming” is what we believe our adversarial processes of criminal justice are designed to do, we transpose the idea to “who did what to whom” inquiries. Indeed, *even characterizing these investigations “who did what to whom” inquiries commits us to a certain manner of conceiving their mandate. By contrast, if that mandate were to be cast in the language of “naming,” the inquiries themselves would be understood more as “what factors lead to events like this happening” investigations.* Our expectations of the outcomes needed to achieve closure would then be much different.²⁴⁹

Thus, different conceptualizations of “accountability” have a particular impact on the type of questions asked, the process used to investigate them, and ultimately the findings made by an inquiry. As such, in order for the Public Inquiry to fully perform its social functions and maintain its public essence, it is imperative that preference is accorded to the truth discourses given that the acceptance of truth-seeking processes hinges on the ability of inquiry discourses to normalize and utilize these unique conceptions of accountability and credibility.

The reluctance to acknowledge the legitimacy of truth discourses is responsible for the growing concern regarding individual rights, which not only steers the inquiry towards the adversarial process model but more importantly forces the institution to choose between the search for truth and a quest for justice. According to Mackay & McQueen:

²⁴⁸ Jamisch, *supra* note 109 at 494. Also see Centa & Macklem, *supra* note 2 at 159.

²⁴⁹ MacDonald, *supra* note 104 at 483-484.

“Our legal system has reached a point where an adversarial encounter between parties with equal ability to put forward evidence is considered indispensable to the discovery of truth. A public inquiry defies this model by denying that there are adversaries, and yet providing the commissioners with the power to control the flow of information, placing all the other parties at a noticeable disadvantage. Rights claimants are reluctant to admit that the different circumstances of a public inquiry might justify a different approach to truth-seeking.”²⁵⁰

When the language is utilized in a way that suggests a competition between individual rights (justice) and the pursuit of truth, the public has a hard time believing and accepting that both justice and truth go hand in hand during an inquiry; that truth is a path to justice rather than *vice versa*. Constantly groomed to define justice as the only legitimate process used to determine truth, the society learns to compromise truth by making it a question of balance rather than the ultimate goal of the Public Inquiry.

(3) Discourses of Balance – Truth as a Question of Balance

This brings us to the discourses of balance and how they are utilized during an inquiry to justify either the institution’s search for the truth or a unilateral defence of the due process. According to MacDonald, “The field of ‘alternative dispute resolution’ teaches us that how we conceive and label situations largely predetermines both how we approach them and the range of outcomes we are prepared to accept.”²⁵¹ So it is with the question of balance. The public acceptance of an inquiry’s own unique functions and processes depends on how the question of balance is framed and discussed.

For instance, Mackay & McQueen conceptualize it as a “challenge”. Specifically, they argue that “[t]he challenge is to strike the proper balance between the flexible pursuit of the truth, one that is less impeded by technical rules of evidence and procedural challenges than the

²⁵⁰MacKay & McQueen, *supra* note 5 at 261.

²⁵¹ MacDonald, *supra* note 104 at 479.

courts, and the fair treatment of those who get caught up in these public inquiries.”²⁵² Mackay & McQueen’s conceptualization recognizes the significance of an inquiry’s flexible approach to the process of truth-seeking. Moreover, although the question remains as to where they would draw the line on proper balance, by framing “balance” as a “challenge”, they suggest that the truth-seeking process of an inquiry is valid and attainable if only challenging. More importantly, they specifically state that some “justice” will *need* to be sacrificed in an inquiry’s search for the truth.²⁵³ In contrast, right off the bat, Ruel skews the question of balance in favour of “strong procedural protection[s]” arguing that “while there are public benefits to conducting a public inquiry, it should not be achieved at the expense of the rights and interests of affected individuals, organizations or corporations, including privacy and reputational interests. This is a question of balance.”²⁵⁴ Thus, he seems to prioritize individual rights protections over the pursuit of truth, suggesting that truth is not worth the sacrifice of justice. In other words, despite the fact that the search for truth is the defining characteristic and essence of the Public Inquiry, an inquiry’s flexible and unconstrained process model (the very thing that allows for it to get to the truth) is not justified in light of the potential damage to reputations that it may cause.²⁵⁵

The concern then becomes whether it is a question of balance at all; whether truth can ever be worth the weight of justice; whether all this talk of an inquiry’s public benefit is mere window dressing used to trick the public into believing that the inquiry is a unique solution to social problems rather than just another arm of adjudication. Ruel’s conceptualization of balance seems to suggest just that. For instance, he defended the Public Inquiry as a “credible instrument of public policy” and argued that “[t]his balancing exercise should also consider more broadly

²⁵² MacKay & McQueen, *supra* note 5 at 291.

²⁵³ *Ibid.* at 292.

²⁵⁴ Ruel, “Inquiry Process”, *supra* note 218 at 69.

²⁵⁵ Ruel, “The Rules of Fairness and Public Inquiries”, *supra* note 145 at 134.

the guiding principles that should apply to the conduct of public inquiries – thoroughness, rigor, expedition, timeliness, efficiency, proportionality, cost-effectiveness, accessibility and openness to the public and fairness.”²⁵⁶ However, under the same breath Ruel also urged that for Public Inquiries “to remain relevant and vibrant, they shall need to stay abreast of the evolving legal framework” such as the increasing preoccupation with due process and individual rights protections.²⁵⁷ What Ruel was essentially suggesting is that the inquiry model and its pursuit of truth are outdated and incongruent with current trends and expectations, which seem to lean in favour of justice. To be sure, the public functions of an inquiry are to be held in high regard, but they are not to define the ultimate structure and process of a Public Inquiry. Accordingly, framed in a way that prioritizes justice to the detriment of truth, the discourse of balance suggests a paradox as there is no actual balancing taking place.

Nevertheless, all hope is not lost. After all, as MacDonald suggested, legitimacy of the inquiry model and its search for the truth is predetermined by how they are conceptualized and labelled.²⁵⁸ As such, the power lies in the ability of truth discourses to formulate the notion of “balance” in terms of an inquiry’s social functions and processes where eventually truth-seeking would not need to undergo through a game of balance in order to justify itself. As MacKay & McQueen would put it, it is a “challenge” but one that is achievable. For instance, a step towards this direction has been taken by Bennett et al., who conceptualized the process of balance as one where “meaningful” procedural protections encompass provisions for accessibility and witness participation rather than truth-hindering procedural and evidentiary exclusions.²⁵⁹

²⁵⁶ Ruel, “Conclusion”, *supra* note 240 at 178 and 181.

²⁵⁷ *Ibid.* at 181.

²⁵⁸ MacDonald, *supra* note 104 at 479.

²⁵⁹ Bennett et al., *supra* note 231 at 32-33.

Similarly, Van Harten argued that there can be “an *appropriate and workable balance* between the search for the truth and the protection of individual right.”²⁶⁰ According to Van Harten, when faced with a “divide between institutional effectiveness and individual rights, between principles of efficiency and fairness”, under appropriate circumstances the public interest in conducting an inquiry outweighs any potential jeopardy to individual rights.²⁶¹ Specifically, he referred to Cory J.’s reasons in *Phillips v. Nova Scotia* when describing the “appropriate balance” as: “...an inquiry of sufficient public importance could proceed, in spite of the prospect of a key witness facing a future criminal trial, as long as the witness enjoyed derivative use immunity for any evidence given at the inquiry, and as long as inquiry-related publicity did not prejudice the witness’s ability to receive a fair trial.”²⁶² Nowhere does he mention that the inquiry must sacrifice its search for the truth by instituting court-like procedures that favour protection of individual rights. In fact, Van Harten implied that those protections are to be implemented and observed within the adversarial context (i.e. the criminal trial).

Moreover, although referring specifically to the “inquiries that have coercive powers to compel testimony and production of documents, as opposed to broad policy inquiries”,²⁶³ Van Harten provided a great example of how truth discourses could be utilized to legitimize the social functions and public processes of an inquiry. For example, in defence of an inquiry’s exercise of coercive powers and in spite of the potential compromise to the rights of those affected Van Harten argued that:

Coercive powers are necessary to an inquiry because of the need to *provoke revelations* that people would otherwise rather not make. The inquiry must *shine light into dark corners where the public interest in uncovering the truth is more important than preserving private secrets*. Without coercive powers, it may be impossible for an inquiry to *respond to*

²⁶⁰ Van Harten, “Truth Before Punishment”, *supra* note 3 at 242 (emphasis added).

²⁶¹ *Ibid.* at 244 and 275.

²⁶² *Ibid.* at 272.

²⁶³ *Ibid.* at 243, note 1.

public demands for an independent and thorough investigation. Because of the serious potential impact on people’s lives, though, the guiding principle of an inquiry must be to *intrude only as far as is essential* to effectively carry out its mandate.²⁶⁴

Note that the language used is one that highlights an inquiry’s public virtues – its search for the truth, its dedication to the public interest and commitment to public demands. Moreover, Van Harten does not question an inquiry’s need to intrude on individual rights. In fact, he was explicit that “[t]he exercise of coercive investigative powers necessarily intrudes on people’s lives.”²⁶⁵ Despite this negative impact, he justified the intrusion by arguing that “coercive powers are essential to an inquiry’s ability to make a useful contribution to the public process”; that they are “an integral part of an inquiry’s capacity for credible fact-finding and forceful recommendations”; and more importantly, “[w]here the use of coercive powers is warranted, failure to use them can undermine the inquiry’s credibility.”²⁶⁶ Essentially, the very credibility of an inquiry hinges on its ability to utilize the powers granted to it, be they informal, extensive, and coercive in nature. Thus, Van Harten legitimized the search for the truth and even went as far as to suggest that the question of balance is redundant given that under appropriate circumstances truth should not be compromised by rigid adherence and observance of legal protections.²⁶⁷

Ultimately, however, Van Harten left the protection of an inquiry’s credibility in the hands of the commissioner arguing that:

The duty of the commissioner is to get to the truth. *There is a legitimate expectation that the commissioner will use his or her powers to ensure that an inquiry is both thorough and independent.* This means seeking out those with relevant information, compelling them to testify, securing relevant documents, and allowing an opportunity for those affected to participate in the process. A tenacious sense of independence is essential to

²⁶⁴ *Ibid.* at 257-258.

²⁶⁵ *Ibid.* at 257.

²⁶⁶ *Ibid.* at 249, 242, and 248.

²⁶⁷ *Ibid.* at 242-243. For instance, he argued that “[w]ith respect to existing legal protections for individual rights, the central issue is perhaps not whether an inquiry violates individual rights but rather whether an inquiry jeopardizes criminal prosecutions.” In which case, the question is whether “enhancing public confidence in the political process is deemed more important than securing a criminal conviction.”

the value of an inquiry, especially where the mandate involves the state itself or its representatives. Like nothing else, independence reflects *raison d'être* of inquiries. *Excessive restraint in the exercise of investigative authority would expose a commissioner to the criticism that he or she abridged the mandate, gave someone the 'soft shoe', or endorsed a cover-up.*²⁶⁸

As such, it is important to analyze the language used by the commissioner in the final report and recommendations in order to understand how (and whether) the importance of an inquiry's social function is relayed to the public and where on the balance are the principles of efficiency in comparison to those of fairness. Will the commissioner's dialogue and exercise of extra-judicial functions foster public confidence in and bolster credibility of the inquiry as a unique public institution?; or will it demonstrate "excessive constraint in the exercise of investigative authority", a reluctance to accept the necessity of an inquiry's intrusion on individual rights, and a general preference for court-like discourses and practices? These are the questions to consider when examining the impact of judicial discourses on the public image of an inquiry.

²⁶⁸ *Ibid.* at 246-247 (emphasis added).

PART IV: CASE STUDIES – JUDICIAL DISCOURSES IN PRACTICE

Having analyzed the discourses of justice and truth and their most common use in an inquiry setting, it is now only fitting to address the role that judge-commissioners have in proliferating these discourses. After all, it is the choice of words and actions assumed by the commissioner when faced with decisions respecting an inquiry's mandate and objectives, functions, and procedures that reflect to the outside the fundamental values and principles that the institution upholds. The commissioner is the face of an inquiry and ultimately dictates the image that the inquiry assumes before and for the public.

Accordingly, the goal of Part IV of this paper will be to zoom in on the judicial discourses by examining and analyzing two judicial inquiries: the Arar Commission²⁶⁹ and the Iacobucci Inquiry.²⁷⁰ The reason for choosing these particular inquiries as the focal point for discourse analysis is based on several factors. For one, both of the inquiries were created by the federal government and intended to inform and advise the national public; thus, making it highly likely that a broad spectrum of society was exposed to and influenced by the decisions and findings of the inquiry. In addition, all two of the inquiries occurred relatively recent in time and were highly publicised, meaning that there is a slew of data available and accessible for study and analysis. More importantly for the purposes of this paper, a judge was appointed to the position of a commissioner in all two of the inquiries and in all two, the judge-commissioner was presented with a complex set of circumstances (i.e., national security confidentiality issues) that forced him to make vital decisions respecting an inquiry's social functions, principles and values balanced against the presence of conflicting adversarial notions of independence and fairness and restrictive conceptions of "truth".

²⁶⁹ Arar Commission, *supra* note 51.

²⁷⁰ Iacobucci Inquiry, *supra* note 52.

Given that the focus is on “judicial” discourses and the role of the judge commissioner in shaping the public image of an inquiry, the discussion and analysis will be limited to those parts of the inquiry that directly reflect a commissioner’s opinions, decisions, and judgement. In other words, the intention here is not to describe the process of each inquiry or narrate all of the actions and decisions taken by the commissioner – that would require almost as much time as each of the inquiries took to fulfill their mandates and would be completely unnecessary given the scope of this paper. Rather, the objective is to provide succinct examples of judicial discourse use and its effect on the inquiry.

As such, the discussion of each of the two inquiries will draw on excerpts from: the inquiry’s terms of reference, opening remarks and statements made by the commissioner, commission reports, recommendations, and any rulings made by the commissioner during the inquiry that specifically address the inquiry’s mandate, goals and objectives, and procedural structure. These documents are a glimpse into the commissioner’s thought process and analysis; they are outlets through which the commissioner expresses his/her views, opinions and interpretations of the “true” functions of an inquiry. Thus, the analysis of these documents will facilitate an unravelling of a commissioner’s priorities and preferences for specific narratives, ideas, issues and assumptions; all of which are complicit in shaping the ultimate identity and image of the Public Inquiry.

A. Arar Commission²⁷¹

As discussed throughout the paper, openness and transparency are among some of the fundamental principles necessary for the proper functioning and survival of the Public Inquiry as a legitimate “public” institution. These principles are not always easy to uphold, especially

²⁷¹ Arar Commission, *supra* note 51.

where the circumstances pertain to national security confidentiality (hereinafter, NSC) and require adherence to high standards of confidentiality and secrecy as in the case of the Arar Commission and the Iacobucci Inquiry. Such circumstances are counterintuitive to the whole purpose of a Public Inquiry. Nevertheless, they must be dealt with and the way in which the judge-commissioner chooses to approach issues of confidentiality and secrecy during an inquiry is telling of his/her perception about the role and function of the said institution, which in turn, affects the public image of the inquiry.

(1) The “Challenge”

The Arar Commission is one such example where the investigation dealt with highly sensitive information, often requiring the commissioner to balance the needs for public access and transparency against NSC considerations. Undertaken by Justice O’Connor, the inquiry was established on February 5th, 2004 under Part I of the *Inquiries Act* in order to “investigate and report on the actions of Canadian officials in relation to Maher Arar (Factual Inquiry)” and his “extraordinary rendition” from a New York airport to a Syrian prison and “recommend an arm’s length review mechanism for the activities of the Royal Canadian Mounted Police with respect to national security (Policy Review).”²⁷² According to Whitaker, who served on the advisory panel to O’Connor J. for the second part of the inquiry, “[s]ince the subject matter of the inquiry was largely considered a matter of national security confidentiality, the issue of public disclosure of findings presented serious difficulties from the start....O’Connor has said that the Arar inquiry was the most difficult and complex task he has ever faced in his professional life, and most of these difficulties stemmed from the requirements of official secrecy imposed upon a ‘public’

²⁷² Arar Commission, “About the Inquiry”, *supra* note 51. For a summary of the inquiry also see Reg Whitaker, “Arar: The Affair, the Inquiry, the Aftermath” (2008) 9:1 IRPP Policy Matters 1 [Whitaker].

inquiry.”²⁷³ Thus, although the Commission had access to all relevant documents, regardless of their security classification, the real challenge was to ensure that the inquiry was publicly perceived as a credible fact finding institution.

According to O’Connor J., “[n]umerous procedural challenges arose from the tension among three different, sometimes competing requirements: making as much information as possible public, protecting legitimate claims of NSC, and ensuring procedural fairness to institutions and individuals who might be affected by the proceedings.”²⁷⁴ These are indeed competing interests that ideally should not have been imposed on an institution geared towards “public” goals (which O’Connor J. later summarized and referred to through his report). But their presence and center stage during the Arar Commission brings us back to the discussion about the discourses of “balance”, which O’Connor J. often utilized in order to justify his course of action. For instance, even the simple act of conceptualizing the investigative process of the inquiry as a “challenge”, pit truth against other values and implied the need for compromises, which O’Connor J. was obliged to do on several occasions – going as far as “direct[ing] major changes in the way the Inquiry would proceed - for the sake of the inquiry’s efficiency and survival.”²⁷⁵ And all this, despite having broad discretionary powers under the Commission’s “Terms of Reference” giving O’Connor J. full charge of the conduct and procedure of the Arar Commission.²⁷⁶

²⁷³ Whitaker, *supra* note 272 at 12. Also see Commission of Inquiry into the Actions of Canadian Officials Relating to Maher Arar, *Report of the Events Relating to Maher Arar: Analysis and Recommendations* (Ottawa: Minister of Public Works and Government Services Canada, 2006), online: <http://epe.lac-bac.gc.ca/100/206/301/pco-bcp/commissions/maher_arar/07-09-13/www.ararcommission.ca/eng/AR_English.pdf> [*Arar Report, Analysis and Recommendations*] at 279.

²⁷⁴ *Arar Report, Analysis and Recommendations, supra* note 273 at 279.

²⁷⁵ *Ibid.*

²⁷⁶ Commission of Inquiry into the Actions of Canadian Officials Relating to Maher Arar, *Report of the Events Relating to Maher Arar: Factual Background, Volume II* (Ottawa: Minister of Public Works and Government Services Canada, 2006), online: <http://epe.lac-bac.gc.ca/100/206/301/pco-bcp/commissions/maher_arar/07-09-13/www.ararcommission.ca/eng/Vol_II_English.pdf> [*Arar Report, Factual Background, Volume II*], “Appendix

Granted, it may be argued that it is the particular nature of the inquiry that brought these challenges to the fore (i.e., the NSC claims); that the commissioner was indeed obliged to engage in the discourses of balance thereby placing the search for truth at risk of becoming a sham; that it was the government to blame for calling a “public” inquiry into events that could not be publicly aired due to legitimate legal constraints. Even accepting that the inquiry was a creation of the government’s desperate attempt to shield itself from criticism by calling into effect an institution allegedly responsive to the public, the abundance of judicialized discourse in the Commission’s Report and Rulings must not be ignored. In fact, the Commission itself was a conglomeration of discourses of truth and justice vying for public attention.

This was the real “challenge” for the commissioner – the unavoidability of judicializing a process that may not have been the most appropriate for addressing NSC claims. Even O’Connor J. recognized as much. Specifically, referring to the related matters of Messrs. Almalki, El Maati and Nureddin brought before him by intervenors - and that would later become the subject matter of the Iacobucci Inquiry - O’Connor J. stated that:

[m]y experience in this Inquiry indicates that conducting a public inquiry in cases such as these can be a tortuous, time-consuming and expensive exercise. Quite properly, the public inquiry process brings with it many procedural requirements for openness and fairness. ...I will simply say that there are more appropriate ways than a full-scale public inquiry to investigate and report on cases where national security confidentiality must play such a prominent role. These types of cases are likely to occur from time to time, and it is not practical or realistic to respond by calling a public inquiry each time...Whatever process is adopted, *it should be one that is able to investigate the matters fully and, in the end, inspire public confidence in the outcome.*²⁷⁷

The implication here is that perhaps the highly judicialized and adjudicative nature of the inquiry process did not achieve what it was meant to do; that the search for truth was hampered by the

1(A) – Terms of Reference, P.C. 2004-48” at 583-586. For instance, under paragraph (e) of the “Terms of Reference”: “the Commissioner be authorized to adopt any procedures and methods that he may consider expedient for the proper conduct of the inquiry, and to sit at any times and in any places in Canada that he may decide”.

²⁷⁷ *Arar Report, Analysis and Recommendations, supra* note 273 at 277-278 (emphasis added).

uncompromising restrictions imposed by the NSC requirements on “openness” and “fairness” that may have done little to encourage public confidence in the process.

(2) The Guiding Principles

Despite these challenges and the continuous need to balance the quest for truth against NSC claims, O’Connor J. tried to compensate by giving his mandate a broad interpretation to ensure a thorough investigation and avoid “overly technical and legalistic approach to the Inquiry.”²⁷⁸ As mentioned previously, his mandate encompassed both a Factual Inquiry into the actions of Canadian officials in relation to Mr. Arar and a Policy Review with the goal of providing recommendations concerning review mechanisms for RCMP’s activities with respect to NSC.²⁷⁹ Despite O’Connor J.’s aversion to the application of the “legalistic approach” during the Commission, he nevertheless assumed the normalcy of the adjudicative process model for part of the mandate.²⁸⁰ For instance, he summarized that “[t]he two parts of the mandate are very different. As the name suggests, the Factual Inquiry involves adjudicative fact-finding – determining what Canadian officials did with respect to Mr. Arar.”²⁸¹ Specifically, O’Connor J. stated that “[t]he Factual Inquiry was conducted by way of evidentiary hearings, some held *in camera* and others, in public. The proceedings had many trial-like features. For example, lawyers played an important role, and witnesses were examined and cross-examined under oath or affirmation. In contrast, the Policy Review process was a research-based consultative study...”²⁸²

Perhaps O’Connor J. had no alternative but to cede to the norms of the adjudicative process model given the demands imposed by NSC claims. However, it is important to note the

²⁷⁸ *Ibid.* at 12. For the Mandate’s “Terms of Reference” see *Arar Report, Factual Background, Volume II*, “Appendix 1(A) – Terms of Reference, P.C. 2004-48”, *supra* note 276 at 583-586.

²⁷⁹ *Ibid.*

²⁸⁰ *Ibid.* at 281.

²⁸¹ *Ibid.*

²⁸² *Ibid.*

ease with which he accepted that the Fact Finding process will be adjudicative in nature rather than inquisitorial. O'Connor J. provided no rationale or justification for the approach. In fact, it was stated as a given that the investigation would assume an adjudicative course - it is what the public is used to; what is perhaps expected from those involved; and what the judge-commissioner himself felt at ease and comfortable with given his professional upbringing in adjudicative culture. This observation is not meant as a criticism of how O'Connor J. conducted his Commission, but rather to point out how discourses of justice are often taken for granted even within an institution geared towards "truth-seeking" rather than the court-like collection of "evidence". Nevertheless, despite having his work cut out for him, O'Connor J. still managed to make important observations regarding the purpose of the Commission as a public institution as well as its guiding principles – if only existing and enforceable in the abstract.

Although in theory the mandate gave O'Connor J. broad powers of discretion, his control over the process was limited by the same mandate's direction to protect NSC and the resulting concerns for fairness.²⁸³ Despite these limitations, O'Connor J. found it pertinent to emphasize the importance of "the public" to the validity of the commission as a public institution. He insisted that:

[t]he government chose to call a public inquiry, not a private investigation. *Implicit in the Terms of Reference is a direction that I maximize the disclosure of information to the public, not just in my report, but during the course of the hearings. The reason for that direction is consistent with what are now broadly accepted as two of the main purposes of public inquiries: to hear the evidence relating to the events in public so that the public can be informed directly about those events, and to provide those who are affected by the events an opportunity to participate in the inquiry process.*

It has often been said that this is not a normal public inquiry, where it is possible to hear virtually all of the evidence in public. On the contrary, because of the NSC claims, only part of the evidence can be heard in public, only part of the story can be told. That is the reality. However, that reality does not mean that I should readily abandon the concept of public hearings for all or even part of the evidence that is not subject to NSC claims. I

²⁸³ *Ibid.* at 282-284.

*think it behooves me as Commissioner in a public inquiry to take reasonable steps to attempt to maximize, during the hearing stage of the Inquiry, the disclosure of information to the public.*²⁸⁴

Accordingly, O'Connor J. read into the Terms of Reference (hereinafter, the Terms) the public aspects of the inquiry and the importance of the "public" concept to the stability and survival of the Commission. In other words, despite the NSC claims, the Commission must still pay allegiance to its "public" roots even if "only part of the story can be told" – and even then with the chance of it being misleading - because otherwise what is the point. As such, O'Connor J. made public disclosure one of his primary responsibilities as a commissioner and tied it directly to the guiding principles of the Commission: thoroughness, expeditiousness, openness to the public, and fairness.

O'Connor J.'s discussion of the guiding principles upholds the structural and component nature of the discourses of truth. For instance, he argued that:

To realize this duty of independence and impartiality, an inquiry must be *thorough* and examine all relevant issues with care and exactitude, to leave no doubt that all questions raised by its mandate were answered and explored. In order to be effective, a public inquiry must also be *expeditious*. Expeditiousness in the conduct of a public inquiry makes it more likely that members of the public will be engaged by the process and will feel confident that the issues are being appropriately addressed.

This is a public inquiry. It was therefore essential that the proceedings be transparent, accessible and *open to the public* as possible. The principles discussed above all stem from the public's interest in an inquiry. It is important to remember, however, that inquiries can have a serious impact on those implicated in the process. Thus, an inquiry must balance the interests of the public in finding out what happened with the rights of those involved to be treated with *fairness*.²⁸⁵

²⁸⁴ Arar Report, *Factual Background, Volume II*, "Appendix 6(J) - Ruling on RCMP Testimony", *supra* note 276 at 773-774 (emphasis added).

²⁸⁵ Arar Report, *Analysis and Recommendations*, *supra* note 273 at 282 (emphasis in the original). These are the same guiding principles that O'Connor J. subscribed to during the Walkerton Inquiry. See Ontario, *Report of the Walkerton Inquiry, Part One* (Toronto: Queen's Printer for Ontario, 2002), online: <http://www.archives.gov.on.ca/en/e_records/walkerton/report1/index.html> [Walkerton Inquiry Report] at 472-474.

Specifically, O'Connor J. identified independence and impartiality with thoroughness or the pursuit of truth – which is one of the virtues of a Public Inquiry - rather than with the legalistic notions of justice underpinning judicial qualities that the government commodifies in the process of appointing a judicial figure to head a commission of inquiry. In other words, O'Connor J. did not hold up independence and impartiality as the goals or primary virtues of a Public Inquiry, but rather as stepping stones to the search for truth; they are qualities that inform the higher virtue of an inquiry – to instill public confidence (or as O'Connor J. put it, “leave no doubt”) via truth. Thus, O'Connor J. reinforced the discourses of truth by suggesting that to be credible the inquiry process must be geared towards truth-seeking (rather than justice-seeking).

Similarly, O'Connor J. conceptualized expeditiousness as a likelihood of a meaningful public participation and utilized it as a measure of an inquiry's effectiveness. For instance, an inquiry process “bogged down in procedural wrangling”²⁸⁶ is unlikely to be effective in the sense that it will inhibit public interest, engagement, participation and thereby confidence in the truth-seeking process. Once again, O'Connor J. emphasized that the credibility of an inquiry stems from its public virtues; an inquiry's capacity for truth-seeking is meaningless without public engagement. In other words, public confidence (and the inquiry's credibility as a valid public institution) originates from realizing its socio-democratic functions²⁸⁷ – remaining public, open, transparent and accessible - rather than merely reiterating its capacity for truth-seeking as implied by the Terms and the governing legislation. O'Connor J. realized as much when he accepted transparency, accessibility, and openness as the inquiry's guiding principles.

However, when referring to the final guiding principle – fairness – O'Connor J. differentiated it from the rest by suggesting that it has no grounding in the public interest and

²⁸⁶ Walkerton Inquiry Report, *supra* note 285 at 473.

²⁸⁷ See Kalajdzic, *supra* note 3at 189-190 for further summary and discussion.

brought the conversation back to the discourses of balance and the challenges that it presents to the search for the truth. In other words, the interests of the public and the truth-seeking functions of an inquiry were portrayed as obstacles to fairness and as such, must be bound by principles of justice if only to ensure that the inquiry is fair. This is not to suggest that the principle of fairness should be absent from any considerations regarding inquiry proceedings. Rather, this is a point about the role of legal discourse during the inquiry and the impressions that it creates with respect to inquiry function and utility.

For instance, although in the above comment O'Connor J. separated the principle of fairness from the other guiding principles - that are unquestionably tied to the public nature of an inquiry - in his discussion of the Policy Review Process, O'Connor J. depicted the same principle in a completely different light. Specifically, he stated that “[t]he the principle of fairness is inextricably linked to the principle of openness and accessibility.”²⁸⁸ Meaning that in order to satisfy the principle of fairness, O'Connor J. saw that as a commissioner it was his duty to provide “meaningful opportunity” for public contribution to the inquiry as well as “endeavour[ed] to keep the public informed of the material information and issues that I was considering, not only to solicit comments, but also in the interest of fairness to the public.”²⁸⁹ Accordingly, O'Connor J. conceptualized “fairness” as an extension of the public nature and function of the inquiry rather than as an oppositional interest likely to restrict the quest for truth. In other words, “fairness” was framed as being part and parcel of the “public” in the Public Inquiry. In this way, the language use emphasized “truth” as a way to “justice” rather than vice versa (as in O'Conner J.'s first definition of the fairness principle).

²⁸⁸ Commission of Inquiry into the Actions of Canadian Officials Relating to Maher Arar, *A New Review Mechanism for the RCMP's National Security Activities*, “Chapter XII: Policy Review Process” (Ottawa: Minister of Public Works and Government Services Canada, 2006), online: <http://epe.lac-bac.gc.ca/100/206/301/pco-bcp/commissions/maher_arar/07-09-13/www.ararcommission.ca/eng/EnglishReportDec122006.pdf> at 613.

²⁸⁹ *Ibid.*

Of course, the quest for truth would be already bound by the applicable legislation (be it the federal *Inquiries Act* or the individual provincial legislation pertaining to the conduct of inquiries). As such, there should be no further need to bind the judicial principle of fairness to the already entrenched standards of inquiry procedure that encompass protections for individual rights. The inquiry discourse should not be overwhelmed with discussions of how to prevent adverse risks to reputations, how to avoid the risk to any potential criminal proceedings, or even the need to expose available information to rigorous evidentiary processes that are the domain of the trial courts in order to displace those risks. Even O'Connor J. recognized that those risks are the price to pay in the search for truth as he cited Justice Cory stating in the Blood Inquiry case that "...it is clear that commissioners must have the authority to make those findings of fact which are relevant to explain and support the recommendations even though they reflect adversely upon individuals."²⁹⁰ An inquiry is not the place for sorting out personal rights and interests; it is about delivering justice to the public through a fair process.

Simply put, the discourse of justice should not consume the true nature and qualities of an inquiry. Unlike in the adversarial context, justice and the related legalistic discourses should not define the course to truth. Rather, the quest to truth shall reveal justice to the public. After all, that is why the inquiry was created in the first place. At its optimal, the institution is meant to restore public confidence in the government and the society in general and thereby, the belief that justice does exist. As O'Connor J. put it, "I believe that the public credibility of this inquiry, and the government who called it, will be enhanced if we work together to make public as much

²⁹⁰ *Arar Report, Analysis and Recommendations*, *supra* note 273 at 288.

information as possible during the public hearings.”²⁹¹ Thus, truth equals confidence; the more information made available to the public, the more justice is served.

Perhaps, O’Connor J. attempted to instill some of that confidence with his Report by continuously referring back to the guiding principles of his Inquiry so as to assure the public that he is dedicated to addressing their concerns and needs. For example, in one of his rulings on the RCMP witness testimony, O’Connor J. insisted on the witnesses’ participation during the public hearing as a ground for securing credibility of the Inquiry before the public.²⁹² Specifically, O’Connor J. argued that providing the involved parties with “the opportunity to hear the evidence” and thus, with meaningful participation in the process, “maximizes the chance of a fuller picture emerging from this Inquiry” and ensures, at the very least, “a useful and informative story for the public”.²⁹³ In this way, O’Connor J. utilized the principles of openness and thoroughness as a means for procuring public’s trust in the process - after all the truth will get out however limited it may be. He even underscored that procedural fairness cannot be stretched so far as to preclude all of the RCMP testimony from the public hearing despite the potential risk of prejudice.²⁹⁴

Moreover, O’Connor J. went as far as to connect these guiding principles to the general justice system in order to justify the Commission’s truth-seeking objectives as well as his attempts as a commissioner to make public as much information as possible even in light of the NSC claims. Specifically, in order to justify his decision to call RCMP witnesses during the public hearings of the Inquiry, O’Connor J. argued that:

²⁹¹ *Arar Report, Factual Background, Volume II*, “Appendix 6(J) - Ruling on RCMP Testimony”, *supra* note 276 at 776.

²⁹² *Ibid.* at 776.

²⁹³ *Ibid.* at 775.

²⁹⁴ *Ibid.* at 777.

[o]penness and transparency are hallmarks of legal proceedings in our system of justice. Exposure to public scrutiny is unquestionably the most effective tool in achieving accountability for those whose actions are being examined and in building public confidence in the process and resulting decision. As Fish J. aptly put it in the *Toronto Star* case, ‘In any constitutional climate, the administration of justice thrives on exposure to light – and withers under a cloud of secrecy.’²⁹⁵

Aside from the significance that O’Connor J. attached to the public principles of an inquiry, it is interesting to note that he found it necessary to validate the inquiry’s quest for truth - to substantiate its public functions. By arguing that “exposure” is a hallmark of the administration of justice, O’Connor J. suggest that it can therefore be legitimately pursued by the inquiry. In other words, O’Connor J. conceptualized the principles of openness and transparency in terms of the discourses of justice. In fact, the above statement is primarily about the administration of justice; the pursuit of truth being merely a subsidiary to. Not to suggest that justice is not one of the goals of an inquiry – in fact, truth is justice within the inquiry context. However, this noticeable desire to bring in to the discussion the “system of justice” says something about the current discursive trends in relation to the inquiry. Namely, such conceptualizations of the relationship between justice and truth suggest that the inquiry process is an extension of the traditional system of justice rather than a separate institution with truth as its form of justice.

The overbearing presence of such discourses of justice during the decision-making processes of the Arar Commission is but the tip of the iceberg of their real impact on the unique identity of the inquiry as an inquisitorial, truth-seeking process as well as the inquiry’s effectiveness in the eyes of the public. Namely, in order to stay true to its public nature, the inquiry must epitomize it not only in its functions (and the declarations of such) but also in the implementation of its processes. In fact, this was the real challenge encountered by O’Connor J. and one that seemed to inhibit the Commission’s quest for truth.

²⁹⁵ *Arar Report, Analysis and Recommendations*, *supra* note 273 at 304.

(3) Practice & Procedure – The Struggle between Truth & Justice

Take for instance the incongruous nature of O'Connor J.'s formulation of and his ultimate approach to the Commission's "Rules of Procedure and Practice". Specifically, while O'Connor J. emphasized that "[i]n formulating the Rules I have been guided to the extent possible by four principles: thoroughness, expedition, openness to the public, and fairness,"²⁹⁶ he nevertheless admitted that putting the principles of openness and fairness to practice will not only present a challenge but will likely be impossible on occasions where NSC claims are made.²⁹⁷ Although O'Connor accepted the Commission's public principles as foundational, the Commission's Terms were such as to inhibit a "public" search for the truth. According to O'Connor J., "[p]aragraph k of those Terms directs that I take steps to prevent public disclosure of information that would be injurious to international relations, national defence or national security (national security confidentiality). As a result, it is inevitable that some of the evidence will have to be heard *in camera* and in the absence of parties and their counsel."²⁹⁸ Thus, right from the get go, limits were set to *how* the Commission pursued truth and *which* truth it would make available to the public; right from the start truth was in competition with justice.

Nevertheless, despite being circumscribed by legitimate NSC claims, O'Connor J. was ultimately in charge of determining the legitimacy of those claims and selecting the information heard *in camera* that could properly be disclosed to the public. Most importantly, he designed the Rules of Practice and Procedure (hereinafter, the Rules) and it is their application that ultimately speaks volumes about the true state and nature of the Commission's function. According to O'Connor J., "[i]n designing the Rules I have attempted to minimize, to the extent possible, the

²⁹⁶ *Arar Report, Factual Background, Volume II*, "Appendix 2(B) – Ruling: Rules of Procedure and Practice", *supra* note 276 at 604.

²⁹⁷ *Ibid.*

²⁹⁸ *Ibid.*

impact of the *in camera* hearings on the principles of openness and fairness.”²⁹⁹ Thus, even O’Connor J. recognized the importance of putting these functions to practice. In fact, given the confidential nature of much of the information reviewed by the Commission, it is likely that O’Connor J. considered it his duty as a commissioner to safeguard these public principles by entrenching their substance in the Rules.

Specifically, in his ruling on NSC, O’Connor J. made sure to address the ever more essential goal of engaging the “public” aspects of the inquiry, especially in a context adverse to the principles of openness and transparency. According to O’Connor J.:

[i]n itself, the calling of a public inquiry is a significant event in a parliamentary democracy. Public inquiries are often called in the wake of a tragedy or a scandal. When the public’s confidence in public officials or institutions has been shaken, the public’s demand to know all of the details about what has occurred is often the catalyst for the calling of a public inquiry. Because a public inquiry is established to be independent of the government, it has the advantage of bringing to light, in an impartial and independent way, those facts that are necessary to assess the situation that triggered public concern. *One of the great advantages of a public inquiry is that it can expose all of the facts, many of which might not be revealed in normal public discourse.*

As important as the Commissioner’s report, at the end of an inquiry, is the process of public exposure of the facts that allows the public to make its own evaluation over time. I agree with Justice Samuel Grange, who conducted two public inquiries, when he said in “How should lawyers and the legal profession adapt?” (1999) 12 Dalhousie Law Journal 151 at 154-55:

I remember once thinking egotistically that all the evidence, all the antics, had only one aim: to convince the commissioner who, after all, eventually wrote the report. But I soon discovered my error. They are not just inquiries; they are public inquires....³⁰⁰

Given the above, it is clear that O’Connor J. deemed the unique public nature and the truth-seeking capacity of the inquiry as a basis for its very existence and utility. He cited the “process of public exposure of facts” as the ultimate indicator of an inquiry’s effectiveness and legitimacy

²⁹⁹ *Ibid.*

³⁰⁰ *Arar Report, Factual Background, Volume II*, “Appendix 6(F) – Ruling on National Security Confidentiality”, *supra* note 276 at 720-721, paras. 37-38 [emphasis added].

as a public institution. In other words, it is all about the “process” of putting the inquisitorial and truth seeking functions of an inquiry to practice.

Accordingly, O’Connor J.’s interpretation of the Terms that dealt directly with the public disclosure of information over which the government claimed NSC was informed by the public aspects of the inquiry process and thus, embraced a generous and flexible approach to disclosure. For instance, O’Connor J. argued that,

I recognize that this Inquiry is different from others in that it is concerned with many matters that, for reasons of NSC, cannot be publicly disclosed. Even so, I think it important that I bear in mind, under section (k)(iii), *the fundamental point that the government established a public inquiry, rather than a private investigation*, in the case of Mr. Arar.

Moreover, the government specifically directed me to opine on what constitutes sufficient public disclosure. In forming that opinion, it is important to consider the public nature of the Inquiry and the importance of providing as much information as possible to the public. Consistent with this approach, section (k)(ii) of the Terms of Reference, speaks of maximizing disclosure. It reads:

In order to maximize disclosure to the public of relevant information, the Commissioner may release a part or a summary of the information received in camera and shall provide the Attorney General of Canada with an opportunity to comment prior to its release... [emphasis added].

Thus, *I am satisfied that I should consider as one of the factors in the balancing exercise, under section (k)(iii), the fact that the sufficiency of public disclosure is being determined in the context of a public inquiry.*³⁰¹

As such, O’Connor J. framed his approach to NSC claims in a more liberal manner – inclining towards public disclosure - than he would have otherwise outside of the inquiry context. Essentially, he conceptualized his role as well as the Commission’s mandate according to the discourse of truth. Despite being aware that much of the information received by the Commission would be heard behind closed doors, O’Connor. J. nevertheless attempted to salvage whatever he could of the essence of the Public Inquiry process by at the very least providing as much “truth” as he could via public summaries. However, as will be shown below,

³⁰¹ *Ibid.* at 721, paras. 39-24 [emphasis added]. Also see Section (k) in *Arar Report, Factual Background, Volume II*, “Appendix 1(A) – Terms of Reference, P.C. 2004-48” at 584-585.

even these attempts proved futile against the constant habitual recourse to judicialized discourses, practices and procedures.

For instance, according to O'Connor J., "my role in deciding what could be made public was limited, and my decisions were always subject to review and challenge by the Government. Indeed, as I describe below, that reality led me to significantly alter the process for the Inquiry after the Government instituted a court challenge to my ruling about the disclosure of information in a summary of *in camera* evidence."³⁰² The mere fact that O'Connor J. found it necessary to justify his limited powers and the rigidity of the Commission's practices in relation to public disclosure and participation confirms that the Commission's public functions were deemed subservient to the requirements of justice – it was justice before the truth; truth was whatever justice would dictate it to be.

More importantly, by pointing to the unavailability of judicialization (i.e., the continuous subjection to rigorous scrutiny of NSC claims and the constant challenges to the disclosure from the government), O'Connor J. ultimately gave into the discourses of justice and went as far as to "significantly alter the process for the Inquiry" in an attempt to make it more conducive to such discourses and thereby less likely open to procedural challenges. Accordingly, despite the significance accorded to the public principles of an inquiry, when it came to practice and procedure, efficiency (and at the basic level, possibly the survival of the Commission) won over the principles of openness and fairness. As Ratushny summarized, "[t]he commissioner decided not to risk aborting the inquiry through ongoing legal challenges but to hear most of the evidence *in camera*. He then wrote a confidential report with reference to all of the evidence for the benefit of the government. Finally, he edited this report to remove portions he thought would be

³⁰² *Arar Report, Analysis and Recommendations*, *supra* note 273 at 284.

subject to NSC so that the edited report could be made public.”³⁰³ Thus, for the sake of avoiding continuous legal interruptions to his Commission proceedings, O’Connor J. had to suspend the most vital public functions of the inquiry.

To be fair, the nature of the issues and hence, the information investigated by the Arar Commission was adverse to the Commission’s public functions right from the start. Perhaps the Government was aware of this but called the Commission anyway in the hopes of appeasing public’s thirst for truth and justice.³⁰⁴ It is conceivable that by relying on the inquiry’s public functions and the respect they get from the general public, the Government assumed that it would gain back some of the credibility and confidence in its institutions. If that was the case, such assumption was misguided. Without the context allowing for their proper application, the public principles and virtues that are so emblematic of the Public Inquiry are virtually useless as a means for instilling public confidence in both the Government and the commission. Most importantly, if the Public Inquiry is continuously utilized in such a way as to devalue its public nature and aspects, it will lose its unique qualities and purpose, and become a mere extension of the adversarial system.

O’Connor J. was aware of just how important it was to put the public guiding principles to practice if only to maintain public confidence in the inquiry. To that effect, he devised the Rules in such a way as to provide for the preparation of public summaries of information heard

³⁰³ Ratushny, “Final Report”, *supra* note 184 at 400.

³⁰⁴ Even O’Connor J. recognized as much when he stated that:

[t]he second unusual factor about the case of Mr. Arar is that the government’s NSC claims are being raised in the context of a public inquiry. No doubt it was partly because of information about Arar that had become public, and the level of controversy that surrounded what happened to Mr. Arar, that the government sought to investigate what had happened. Significantly, the government chose to pursue a public inquiry, rather than a private investigation, into these events.

See *Arar Report, Factual Background, Volume II*, “Appendix 6(F) – Ruling on National Security Confidentiality”, *supra* note 276 at 719.

in camera, in an attempt to secure some form of public accessibility and transparency.³⁰⁵ Specifically, O’Connor J. hoped that his summaries of the *in camera* evidence would “keep the public informed, to the extent possible, of the evidence being heard *in camera*; and [to] provide the parties with as much information as possible about the *in camera* evidence before the public hearings took place.”³⁰⁶ Although in theory this may seem like a compelling solution to maintaining some semblance of openness and transparency, especially given the confidential nature of much of the information available to the Commission, in actuality it merely underscored the severity of the limits placed on public access to truth. Most importantly, the very process of generating a public summary illustrates just how adversarial the search for the truth had become.

Namely, according to O’Connor J.:

[f]inally, the summary in many instances does not fully reflect the probing of witnesses, by Commission counsel, particularly where relevant information in the testimony is being disclosed at the present time. *Information has been excluded or synthesized in the summary in order to present a logical account of evidence that is deemed to be both relevant and significant. The summary also excludes information that is subject to valid NSC claim and where, in the Commissioner’s opinion, the public interest in non-disclosure is not outweighed by the public interest in disclosure. Further, some information has been excluded for reasons of fairness, including consideration of the inability of individuals to cross-examine witnesses whose testimony affects those individuals, the need to account for conflicts in the evidence, and the need not to mislead the public.* In particular, to avoid unfairness, information has been excluded where it involves speculation or where it may be contradicted by other evidence. The unusual nature of publishing information by summary has led the Commission to exercise caution in avoiding undue emphasis on evidence that may yet be called into question.³⁰⁷

³⁰⁵ See Rule 48 in *Arar Report, Factual Background, Volume II*, “Appendix 2(A) – Rules of Procedure and Practice”, *supra* note 276 at 600:

If the Commissioner is of the view that notwithstanding National Security Confidentiality, such evidence should be disclosed publicly, the Commissioner may prepare a separate summary of the evidence. The Commissioner shall advise the Attorney General and provide the summary to the Attorney General, which shall constitute notice under section 38.01 of the Canada Evidence Act.

³⁰⁶ *Arar Report, Factual Background, Volume II*, “Appendix 6(H) – Ruling on Summaries”, *supra* note 219 at 758. See also *Arar Report, Analysis and Recommendations*, *supra* note 276 at 285.

³⁰⁷ *Arar Report, Factual Background, Volume II*, “Appendix 6(F) – Ruling on National Security Confidentiality”, *supra* note 276 at 738 (emphasis added).

It is not hard to see from the above that whatever the limited “truth” that the summary can provide to the public is a product of extensive and elaborate adjudicative procedures that process available information into “facts” whereby certain types and sources of information are selected over others according to a standard of relevance, credibility and fairness – which is itself informed by the commissioner’s perceptions and value preferences. The remaining “facts” are further molded into particular truths that go through a further process of selection and categorization according to the character and dictates of a particular inquiry. In this case, the compartmentalization of relevant and non-NSC compromising truths would proceed according to its “significance” and capacity to “present a logical account” without misleading the public.

Alas, even the public disclosure of such summaries was eventually abandoned during the course of the investigation. According to O’Connor J.:

...the discussions with the government about the contents of the summary and what parts of it could be disclosed publicly were *extremely time-consuming*. In the end, no agreement was reached and the government filed an application in the Federal Court challenging the disclosure of some parts of the summary.

In light of that experience, it became obvious to me that, *from a practical standpoint, the summary process is unworkable*. Were that process to be continued, discussions with the government about the contents of summaries and what parts may be disclosed publicly would be both complex and time-consuming....*The summary process, if continued, could lead to a series of potentially lengthy court applications, with ensuing delays of the work of the Commission and a substantial increase in the cost of the Inquiry.*³⁰⁸

Note that the Commissioner is concerned here first and foremost with the efficiency of the inquiry rather than its effectiveness, which would suffer even more due to such constraints on public truth. This suggests that perhaps the complex and time-consuming nature of generating public truths in the context of NSC claims is not worth the delays and costs that the process would impose on the Commission. Thus, for the sake of efficiency and to avoid bringing the

³⁰⁸ *Arar Report, Factual Background, Volume II*, “Appendix 6(H) – Ruling on Summaries”, *supra* note 276 at 758.

Commission's work to a "complete halt",³⁰⁹ O'Connor J. decided to implement a new procedure "designed to develop a more efficient, expeditious and workable process for the Inquiry."³¹⁰ According to him, "[t]his new approach meant that the public hearings would proceed on the basis that there would be no public disclosure of any information over which the Government claimed NSC, even when I disagreed with the claims."³¹¹ Thus, in the hopes of avoiding "a series of protracted and costly interlocutory proceedings", O'Connor J. would defer making any decisions with respect to the disclosure of information heard *in camera* until issuing his report.³¹² In other words, this meant that the implementation of the Commission's public functions would be suspended for the sake of efficiency and in light of the adversarial impediments to public search for truth.

O'Connor J. did make it clear that "the fact that information received at the *in camera* hearings has not been disclosed in the final summary does not foreclose disclosure of such information in a future summary or other public release."³¹³ In fact, the Government's tendency to "overclaim"³¹⁴ NSC over much of the information during Commission's proceedings was eventually pursued in Federal Court.³¹⁵ Although the Federal Court "ruled largely in favour of the Commission, additional material from the report was released almost a year after the initial publication."³¹⁶ By then, however, the damage had already been done to the public image of the Commission and the principles for which it stood.

³⁰⁹ *Arar Report, Analysis and Recommendations*, *supra* note 273 at 295.

³¹⁰ *Arar Report, Factual Background, Volume II*, "Appendix 6(H) – Ruling on Summaries", *supra* note 276 at 759.

³¹¹ *Arar Report, Analysis and Recommendations*, *supra* note 273 at 296.

³¹² *Ibid.*

³¹³ *Arar Report, Factual Background, Volume II*, "Appendix 6(F) – Ruling on National Security Confidentiality", *supra* note 276 at 714, para. 18.

³¹⁴ *Arar Report, Analysis and Recommendations*, *supra* note 273 at 302.

³¹⁵ See *Canada (Attorney General) v. Canada (Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar)*, [2008] 3 F.C.R. 248 (F.C.).

³¹⁶ Whitaker, *supra* note 272 at 14. Also see Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, "Arar Commission Discloses More Information to the Public", *Press Release* (Ottawa:

The abandonment of procedural safeguards to the public quest for truth signalled adversarial takeover of Commission processes. More important than that, the Government's over-assertions of NSC inhibited the inquisitorial process and undermined the general principles of openness, transparency and fairness. Even O'Connor J. admitted that the "public hearing process suffered" given that the Commission was prevented from addressing several important areas of its investigation during the public hearings.³¹⁷ He also found it necessary "to highlight the fact that overclaiming exacerbates the transparency and procedural fairness of the problems that inevitably accompany any proceedings that can not be fully open because of NSC concerns. It also promotes public suspicion and cynicism about legitimate claims by the Government of national security confidentiality."³¹⁸ Thus, the adversarial mentality that the Commission was eventually forced to assume as a consequence of avoiding "a complete and final halt"³¹⁹ of its proceedings only served to frustrate the public principles and foundation on which it stood. In other words, in order to ensure its "physical" survival, the Commission had to abandon its public spirit.

Perhaps the irony was not lost on O'Connor J. and in an attempt to remedy (or at the very least, compensate for) the circumstances he made a structural decision to proceed with the Policy Review process simultaneous to the Factual Inquiry.³²⁰ According to O'Connor J., "[s]ince it seemed possible that the public release of the Factual Inquiry report would be delayed because of NSC issues, I decided it was best to proceed with the Policy Review process, so as not to delay the delivery of that report."³²¹ Thus, O'Connor J. wanted to ensure that the delays and

August 9, 2007), online: <http://epe.lac-bac.gc.ca/100/206/301/pco-bcp/commissions/maher_arar/07-09-13/www.ararcommission.ca/eng/2007-08-09.pdf>.

³¹⁷ *Arar Report, Analysis and Recommendations*, *supra* note 273 at 303.

³¹⁸ *Ibid.* at 302.

³¹⁹ *Ibid.*

³²⁰ *Ibid.* at 281.

³²¹ *Ibid.* at 281-282.

impediments to public disclosure that were inhibiting the Factual Inquiry would not compromise the public utility of the remaining portion of the Mandate, especially when it operated under the same guiding principles. In other words, he attempted to salvage the public search for truth however limited it may be if only to maintain public confidence in the viability of the general functions of the inquiry process.

(4) Accountability via Public Access to Truth

Furthermore, despite the prevalent recourse to the discourses of justice and adversarial practices during Commission proceedings, O'Connor J.'s effort to preserve the fundamental, public nature of the inquiry could also be glimpsed in the way that he conceptualized "accountability". Being one of the essential goals of the inquiry, accountability is an important aspect of the truth discourses. To that effect, O'Connor J. confirmed that unlike the adversarial process, "a public inquiry should not be turned into a fault-finding exercise."³²² Instead, he focused on identifying the "shortcomings, as I viewed them, in what Canadian officials did or did not do in relation to Mr. Arar..."³²³ Essentially, according to O'Connor J., "accountability" was not a matter of determining guilt or innocence but rather a process of identifying and addressing unjust practices and systemic failings (i.e., lack of communication among the agencies, deficient screening practices, and inadequate training and experience, etc.).³²⁴

More important, however, is how O'Connor J. described the path to achieving accountability in the context of an inquiry. Specifically, during proceedings before the Federal Court regarding public disclosure of information over which the Government was claiming NSC, the Commission made the following submissions:

³²² *Ibid.* at 12.

³²³ *Ibid.* at 12 -13.

³²⁴ *Ibid.* at 15 and 26.

The Commission submits that disclosure is necessary to promote the “open court” principle. *Public inquiries play an important role in democracy* by ensuring that Government officials are accountable. A commission’s ability to reveal the truth to the public about a particular controversy may allow the public to regain its confidence in governing institutions. *The Commission also submits that only through maximum disclosure will the Government be exposed to public scrutiny, which is, according to the Commission “unquestionably the most effective tool in achieving accountability for those whose action [sic] are being examined.”*³²⁵

Accordingly, the public search for truth – a quality for which Public Inquiries are generally held in high regards – is the best method for achieving accountability and possibly encouraging public confidence in the government. Note that the principles of openness and transparency play an essential role in procuring such accountability. In other words, when these principles are impaired, the Public Inquiry’s capacity for securing accountability is also undermined given its limited ability to reveal truth to the public. Thus, “accountability” within the context of an inquiry should be defined and pursued in accordance with the institution’s public principles, especially in order to preserve the efficacy and utility of the inquiry.

Moreover, in addition to the principles of openness and transparency, O’Connor J. also referred to the principle of fairness as comprising an important element in the discourse of truth and accountability during inquiry proceedings. According to the Commissioner, “...the single most important factor in trying to ensure public accountability and fairness is for the Government to limit, from the outset, the breath of those claims to what is truly necessary. Litigating questionable NSC claims is in nobody’s interest.”³²⁶ Essentially, public truth delivers accountability and ensures fairness when it comes to Public Inquiries. For instance, in terms of “fairness”, O’Connor J. emphasized that the Commission owed Mr. Arar a common law duty of

³²⁵ *Canada (Attorney General) v. Canada (Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar)*, [2008] 3 F.C.R. 248 (F.C.) at para. 95 (emphasis added).

³²⁶ *Arar Report, Analysis and Recommendations*, *supra* note 273 at 304.

procedural fairness.³²⁷ To that effect, it was essential that Mr. Arar (and by extension, the public) was provided with maximum disclosure of the Government’s information especially in order to ensure that the search for truth – which, after all, was at the core of the Commission’s Mandate – would be based on the full view of the facts.³²⁸

Accordingly, conceptualized in terms of the discourses of truth, as was largely done by O’Connor J. above, both fairness and accountability are the products of truth. Being the foundation for fairness and “social accountability” (as opposed to “legal” accountability),³²⁹ the public search for truth is the essence of the Public Inquiry image. Not surprisingly, O’Connor J. argued that “[i]f it is possible to hold a public hearing, this should always be the first option.”³³⁰ In fact, it should be the only option in the context of a Public Inquiry. To do otherwise is to compromise the inquiry’s public image and open the floodgates to the judicialization of truth.

(5) Conceptualizing Truth

This brings us to the final topic of analysis pertaining to the Arar Commission – namely, what is “truth” or rather, how was it conceptualized during the course of Commission proceedings (particularly the Factual Inquiry)? It should not come as a surprise that given the subject matter of the Commission, “truth” became a product of an elaborate process. Not only was the Government’s “evidence” subject to extensive and vigorous cross-examination - the hallmark of adversarial approach to collecting relevant and credible evidence³³¹ - but it was further circumscribed when it came to its public disclosure. In fact, O’Connor J. indicated that he “relied on a variety of factors in deciding what information could be disclosed publicly” in the

³²⁷ *Arar Report, Factual Background, Volume II*, “Appendix 6(I) – Ruling on Process and Procedural Issues”, *supra* note 276 at 763.

³²⁸ *Ibid.*

³²⁹ Kalajdzic, *supra* note 3 at 190.

³³⁰ *Arar Report, Analysis and Recommendations*, *supra* note 273 at 304.

³³¹ *Ibid.* at 291-292.

report.³³² In addition to these factors (most of which are dedicated to addressing Government's grounds for NSC claims), O'Connor J. relied on multiple *in camera* hearings, submissions of the *amici curiae*, and the assistance of an expert advisor on NSC issues.³³³ Even the process of generating a mere public "summary" of the information heard *in camera* consisted of a balance of interests, considerations of relevance and significance, and exclusions for reasons of fairness.³³⁴

Notwithstanding the NSC claims, the resemblance of such procedures to the adversarial means for admitting evidence is striking. In fact, the final product was "evidence" - and it was called as such throughout the inquiry - rather than "truth" or even just a collection of "facts". In other words, "truth" was conceptualized according to the highly structured and rigid adjudicative standards. After all, within the context of an inquiry, truth should be much simpler, closer to its organic state, and require less processing; it should be as simple as the "truth". Nevertheless, contrary to the nature of a Public Inquiry, the Arar Commission processed, dissected, and compartmentalized truth. Even O'Connor J. revealed that "[t]here are two versions of the factual background. One, which may not be disclosed publicly, is a summary of all of the evidence, including that which is subject to national security confidentiality. The other is a public version, from which I have removed those parts of the evidence that, in my opinion, may not be disclosed publicly for reasons of national security confidentiality."³³⁵

Moreover, the Commission's report was "based primarily on the evidence of Canadian officials" and neither version of the truth included Mr. Arar's testimony.³³⁶ According to

³³² *Ibid.* at 301.

³³³ *Ibid.*

³³⁴ *Arar Report, Factual Background, Volume II*, "Appendix 6(F) – Ruling on National Security Confidentiality", *supra* note 276 at 738. Also see the discussion above regarding this topic.

³³⁵ *Arar Report, Analysis and Recommendations*, *supra* note 273 at 10-11.

³³⁶ *Ibid.* at 11.

O'Connor J. "[f]or reasons of fairness, it was not deemed appropriate for Mr. Arar to testify before the release of the Report, the idea being that the Report would provide the maximum amount of disclosure of information to him about what had occurred."³³⁷ Note that the principle of fairness was being utilized here as a means for processing facts or truths rather than as public principle directed at maximizing disclosure. Essentially, fairness was weighted against truth and in turn, truth became part and parcel of a balancing equation.

Most importantly, however, the absence of Mr. Arar's testimony created a huge gap in the "truth" that the Commission was ultimately able to publicly release. After all, the mandate for the Commission was "to investigate and report on the actions of Canadian officials in relation to Maher Arar..."³³⁸ However, that mandate was fulfilled by relying primarily on the facts as told by the Government officials. Mr. Arar's story and his version of the truth were heard through a fact-finder³³⁹ appointed by the Commissioner as well as third party statements.³⁴⁰ In fact, O'Connor J. made it clear that it was not necessary for him to hear Mr. Arar's testimony in order to fulfill his mandate.³⁴¹ He insisted that, "I do occasionally point out in the Report that Mr. Arar's evidence might shed additional light on a particular event or conclusion. In the main, however, I do not think that I was limited in any significant way by not hearing Mr. Arar's evidence."³⁴² The question remains, however, if this is sufficient? Does such thinking uphold the guiding principles of accessibility, transparency, and openness? Should the inquiry settle for half-truths as a result of the demands placed on it by the discourses of justice? Will this do it any justice?

³³⁷ *Ibid.* See also *Arar Report, Factual Background, Volume II*, "Appendix 6(I) – Ruling on Process and Procedural Issues", *supra* note 276 at 761.

³³⁸ *Ibid.* at 11.

³³⁹ *Ibid.* at 297.

³⁴⁰ *Ibid.* at 45.

³⁴¹ *Ibid.* at 296 and 304.

³⁴² *Ibid.* at 11.

The answer is in how “truth” is conceptualized. For instance, if viewed in terms of the discourses of justice, a one-sided tale may be satisfactory if there is even a possibility that the whole story will jeopardize the principles of adversarial justice. On the other hand, if viewed from the perspective of the truth discourses, “truth, the whole truth, and nothing but the truth” are a means to achieving public justice even if that means sacrificing some of the individual “justice” along the way. After all, a Public Inquiry is not a trial. Its main objective is to discover truth and deliver it to the public while bound solely by the flexible notions of procedural fairness. A Public Inquiry is not an Inquiry if its essential objective – the quest for truth – is jeopardized in the name of adjudicative justice.

Where concerns for justice define the nature and scope of truth, as in the case of the Arar Commission, it begs the question of whether an inquiry was the best approach for addressing these particular concerns. In other words, what is the use of an institution established as a means for instilling public confidence and trust when it cannot even deliver what it was meant to? In the end, it really comes down to the ability of a particular institution such as an inquiry to uphold its public image, its relevance and utility. An Inquiry (and its Commissioner) should not have to fight in order to justify and uphold its public essence like O’Connor J. did during the Arar Commission. An inquiry overrun by the discourses of justice is set up for failure and “truth” loses all meaning in defining the essence of the Public Inquiry.

B. Iacobucci Inquiry³⁴³

Nevertheless, the Arar Commission did the best it could in light of the confidential nature of much of the information that it processed. The attempts made by O’Connor J. to preserve even an inkling of the Public Inquiry essence despite the limits placed on the Commission’s capacity

³⁴³ Iacobucci Inquiry, *supra* note 52.

for public disclosure are striking especially in light of the highly secretive proceedings of the Iacobucci Inquiry that followed in the wake of the Arar Commission. On December 11, 2006, Justice Iacobucci was “appointed under Part I of the *Inquiries Act* to conduct an internal inquiry into the actions of Canadian officials in relation to Abdullah Almalki, Ahmad Abou-Elmaati and Muayyed Nureddin (the ‘Inquiry’).”³⁴⁴ Right from the start, the Terms of Reference (hereinafter, the Terms) highlighted the “internal” nature of the Inquiry which Iacobucci J. took to heart and utilized to define his role as a Commissioner, conceptualize the guiding principles of his Inquiry, and to generally justify his preference for and recourse to the discourses of justice.

Aside from this critical distinction in the Terms that the Inquiry be “conducted in private”,³⁴⁵ both the Arar Commission and the Iacobucci Inquiry were similar in terms of their mandates and the content of their investigations. In fact, “[b]ecause the Iacobucci Inquiry was very much a product of Justice O’Connor’s recommendations, many may have perceived it as an extension of the Arar Commission.”³⁴⁶ However, unlike the Arar Commission and despite being established under Part I of the *Inquiries Act* - and thus falling within the general category of “Public Inquiries”³⁴⁷ - the Iacobucci Inquiry was framed as an “internal” process in every sense of the word. According to Kalajdzic, who appeared as counsel for Abdullah Almalki before the Iacobucci Inquiry,

[t]he resulting Inquiry looked quite unlike the hundreds of other inquiries that have been called under Part I of the *Inquiries Act*. It was conducted almost entirely in secret. No documents, redacted or otherwise, were released to the public or to the non-government parties, including documents not protected by national security confidentiality claims. Only one and a half days of public hearings were held on substantive matters. While

³⁴⁴ Internal Inquiry into the Actions of Canadian Officials in Relation to Abdullah Almalki, Ahmad Abou-Elmaati and Muayyed Nureddin, *Final Report, Appendices* (Ottawa: Public Works and Government Services Canada, 2008), online: http://epe.lac-bac.gc.ca/100/206/301/pco-bcp/commissions/internal_inquiry/2010-03-09/www.iacobucciinquiry.ca/pdfs/documents/Final-Report-en-Appendices.pdf [Iacobucci Report, Appendices] at 459.

³⁴⁵ *Ibid.* at 460. The “private” aspect of the Inquiry will be addressed further below.

³⁴⁶ Kalajdzic, *supra* note 3at 199.

³⁴⁷ R.S.C. 1985, Chap. I-11, s. 2, Part I.

Commission counsel interviewed over forty witnesses, none were examined in public or by counsel for the three men. No summaries of evidence or redacted transcripts were provided, and consultations with Commission counsel were infrequent.³⁴⁸

In other words, the most important distinction between the two inquiries was in their approach to NSC. While O'Connor J. defined his practices and Commission procedures in terms of the inquiry's public nature despite the privacy and confidentiality concerns, Iacobucci J. utilized the terms "internal" and "private" in a manner that disassociated the body of the Public Inquiry from its essential qualities, especially the "public" search for truth. To do so, Iacobucci J. relied on the discourses of justice and, as will be argued below, went to redefine the purpose and image of the Public Inquiry.

(1) Private is the New Public

As mentioned above, contrary to its very nature, the Iacobucci Inquiry was framed as an "internal" and "private" investigation. One may even say that the mere idea of an "internal", Public Inquiry is an oxymoron in its right and as such, required a great deal of discursive maneuvering on the part of Commissioner Iacobucci in order to justify this new "private" take on an essentially "public" institution. In fact, Iacobucci J. argued that:

[t]he requirement that the Inquiry be conducted in private originated in the comments of Justice O'Connor in the Report of the Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar. Justice O'Connor recommended that the cases of Mr. Almalki, Mr. Elmaati and Mr. Nureddin be reviewed, but in a manner more appropriate than a full scale public inquiry, which, when national security issues are involved, can be complicated, unduly protracted and expensive.³⁴⁹

³⁴⁸ Kalajdzic, *supra* note 3 at 176.

³⁴⁹ Internal Inquiry into the Actions of Canadian Officials in Relation to Abdullah Almalki, Ahmad Abou-Elmaati and Muayyed Nureddin, *Final Report* (Ottawa: Public Works and Government Services Canada, 2008), online: <http://epe.lac-bac.gc.ca/100/206/301/pco-bcp/commissions/internal_inquiry/2010-03-09/www.iacobucciinquiry.ca/pdfs/documents/final-report-copy-en.pdf> [Iacobucci Report, Final Report] at 30.

He went even further and claimed that “Justice O’Connor did not recommend that the review take the form of a *traditional public inquiry*”,³⁵⁰ thereby suggesting that there is a spectrum of public inquiries, ranging from the “traditional” to the “internal” or rather, that the current private investigation is the new and improved Public Inquiry process applicable especially where the subject matter under review is complicated by NSC concerns. What is troubling here, however, is that Iacobucci J. cited O’Connor J. as the source for this original idea of an internal, public inquiry despite the lack of evidence.

Namely, in order to justify his personal take on the Public Inquiry and thus, his interpretation of the Inquiry’s Terms, Iacobucci J. referred to the following statement by O’Connor J.,

My experience in this Inquiry indicates that conducting a public inquiry in cases such as these can be a tortuous, time-consuming and expensive exercise. Quite properly, the public inquiry process brings with it many procedural requirements for openness and fairness....[T]here are more appropriate ways than a full-scale public inquiry to investigate and report on cases where national security confidentiality must play such a prominent role.³⁵¹

However, choosing to end on this note was misleading. Not only did Iacobucci J. omit from the above reference the underscored statement, which clearly indicates O’Connor J.’s conception of the Public Inquiry as a predominantly “open” process, but he also left out the fact that O’Connor J. gave specific examples of the type of approaches that would be more appropriate for dealing with matters concerning NSC and none of them were a variant of a Public Inquiry, not to mention an “internal” inquiry. Specifically, O’Connor J. offered that,

The process that will result from my Policy Review recommendations, if implemented, is one approach that, in my view, would be acceptable. However, there may be delays. Another possibility would be the type of process recommended by Bob Rae, Independent Advisor to the Minister of Public Safety and Emergency Preparedness on questions relating to the bombing of Air India Flight 182, for reviewing the investigations in the Air

³⁵⁰ *Ibid.* at 44 (emphasis added).

³⁵¹ *Arar Report, Analysis and Recommendations*, *supra* note 273 at 277-278 (emphasis added).

India case. *Whatever process is adopted, it should be one that is able to investigate the matters fully and, in the end, inspire public confidence in the outcome.*³⁵²

In other words, both of the approaches approved of by O'Connor J. were more akin to departmental reviews rather than public inquiries. Thus, contrary to Iacobucci J.'s suggestion, O'Connor J. did not recommend or even foresee a new form of Public Inquiry. After all, a Public Inquiry is a "public" inquiry. Introducing concepts such as "private" and "internal" into the principal framework of the institution will necessarily change the essential character and nature of the process. Implementing such process is unlikely to "inspire public confidence in the outcome" especially when this new private identity of the institution does not correspond to the public functions it was originally entailed to perform.

Nonetheless, this did not stop Iacobucci J. from engaging the discourse of justice to further promote his vision of an "internal" Public Inquiry process while simultaneously distancing his Inquiry from any notions of the "traditional" public search for truth. One of the best examples of this instance is Iacobucci J.'s interpretation of the Inquiry's Terms. Specifically, Iacobucci J. relied on the following provisions to support his definition of the "internal" inquiry mandated by the Terms:

(d) authorize the Commissioner to adopt any procedures and methods that he considers expedient for the proper conduct of the inquiry, *while taking all steps necessary to ensure that the Inquiry is conducted in private*; and

(k) direct the Commissioner, in conducting the Inquiry, *to take all steps necessary to prevent the disclosure of information to persons or bodies other than the Government of Canada* that, if it were disclosed to those persons or bodies, would be injurious to international relations, national defense, national security, or the conduct of any investigation or proceeding....³⁵³

Although Iacobucci J. admitted that he had extensive powers as a Commissioner to "adopt any procedures and methods that he considers expedient for the proper conduct of the inquiry" and

³⁵² *Ibid.* at 278 (emphasis added).

³⁵³ Iacobucci Report, Appendices, *supra* note 344 at 460-461 (emphasis added).

that under paragraph (e) of the Terms, he could “conduct specific portions of the Inquiry in public if he is satisfied that it is essential to ensure the effective conduct of the inquiry”,³⁵⁴ throughout the Inquiry, he nevertheless continued to emphasize as definitive of the Inquiry’s structure and process that “[t]he Inquiry was required to be internal and presumptively private. The Terms of Reference were very specific in describing the Inquiry as an “internal inquiry” and in requiring that I take all steps necessary to ensure that the Inquiry was conducted in private....”³⁵⁵ In other words, as evidenced by his report, Iacobucci J. gave little thought to the “public” essence of his Inquiry despite being mandated to under paragraph (e) of the Terms. Instead, his interpretation of the Terms deemed the matter of public proceedings as being subservient to the dictates of the “private” aspects of the process rather than vice versa.

For instance, the very few times that Iacobucci J. did mention something about public hearings it was only to emphasize that they were the exception rather than a norm. He could not be much clearer on this point than in his opening remarks at the first public hearing in the Inquiry when he stated that “it is fair to say that the thrust of this Inquiry will, because of national security concerns, be conducted generally in private and exceptionally in public.”³⁵⁶ Moreover, Iacobucci J. argued elsewhere that:

it is preferable that both adversarial and inquisitorial proceedings be open and public. I do not resile from that comment but *I do note that it reflected a general preference that was subject to the specific terms of reference of the inquiry in question and the context that surrounds the inquiry.* Here there is no doubt the Terms of Reference emphasize the internal or private nature of the Inquiry and that national security confidentiality is a very important consideration.”³⁵⁷

³⁵⁴ *Ibid.* at 460.

³⁵⁵ Iacobucci Report, Final Report, *supra* note 349 at 30. Also see *Ibid.* at 42.

³⁵⁶ Internal Inquiry into the Actions of Canadian Officials in Relation to Abdullah Almalki, Ahmad Abou-Elmaati and Muayyed Nureddin, *Hearing on Participation and Funding*, Tr. (Mar. 21, 2007), online: <http://epe.lac-bac.gc.ca/100/206/301/pco-bcp/commissions/internal_inquiry/2010-03-09/www.iacobucciinquiry.ca/pdfs/hearings/2007-03-21_original-transcript-en.pdf> [*Hearing on Participation and Funding*] at p. 6, paras. 13-20.

³⁵⁷ Iacobucci Report, Appendices, *supra* note 344 at 490 (emphasis added).

Note here, how Iacobucci J. made the “public” essence of the inquiry subservient to his interpretation of the Terms. According to him, the public aspects of an inquiry are merely a “preference” rather than the defining feature of the institution subject to the dictates of the Terms (and their interpretation) as well as the context. Given his narrow view of the “public’s” role in the Public Inquiry, it is not surprising that Iacobucci J. missed the true power and meaning of his authority to “conduct specific portions of the Inquiry in public if he is satisfied that it is essential to ensure the effective conduct of the inquiry”. In other words, Iacobucci J. had a chance to define his mandate in accordance with the public nature of the inquiry. Instead, he chose to redefine the image of the Public Inquiry in light of his narrow interpretation of “justice” – one that prioritized the process of getting to the truth over its quality and contribution to the fulfilment of inquiry’s social functions. After all, the public search for truth is the “essential” character of the institution and therefore, ought to be a prerequisite for the effective conduct of an inquiry.

Nevertheless, Iacobucci J. embraced a narrow conception of truth, one defined by the boundaries of “justice” which, given his adjudicative interpretation of the Terms, was achievable only by means of a private process rather than a public search for truth. For instance, according to him:

*I intend to interpret the words, ‘essential to the effective conduct of the Inquiry’, as not being totally restrictive, since they reflect an intention that holding some aspects of this Inquiry can contribute to the effective conduct of the Inquiry. In other words, it is my opinion that ‘to ensure the effective conduct of the Inquiry’ means holding portions of the Inquiry in public to ensure the goal as circumstances may warrant. This will be ultimately a discretionary decision, to be made on a case-by-case basis, influenced by the need for blending of efficiency and transparency dictated by the circumstances and context.*³⁵⁸

Clearly, the public search for truth was never even considered to be the goal of the Inquiry; truth was not a measure of justice. Rather, Iacobucci J. assumed justice as the basis for truth and

³⁵⁸ *Ibid.* at 502 (emphasis added).

implemented a process that was most convenient and practical for satisfying any justiciability concerns or capable of being defined according to the elements of justiciability.³⁵⁹ As such, the Inquiry’s public utility was defined as merely an element in the justice equation and its public functions “dictated by the circumstances and context” and subject to the discretion of the Commissioner, rather than informing how that discretion was to be utilized in the first place. Consequently, the Inquiry’s “effectiveness” was conceptualized according to the discourses of justice. To do otherwise would have meant going against the grain of the traditional legalistic notions of justice and accepting the public quest for truth as the defining objective of the Public Inquiry, one that does not easily land itself to the justiciability concepts and processes as it operates outside the adjudicative justice paradigm. Consequently, Iacobucci J. deemed the “private” and “internal” process as more “workable”³⁶⁰ and readily amenable to the demands of adjudicative justice without giving further thought to how the effectiveness of a Public Inquiry conducted almost entirely in private could properly be evaluated.

Moreover, in support of his broad conception of the Term’s provisions for a “private” inquiry, Iacobucci J. once again cited paragraph (k) as “expressly directing” him to limit public disclosure of information before the Inquiry in light of the NSC claims.³⁶¹ He forgot, however, that the Terms of the Arar Commission had a very similar provision, which, as was demonstrated above, did not prevent O’Connor J. from giving credence to the public nature of the Commission and even going so far as to grant them the status of the proceedings’ “guiding principles”.³⁶² To be fair, the Terms of the Arar Commission gave consideration for the “maximum disclosure to

³⁵⁹ Please see the discussion below regarding “Workability and Practicability”.

³⁶⁰ Iacobucci Report, Appendices, *supra* note 344 at 495.

³⁶¹ *Ibid.* at 490.

³⁶² *Arar Report, Factual Background, Volume II*, “Appendix 1(A) – Terms of Reference, P.C. 2004-48”, *supra* note 276 at 584-585:

(k) the Commissioner be directed, in conducting the inquiry, to take all steps necessary to prevent disclosure of information that, if it were disclosed to the public, would, in the opinion of the Commissioner, be injurious to international relations, national defence or national security...

the public of relevant information” and perhaps most importantly, did not define the Commission as an “internal” process.³⁶³ Nevertheless, it was O’Connor J. who ultimately highlighted the significance of public proceedings, transparency and openness. There were no provisions in the Terms for the implementation of these principles. The fact stands that O’Connor J. utilized his broad powers of discretion and authority to “adopt any procedures and methods that he may consider expedient for the proper conduct of the inquiry”³⁶⁴ in a way that prioritized the public principles for which the inquiry institution stands for despite his dual obligation to safeguard any information subject to valid NSC claims. Thus, as previously shown, O’Connor J. relied on the discourses of truth when considering the type of “procedures and methods” essential for the “expedient” and “proper” conduct of an inquiry and to a large extent, those “procedures and methods” emphasized the Commission’s public qualities.

In contrast, Iacobucci J. got fixated on the words “internal” and “private”, letting them dictate his powers as a Commissioner and the nature of his Inquiry. Unlike O’Connor J.’s attempts to limit the impact of NSC claims on the proper conduct of the inquiry, Iacobucci J. seemed to embrace the highly legalistic and judicialized language of the Term’s NSC provisions. As such, he assigned minimal significance to his authority under the Terms to “conduct specific portions of the Inquiry in public”, deciding instead to nominate the private aspects of the NSC provisions as the defining principles of his Inquiry. According to Iacobucci J., “[a]lthough the Terms of Reference admit of a public hearing they emphasize the *presumptively private nature of the hearings*, among other things to respect national security confidentiality”³⁶⁵ Clearly, Iacobucci J.’s first allegiance was not to the guiding principles of a Public Inquiry. He focused on the technical requirements of his mandate – such as ensuring that information subject to valid

³⁶³ *Ibid.* at 585.

³⁶⁴ *Ibid.* at 584.

³⁶⁵ Iacobucci Report, Appendices, *supra* note 344 at 501 (emphasis added).

NSC claims was protected - without stepping back and recognizing the unique nature of the system in which his mandate must be accomplished.

In other words, Iacobucci J.'s interpretation of his role as the Commissioner and the role of the Inquiry – as well as the actions that he consequently assumed - were informed by the traditional discourses of justice that lend themselves easier to the privacy demands of the NSC context. Under such framework of thought, little room exists for the unique social processes of the inquiry where “justice” is more than respecting the letter of the law or protecting legal rights on the path to truth; where “justice” *is* the enabling of public participation in the pursuit of truth, and the extent to which this “justice” is realized is the real measure of a Public Inquiry’s ultimate success. Such “public” justice was conceptualized by the persons in whose name the inquiry was created in the first place as one that includes “a much more public process, one that entails a much more robust role for the participants, the intervenors and their counsel. They argue that the Commission must conduct as much of its business as possible in public.”³⁶⁶ If this was the leading discourse, the Iacobucci Inquiry process would look similar to that conducted by O’Connor J. Namely, it would comply with the following terms: “the Inquiry’s hearings should only be conducted in private where national security confidentiality claims are made, and then only after and to the extent that evidence might engage national security confidentiality is tested and it is determined that the evidence does indeed engage national security confidentiality.”³⁶⁷ Alas, Iacobucci J. was unmoved by the force of the discourse of truth, arguing instead that “there is nothing in the Act to prevent a public inquiry being held in part or all in private”³⁶⁸ without addressing the fact that a private inquiry is something completely different and could not be equated with a Public Inquiry.

³⁶⁶ *Ibid.* at 482.

³⁶⁷ *Ibid.* at 483.

³⁶⁸ *Ibid.* at 501.

Nevertheless, Iacobucci J. drafted the General Rules of Procedure and Practice (hereinafter, the Rules) in accordance with this justice-centered interpretation of the Public Inquiry's role. For instance, under Rule 2, he specified that "[t]he Commissioner may amend or dispense with compliance with these Rules as he considers necessary to ensure that the Inquiry *is thorough, expeditious and fair.*"³⁶⁹ Clearly, the defining principles of the Iacobucci Inquiry were far from epitomizing the essential social functions of a Public Inquiry such as "openness" and "transparency" that were continuously reiterated throughout the Arar Commission. The Inquiry's public functions and with them the uniqueness of its very identity were traded for procedural efficiency instead.

Iacobucci J. did not stop here. In Rule 6, he further emphasised that "[t]hese Rules shall be interpreted and applied in a manner that ensures the protection of National Security Confidentiality,"³⁷⁰ thus making it clear that his thought process was influenced by the adjudicative definition of justice. Lastly, in Rule 11, Iacobucci J. solidified his dedication to the discourse of justice when he reiterated that "[i]n accordance with the Terms of Reference, the Inquiry, including the review of documents and the taking of oral evidence, shall be conducted in private..."³⁷¹ Thus, the privacy of the Inquiry was not an exception but the rule and it would dictate not only the type of justice pursued by the process or the truth that would result but also and most importantly the nature and identity of the Inquiry that would be aired to the public.

Not surprisingly, Iacobucci J. saw little value in holding public hearings. In fact, he denied the main parties' motion requesting a public hearing to receive final submissions deeming the oral submissions of no further "significance". Without addressing the value of the public hearing itself – especially to satisfying the Inquiry's mandate of "inspir[ing] public confidence in

³⁶⁹ Iacobucci Report, Appendices, *supra* 344 at 509 (emphasis added).

³⁷⁰ *Ibid.*

³⁷¹ *Ibid.*

the outcome”³⁷² – Iacobucci J. argued instead that “I considered it in the *best interests of the Inquiry* and all those affected by it to pursue its completion without taking the additional time that hearing oral submissions would inevitably entail, given that *such submissions would not add very much value to what I had already read and heard.*”³⁷³ Note here how he focused on the added value of the submissions to his individual interests rather than the interests of the public to hear these submissions and thereby participate in the process. In other words, he once again focused on the Inquiry’s efficiency in satisfying the mandate rather than the quality of the Inquiry process measured by its ability to “inspire” public confidence. However, this did not deter Iacobucci J. from redefining the Public Inquiry according to his valuation of its “public” nature and its relationship to justice and truth.

(2) Redefining the Public Inquiry through the Lens of Justice

According to Iacobucci J., “[t]here was no template for pursuing an inquiry of this kind. Within the framework of the Terms of Reference, I sought to adopt a process that would enable me to *carry out a private but thorough investigation...*”³⁷⁴ thereby admitting that such “internal” inquiry was the first of its kind; the kind that would require a paradigm shift, a unique “private but thorough” process and ultimately a new objective and identity. The process that Iacobucci J. ultimately adopted was more in tune with the standards of the adversarial justice model than the justice conceived by the public pursuit of truth. The irony of all this was that while Iacobucci J. attempted to distinguish his Inquiry from the adversarial process he was simultaneously explaining away the essential elements of a Public Inquiry as those belonging to the adversarial

³⁷² Iacobucci Report, Appendices, *supra* note 344 at 459.

³⁷³ Iacobucci Report, Final Report, *supra* note 349 at 62 (emphasis added).

³⁷⁴ *Ibid.* (emphasis added) at 45.

context. In this way Iacobucci J. was able to justify his recourse to the discourse of justice by redefining the Inquiry through its value system and standards.

Specifically, Iacobucci J. defined the nature and purpose of his Inquiry in the following terms: “[t]he Inquiry was an investigative and inquisitorial proceeding and not a judicial or adversarial one. *Many of the features of an adversarial proceeding therefore did not apply.* My counsel and I *have nonetheless attempted to be as fair and as respectful as possible to all those involved.*”³⁷⁵ Note here that he attempted to define the Inquiry process as separate and unique in the sense of not having as elaborate of a system for the protection of individual rights as that available in an adversarial setting. In the same breath he confirmed that he would instill “fairness” into the process thus suggesting that his conception of “fairness” was grounded in the adversarial notions of justice. For instance, Iacobucci J. further indicated that despite it being an inquisitorial process, “[t]his is not to say the Inquiry has taken place without safeguards or protections for those affected by it....In accordance with the dictum of Chief Justice McLachlin in *Charkaoui v. Canada (Citizenship and Immigration)*, I ‘took charge of the gathering of evidence in an independent and impartial way.’”³⁷⁶ Thus, he imported the very concepts that define the adversarial system and what it stands for into his Inquiry in an attempt to validate the “inquisitorial” process. Namely, Iacobucci J. utilized the discourses of judicial independence and impartiality as a means for keeping the inquiry process in check with the adjudicative norms and practices as if to reassure himself and those involved that “justice” – as it was traditionally known - will be served despite the unique nature of the mechanism used to obtain it.

³⁷⁵ *Ibid.* at 29 (emphasis added).

³⁷⁶ *Ibid.* at 43.

To that effect, Iacobucci J. emphasized that above all, the Inquiry’s Terms must be dealt with “effectively, comprehensively and independently” rather than openly and transparently.³⁷⁷ Moreover, he used Chief Justice McLachlin’s decision in *Charkaoui* in such a way as to define the concepts “public” and “openness” as those belonging to the adversarial context thereby justifying his new “private” version of a Public Inquiry. Specifically, in order to describe the difference between inquisitorial and adversarial systems, Iacobucci J. cited the following:

There are two types of judicial systems, and they ensure that the full case is placed before the judge in two different ways. In inquisitorial systems, as in Continental Europe, *the judge takes charge of the gathering of evidence in an independent and impartial way*. By contrast, an adversarial system, which is the norm in Canada, relies on the parties – who are entitled to disclosure of the case to meet, *and to full participation in open proceedings* – to produce the relevant evidence...³⁷⁸

Essentially, he utilized the above passage as a means for disassociating the Public Inquiry from its fundamentally open and transparent nature. Importantly, he did not address the fact that McLachlin C.J. made this statement primarily with regards to the process under the *Immigration and Refugee Protection Act*³⁷⁹ which is not the same as that under the *Public Inquiries Act* as it relies much less on the public functions of the inquiry for its credibility. Nevertheless, Iacobucci J. deemed “open proceedings” as a hallmark of the adversarial “open court” process³⁸⁰ while simultaneously importing judicial values of “independence” and “impartiality” in an attempt to justify his role as a Commissioner and his vision of the Inquiry.

For instance, according to Iacobucci J., “the Commissioner is appointed as an independent investigator who is obliged to pursue the terms of his mandate to the best of his ability and *to ensure that the process is fair, effective and expeditious*. And most importantly, the Commissioner, through his or her role as an independent investigator, *represents the public*

³⁷⁷ Iacobucci Report, Appendices, *supra* note 344 at 487.

³⁷⁸ *Charkaoui v. Canada (Citizenship and Immigration)*, [2007] 1SCR 350 at para. 50 (emphasis added).

³⁷⁹ S.C. 2001, c. 27.

³⁸⁰ Iacobucci Report, Appendices, *supra* note 344 at 493.

interest.”³⁸¹ Nowhere in this definition was any mention of the *public* search for truth that the Public Inquiry is generally known and valued for by the very public in whose interest Iacobucci J. claimed to exercise his functions. Instead, Iacobucci J. referred to his experience as a judge in order to impart on his audience the qualities he deemed most important to his role as a commissioner. Specifically, he indicated that “[h]aving been a judge for some 17 years, I have a profound respect for the principles of independence and acting in the public interest and will be as vigilant as I can to ensure that the Inquiry is as independent, thorough and fair as it can possibly be under the circumstances.”³⁸² Thus, Iacobucci J. utilized the discourse of justice when describing his role more in line with that of the *arbiter* of justice rather than a *facilitator* of public truth and justice.

The consequences of Iacobucci J.’s reliance on the discourses of justice should not be overlooked. Seemingly harmless – after all, who could argue with having a “just” process – his choice of discourse suggests that a Public Inquiry is something less than an adjudicative trial as it does not offer same level of protection. In other words, rather than describing the Public Inquiry as an entirely different mechanism in pursuit of truth and justice defined according to its own institutional values and norms, Iacobucci J. adopted the adjudicative standard as a measuring rod for the conduct of his Inquiry. Consequently, he also set the standard for how the public should receive and perceive the Inquiry.

For instance, unlike the Arar Commission, the Iacobucci Inquiry defined “procedural fairness” in a limiting manner such that restricted public disclosure of non-privileged documents and thereby public access and meaningful participation of those involved.³⁸³ As such, the process quickly became a matter of satisfying the requirements of adversarial justice rather than ensuring

³⁸¹ *Ibid.* at 488 (emphasis added).

³⁸² *Hearing on Participation and Funding*, *supra* note 356 at p.7, paras. 14-20.

³⁸³ Kalajdzic, *supra* note 3 at 182.

that truth and justice were publicly pursued so as to instill public confidence in the utility of the Public Inquiry itself. After all, one of the goals of an inquiry is to serve as a healing process via public participation and disclosure.³⁸⁴ Stripped of such potential, an inquiry becomes nothing more than a glorified trial subject to strict rules of evidence and procedure, and a narrow conception of justice that risks undermining its very essence.

Iacobucci J. accepted that risk by redefining the Inquiry according to the discourses of justice. He allowed the NSC concerns to define the purpose and nature of his Inquiry rather than enforcing the Inquiry's vital social functions and testing the legitimacy of those NSC claims as was done by O'Connor J. under similar provisions of the Terms during the Arar Commission. Specifically, Iacobucci J. indicated that his primary objective was to "take all steps necessary to prevent the disclosure of information subject to national security confidentiality..."³⁸⁵ Although, he also stated that "I engaged in the national security review process with a view to providing the public with as complete as possible an account of the actions of Canadian officials and my findings in respect of those actions,"³⁸⁶ that account or narrative was created entirely in private and no matter how complete it may have been it could not replace the true value of holding a public hearing – namely, having the public participate in creating the "account". Nevertheless, this mentality guided how Iacobucci J. interpreted the rest of his mandate and justified holding merely three public hearings during the almost two-year term of the Inquiry.

For instance, giving this mentality, Iacobucci J. redefined the concept of "meaningful participation" as it related to Public Inquiries. Specifically, he relied on the commission counsel to substitute for the parties, intervenors, and the general public during the *in camera* hearings. In other words, meaningful participation consisted of a series of interviews and meetings with

³⁸⁴ *Ibid.* at 183.

³⁸⁵ Iacobucci Report, Final Report, *supra* note 349 at 33.

³⁸⁶ *Ibid.*

parties and intervenors “to discuss questions to be asked of witnesses and to share testimony provided by witnesses that could be disclosed without jeopardizing national security confidentiality.”³⁸⁷ In fact, quoting Justice Major, Iacobucci J. went as far as allowing his commission counsel to “depart somewhat from his or her normal role and to engage in pointed cross-examination where necessary, so as to ensure that evidence heard *in camera* is thoroughly tested...”³⁸⁸ Moreover, according to Iacobucci J., “given the mandate of Inquiry counsel to *vigorously test the evidence* of all witnesses that will be interviewed or examined in private, I do not see how the presence of a security-cleared counsel for Messrs. Almalki, Elmaati and Nureddin will *as a practical matter* assist the Inquiry or these individuals.”³⁸⁹ Thus, Iacobucci J. was more willing to compromise the neutral, non-adversarial role of the commission counsel³⁹⁰ than allow the parties/public to directly participate in the truth-seeking process of the inquiry as was originally intended by the creation of the Public Inquiry institution.

As Iacobucci J. saw it, “In my view, a far *more practical and effective way* for counsel for Messrs. Almalki, Elmaati and Nureddin to have a *genuine input* into this Inquiry is for them to *consult with Inquiry counsel....*”³⁹¹ Again, Iacobucci J. deemed this as “effective input”, placing emphasis on the practicality rather than quality of “participation” via commission counsel. The participants’ perspective was to be entrusted to commission counsel as well. To that effect, Iacobucci J. “instructed Inquiry counsel to maintain regular contact with counsel for the participants...so that Inquiry counsel are appraised of information that is *relevant and helpful* from the participants’ perspective.”³⁹² Of course, what was “relevant and helpful” was judged

³⁸⁷ *Ibid.* at 32.

³⁸⁸ Iacobucci Report, Appendices, *supra* note 344 at 489.

³⁸⁹ *Ibid.* at 496 (emphasis added).

³⁹⁰ *Ibid.* at 489.

³⁹¹ *Ibid.* at 496 (emphasis added).

³⁹² *Ibid.* at 502 (emphasis added).

according to the Commissioner's and commission counsel's perspectives and those were guided by the discourse of justice. Thus, by conceptualizing the nature of Public Inquiry in terms of the principles of adversarial justice, Iacobucci J. was able to redefine not only his role and that of the commission counsel but more importantly, justify a new, not-so "public" version of the Public Inquiry itself.

(3) New Guiding Principles – Workability & Practicality

Furthermore, although Iacobucci J. engaged the discourse of inquiry functions he did so by flipping it on its head. As mentioned previously, the principles that Iacobucci J. relied on in order to validate his recourse to this new, private version of a Public Inquiry were grounded more in the efficiency rather than the effectiveness of the inquiry process such as this one. Those principles were "workability" and "practicality", which Iacobucci J. explicitly invoked in his ruling on the Terms of Reference and Procedure. As will be shown below, they are a far cry from the "openness", "transparency" and "accessibility" principles endorsed by the Arar Commission as fundamental to the nature of the Public Inquiry. According to Iacobucci J.:

...the appropriate process for this Inquiry is one that should not only reflect its inquisitorial nature and the sensitive context in which the questions that I must determine arise, but also *respect the workability and practicality principles that have been endorsed judicially and sensibly so in my view*. It would serve no one's interest if the process of the Inquiry impeded it from an *expeditious determination of the questions* that I have been mandated to pursue.³⁹³

Clearly, his main concern was "efficient" and "timely" collection of information.³⁹⁴ He had a mandate to pursue and it did not seem crucial that it was to be pursued within the confines of a fundamentally "public" institution as long as the process was practical and expeditious. In other words, Iacobucci J. saw the tree and approached it without considering the forest he was trudging

³⁹³Iacobucci Report, Appendices, *supra* note 344 at 497 (emphasis added).

³⁹⁴Iacobucci Report, Final Report, *supra* note 349 at 31.

through. In fact, he was not sensitive to the nature of the context in which he operated and thereby continued to apply the discourse that he was accustomed to as a judge.

For instance, the principles of “workability” and “practicality” are gouged in the discourse of justice that permeates the adjudicative setting. For one, they do not lend themselves easily to the public pursuit of truth that is often more complex and less practical than an internal, formal and highly structured process envisioned by Iacobucci J. After all, there are a lot more variables (parties and interests) at play making it difficult to regulate how truth is pursued, transmitted, and appreciated.

More importantly, as Iacobucci J. seemed to suggest, these principles are more in tune with the proper administration of justice and thereby amenable to the judicial discourse. According to Iacobucci J., “[e]ven where the ‘open court’ principle is applicable, ‘workability’ has been cited as a factor that may militate against public access.”³⁹⁵ He went on to quote Justice La Forest in *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)* who argued that,

...this Court has noted on previous occasions that public access to certain judicial processes would render the administration of justice unworkable....*The importance of ensuring that the administration of justice is not rendered unworkable provides a palpable reason for prohibiting public access....* Indeed, as we have seen in this case, the open court principle itself must yield to circumstances that would render the proper administration of justice unworkable.³⁹⁶

Not only did Iacobucci J. utilize the standard of administration of justice as a benchmark for the proper conduct of his Inquiry rather than adhering to the social functions of the institution, but he also equated the “open court” principle, which is another adversarial concept, with the public principles of the Inquiry. Although at first glance the “open court” principle may resemble the principles of “openness” and “transparency”, it does not quite capture the central role of the public

³⁹⁵ Iacobucci Report, Appendices, *supra* note 344 at 492.

³⁹⁶ [1996] 3 S.C.R. 480 at para. 29 (emphasis added).

search for truth, its significance to the proper functioning of the Public Inquiry and ultimately, its capacity to uphold the institution's public image.

Aside from conceptualizing justice in terms of the judicial discourse and then utilizing the concept to justify conducting a "private" Inquiry and applying new guiding principles to do so, Iacobucci J. forgot to mention that the grounds for his argument – namely, La Forest J.'s judgment above – were originally made pursuant to the proper conduct of a *criminal trial* where the administration of justice does take the front stage. Nevertheless, Iacobucci J. insisted that in carrying out his work as the Commissioner, he "must consider the most practical means to accomplish the Inquiry's objectives."³⁹⁷ Remember also that those very "objectives" were defined by the adversarial conception of justice. Moreover, Iacobucci J. made sure to mention that he was "not elevating the workability principle to a unjustifiable degree, but simply recognizing that, for example, to encourage arguments over material that would be presented and whether it would be cleared for release or for redaction purposes and the like would, as experience in the Arar Inquiry demonstrated, *cause significant delay and complexity.*"³⁹⁸ However, Iacobucci J.'s emphasis on "an information-gathering and fact-finding process that was practical, efficient and fair"³⁹⁹ made it very clear that he was in fact elevating the workability principle to the Inquiry's new guiding principle. Thus, without once suggesting that a public inquiry was *impossible* or *unworkable*, Iacobucci J. represented his judicialized conception of the inquiry process as the new face of the Public Inquiry.

The search for truth, which should have been at the core of the Inquiry's mandate, was traded in for efficiency and on the basis of the workability and practicality principles the Inquiry was conducted almost entirely *in camera* and *ex parte*. However, no matter what the Inquiry may

³⁹⁷ Iacobucci Report, Appendices, *supra* note 344 at 495.

³⁹⁸ *Ibid.* at 503 (emphasis added).

³⁹⁹ Iacobucci Report, Final Report, *supra* note 349 at 56.

have achieved in term of its efficiency,⁴⁰⁰ it ultimately lost in terms of its effectiveness and thereby legitimacy as a genuinely public institution due to its new “internal” or “invisible” process.⁴⁰¹

According to Kalajdzic, the internal inquiry made it

...virtually impossible for members of the public to form an opinion of the accuracy of the Commissioner’s finding on the role of Canadian officials in the men’s detention and torture, and therefore to be confident in the thoroughness of the Report and in what it says about the functioning of the relevant government institutions. Because the Inquiry falls short with respect to both its investigative and democratic functions, it cannot be said to be fully effective.⁴⁰²

Thus, although the new guiding principles, “workability” and “practicality” may have made the Inquiry more efficient, they robbed the Inquiry of its public function, utility and image. In other words, Iacobucci J.’s recourse to the discourse of justice jeopardized public’s confidence in the process and findings of his Inquiry despite setting out on the path to a “just” truth. More importantly, the lack of openness, transparency, and accessibility threatened the very foundation of the Public Inquiry, namely its capacity for public truth-seeking. It did not help that in addition to privately pursuing truth, Iacobucci J. was not authorized to publicly disclose all of his findings and was thus forced to create separate versions of the “truth”, an act that goes against the very rubric of the Public Inquiry institution.

(4) Truth Versions

In an ideal world, there would be only one truth. If that was so, there would be no need for an adjudicative process geared towards sorting out through versions of truth according to the standards of adversarial justice. Nevertheless, this pursuit of the ideal was precisely why the

⁴⁰⁰ According to Kalajdzic, the Iacobucci Inquiry “managed more than 40,000 documents, interviewed 44 witnesses, reviewed an investigation of three men spanning several years, and produced a 544-page report in under two years. In terms of both efficiency and manageability, the Iacobucci Inquiry may be considered successful.” See *supra* note 3 at 196.

⁴⁰¹ *Ibid.* at 176 and 200.

⁴⁰² *Ibid.* at 195.

Public Inquiry was originally set up to do and what the public generally expects it to do. However, the Iacobucci Inquiry was never meant to even behold the mere possibility of that ideal. In fact, the Inquiry's Terms of Reference directed the Commissioner to submit "both a confidential report and a separate report that is suitable for disclosure to the public..."⁴⁰³ The two versions of Iacobucci J.'s report were in turn products of an elaborate processing of the truth whereby Iacobucci J.,

...directed Inquiry counsel to prepare draft factual narratives for my review, based on documents, interviews and other information. I also directed that Inquiry counsel make these draft narratives available for review by counsel for Inquiry Participants and Intervenors on a confidential basis. Counsel for Inquiry Participants and Intervenors provided detailed comments and suggestions concerning the draft factual narratives both orally, in discussion with Inquiry counsel, and in writing. Inquiry counsel took these comments and suggestions into account in finalizing the narratives for my consideration.⁴⁰⁴

The irony is that the Public Inquiry was created precisely in order to avoid a process such as this and to engage the public as much as possible in the pursuit of truth in its most organic form and shape. However, Iacobucci J. did not seem too concerned about redefining the truth-seeking process or circumscribing the potential of his Inquiry. In fact, he stated that "[w]hile I benefited from guidance provided by the national security review process in Arar Inquiry, I undertook my own, independent national security review and was not limited by any prior decisions."⁴⁰⁵ As such, he embraced the new approach to reviewing NSC claims and therefore, deciding what should and should not constitute public truth, despite the fact that the Arar Commission faced similar claims, under similar Terms of Reference without discounting the role of public truth-seeking in maintain credibility of the inquiry process.

⁴⁰³ Iacobucci Report, Appendices, *supra* note 344 at 464.

⁴⁰⁴ Iacobucci Report, Final Report, *supra* note 349 at 32.

⁴⁰⁵ *Ibid.* at 59.

In addition to pursuing and processing truth according to the adjudicative standards of justice, the Iacobucci Inquiry went even further and excluded from the truth generating process the very parties in whose names the Inquiry was created. Specifically, only the Attorney General was provided with both the confidential and the public versions of the factual narratives while the actual parties could not even review the public version prior to its release.⁴⁰⁶ Moreover, according to Iacobucci J.:

[i]n preparing the public version of my report, I chose not to use the technique of indicating where information has been omitted through blackouts or ellipsis marks. In my view, doing so would have impaired the intelligibility and coherence of the public reports, particularly since, in many instances, the best solution to a national security confidentiality concern was to summarize the information or convey its essence in a different way, rather than omit specific words or phrases. The text of the public report includes approximately 20% fewer words than the text of the confidential report (excluding footnoted).⁴⁰⁷

Once again, Iacobucci J. seemed to forget that the very purpose of a Public Inquiry was to present truth as close to its organic state as possible rather than to simply summarize its essence. What would be the point of a Public Inquiry if a mere summary of the evidence would suffice to instill public confidence in the government institution under investigation? After all, an inquiry is about truth-seeking rather than truth stories, which Iacobucci J. attempted to normalize. No matter the intent behind the truth versions, the internal inquiry model adopted by Iacobucci J., did less to informing the public than to isolate it from the process altogether. According to Amnesty International, “[f]or these men, for the Intervenors, and for the public, this process has been unacceptable, and, no matter what the outcome, has fostered a culture of impunity. As Commissioner Iacobucci has said himself, [since] ‘it is essential to the administration of justice that justice is done and is seen to be done, such public scrutiny is fundamental.’”⁴⁰⁸ Alas, this

⁴⁰⁶ *Ibid.* at 58-59.

⁴⁰⁷ *Ibid.* at 60.

⁴⁰⁸ Amnesty International et al., “The ‘Internal Inquiry’ process: Fostering a culture of impunity” (17 October 2008) as cited in Kalajdzic, *supra* note 3 at 178-179.

essential public scrutiny has been excluded from the Iacobucci Inquiry, impacting not only the effectiveness of the process but also its traditional objectives and image.

CONCLUSION – THE SIGNS OF AN INQUIRY’S DEMISE

According to Salter, an inquiry is fully capable of incorporating radical alternatives and debate and more importantly, encouraging “genuinely democratic participation.”⁴⁰⁹ Despite its radical nature and capacity for public truth-seeking and justice, the analysis above leaves no doubt as to the impending demise of the Public Inquiry as a truly unique and public institution if the discourses of justice continue to dominate the academic and professional discussion of the inquiry’s principal framework, functions, and practices that define its public image. For one, the tendency has been to pit the adversarial notions of truth and justice against those expected to guide the inquiry, consequently “judicializing” the process, preventing full public participation, precluding thorough truth-seeking and foreclosing justice in an inquisitorial setting such as that of a Public Inquiry. In other words, the trend is to convert the inquiry into yet another form of adversarial apparatus thus leading to the gradual demise of an inquiry as a unique public process.

Moreover, as argued above, the commissioner has ultimate power – as an insider and leader of the process - to influence how the public perceives and receives an inquiry. In other words, the judge-commissioner is the persona of an inquiry and plays a primary role in building and depicting the values, essence, virtue and identity of an inquiry. However, between the influence of a judge-commissioner’s professional upbringing on his/her decision-making and the real/perceived (both externally and internally applied) pressure to adhere to the traditional adjudicative standards of justice and truth-seeking, the judge-commissioner is not in any better position to fight against the current of judicialized discourses. In fact, both O’Connor J. in the Arar Commission and Iacobucci J. in the Iacobucci Inquiry, were continuously referencing adjudicative norms and standards in order to rationalize their decision-making process and the

⁴⁰⁹ Salter, “The Two Contradictions in Public Inquiries”, *supra* note 26 at 181.

conclusions they had reached either to uphold the legitimacy of their “judicial” status (i.e., independence and impartiality, as well as the judicial obligation to protect individual rights) or to ensure their inquiry’s survival (or efficiency). Iacobucci J. went even as far as justifying a new “private” version of the Public Inquiry. As Robardet argued:

Such attitudes are part and parcel of the ideology of law and as such are inculcated in lawyers as they partake of legal education, read legal scholarship and practice law. Even where serious efforts are made to escape the bounds of inherited legal thought, *a persistent suspicion of public administration and consequently a general preference of ‘private’ rather than ‘public’ ordering lingers in the juristic mind.*⁴¹⁰

As argued throughout the paper, to a greater extent the same can be said with respect to the attitude of a judge-commissioner whether he/she is conscious of it or not. It is this attitude and the constant preference for and recourse to the discourses of justice that is gradually leading to the demise of the Public Inquiry as a unique public institution separate and independent from the adjudicative/adversarial system.

What is more alarming, however, is that most of the judge-commissioners as well as the academics writing on the subject of public inquiries, are not aware of the extent to which this particular attitude – one that treats as normative the adjudicative forms of truth and justice – shapes and molds the Public Inquiry image to fit within this adversarial/adjudicative paradigm. The consequences are ever direr. As the Public Inquiry assumes the image that is prescribed by the standards of judicial discourse, it abandons its true public nature and essence, neglects its social functions, and ultimately fails to achieve its most important institutional goal and objective, namely to encourage and secure public confidence in the government that created it, the public institutions that are under its investigation, and most importantly, its own institutional utility and credibility.

⁴¹⁰ Robardet, *supra* note 27 at 111-112 (emphasis added).

The significance of this impact should not be ignored or underestimated. As a unique institution, the Public Inquiry has the capacity and potential to add meaningful and enlightening contribution to social thought and development. According to Berger:

The work of commissions of inquiry, both through their hearings and in their reports, has brought new thinking into the public consciousness; expanded the vocabulary of politics, education, and social science; and added to the furniture that we now expect to find in Canada's storefront of ideas. Contrary to popular mythology, commissions of inquiry have always had real importance in providing considered advice to governments. They supplement the traditional machinery of government, by bringing to bear the resources of time, objectivity, expertise, and by offering a forum for the expression of public opinion.⁴¹¹

In order to ensure that the Public Inquiry continues its unique contribution to social development, both the academia and the legal professionals need to be conscious at all times of the discourses that they utilize as well as their impact within the inquiry context. As the creator of the public inquiry image, the commissioner, more than ever, needs to be conscious of the discourses underpinning his/her decision-making so as to avoid presenting the inquiry as something other than it is and thereby undermining public trust when the institutional values conflict with the outcome and vice versa. All that is needed is an awareness of the social functions essential to an inquiry's survival as a separate and unique public institution and that means a conscious refrain from defining the inquiry according to discourses that pit "justice" against truth.

⁴¹¹ Thomas R. Berger, "Canadian Commissions of Inquiry: An Insider's Perspective" 13 in Manson & Mullan, *Commissions of Inquiry*, *supra* note 3at 14.

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