

# THE PROTECTION OF INDIVIDUAL RIGHTS AND THE PUBLIC INQUIRY

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## I. Introduction

Public inquiries deal with society's most problematic situations. They delve into clandestine activities and have a profound effect on the people they investigate. In some ways, they violate our most strongly held beliefs about individual rights. Yet it is my opinion that public inquiries are not unfair to individuals and that individuals should not be protected from them.

A public inquiry for the purpose of this paper is an *ad hoc* inquiry called by the government with its own terms of reference specific to the subject matter of the inquiry which has the power to subpoena witnesses and require the production of documents. It may not take any punitive action but may only make findings and recommendations.<sup>1</sup> Also, for the purpose of this paper, the protection of individual rights will be taken to include all of the normal evidentiary rules that exist to prevent any potential unfairness to an individual in the legal process. These will be analyzed to determine the extent to which they might cause unfairness to an individual within the inquiry process, along with the impact of the inquiry on subsequent judicial or quasi-judicial actions with relation to an accused. This will also allow the examination of issues of self-incrimination, right to silence and the right to a fair and impartial tribunal.

Several characteristics make a public inquiry of particular concern in relation to issues such as the presumption of innocence. First, it employs all the state power of judicial proceedings, especially testimonial compulsion but, since it is *ad hoc* and particular to the situation under investigation, it is impossible to refine the procedure to ensure fairness to the individuals involved. Second, because inquiries tend to investigate acts of misconduct, it is highly likely that criminal or regulatory charges may be brought against individuals in relation to the incident that is under investigation. The public inquiry allows the state to use judicial tools within the inquiry process to uncover facts prior to an official criminal investigation. Normally, these judicial tools would not be available at all, e.g. compulsion of the accused, or would not be available at such an early stage of the investigation, e.g. the compulsion of other witnesses and the compelled production of documents.

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<sup>1</sup> See for example, this description in Alberta Law Reform Institute, *Issues Paper No. 3: Public Inquiries* (1991) at 8: "A public inquiry has two essential legal characteristics. The first is that it has power to inquire into facts and make recommendations. The second is that it has no power to make a legally binding decision about the matters into which it inquires. It is the executive that establishes public inquiries."

The public inquiry distorts the sequence of events, often in a way that results in people feeling that they have been unfairly treated. The important question is whether they have, in fact, been unfairly treated, or whether their expectations are based on a misunderstanding of what civilized society promises.

## **II. Potential Unfairness of the Public Inquiry**

A public inquiry is distinct from most judicial proceedings in that it is primarily investigative in nature, and yet it enjoys the same judicial powers as more formal proceedings. Though there may be an argument that this is not unfair to the individual because an inquiry has no specific legal consequences, an inquiry may still have a negative impact on an individual in a number of ways.

### **(i) Negative Effects of the Inquiry Itself**

There may be direct results of the inquiry that could have an adverse effect on the individual. While individuals are not legally in jeopardy during the inquiry, an inquiry may have repercussions on an individual apart from its legal impact. The public inquiry by its very nature addresses issues of intense public interest. The evidence and findings of an inquiry will likely be reported by the media, which may affect an individual's reputation and standing in the community. Private extra-legal action may also be taken as a result of the findings of the inquiry. Clearly, an individual on whom an inquiry focuses may be subject to informal jeopardies that he or she may be unable to avoid.

### **(ii) Effect of an Inquiry on a Subsequent Trial**

The second potential unfairness that an inquiry may have on an individual or group of individuals is that it may provide either direct evidence or information that can be used in relation to charges made by the state against the individual. Even if the testimony from the inquiry itself is not admissible in subsequent proceedings (as will usually be the case), the testimony is available for use by investigators to assist their search for evidence that might not otherwise be discoverable, or at least not discovered.

In addition, after a full review of the issue in public by a judicial body, the evidence before, and even the findings of, that body may be so exposed that it is difficult to ensure that they will not affect the individual's right to a fair trial if criminal proceedings are subsequently brought against him or her. This problem is independent of the concern over evidence being brought out in the inquiry and used to assist in a subsequent criminal investigation. Rather, this concern stems from the misconception that once an inquiry has established fault, the legal system has done its job and all that remains is for a court to mete out an appropriate

punishment. This impression can be created even if the inquiry makes no findings of fault.

### III. The Philosophy Behind the Rules that Protect Individuals

The underlying philosophy of the fairness concepts that will be addressed in this paper – the presumption of innocence, the right against self-incrimination, and the right to silence – is normally thought to be the basic obligation of the Crown to provide a “case to meet” at various points during the adversarial process.<sup>2</sup> In a civilized society that operates under the adversarial system of justice, a person should not be put in the position of explaining his or her actions until the state has shown that there is something that demands explanation according to the accepted rules of the society. Moreover, a person should not be subject to penalty by the state until the state has proven its right to punish at a high enough level to be beyond question. The accused does not have to provide this “evidence” either in or out of court; to do so would allow the state to proceed without adequate grounds, confident that it will either get the necessary evidence from the accused, or a conviction of the accused for refusing to give evidence. The potential for such an exercise of arbitrary power by the state is dangerous.

Furthermore, the crown is not normally entitled to compel others to give statements as part of the investigation. When they have adequate grounds, the police may search for real evidence, but generally the sole power to compel witnesses to testify is at a trial. Again, this protects individuals, both the accused and others, against the arbitrary use of power by the government.

As a further protection against these potential abuses of power, our system requires a precise statement of the accusation before an individual can be compelled to testify. The crown must also present enough evidence to establish a *prima facie* case before the evidentiary burden of proof shifts to the accused. Moreover, the requirement of proof beyond a reasonable doubt before punishment can be imposed, presupposes an unbiased court i.e. one that has not prejudged the issue based on prior knowledge.

It is important to reiterate here that these requirements are not based on a philosophy that individuals do not need to take responsibility for their actions. Rather they are based on a philosophy that the government *does* need to take responsibility for its actions.

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<sup>2</sup>For example, see E. Ratushny, *Self-Incrimination* (Toronto: Carswell, 1979) at 174-190.

#### IV. The Purpose of the Public Inquiry

The purpose of the public inquiry is not to punish but to provide an explanation for an event or situation that will help the government and society to avoid the situation or better handle it in the future.<sup>3</sup> Several authors have pointed out what a valuable function this is and its necessity to the proper functioning of government and the society that government is meant to serve.<sup>4</sup> Moreover, it could be said that the state, in exercising its investigative powers through the inquiry process, represents individual interests in a way that disempowered individuals could never do themselves. The problem that arises when the government exercises its investigative powers lies with the specific power of compulsion at the investigation stage of an inquiry. The power of compulsion does not exist at this stage in other judicial proceedings. However, as the Alberta Law Reform Commission has noted, the power to compel witnesses during its investigation is a fundamental element of the public inquiry:

Public inquiries are usually established for purposes in which the public has an interest that is likely to be at least as important as the private interest of a party to a lawsuit. A commission of inquiry may be seriously hampered in its work if it cannot compel the giving of testimony and the production of documents.<sup>5</sup>

While concerns about individual protections focus on the potential harm caused by direct government action, one has to question whether individuals in society are concerned *solely* with this type of harm. Just as much harm can be caused by a government not exercising its investigative powers. If government exists to accomplish things for individuals that they are unable to accomplish on their own, such as to control harm from other sources, then it is essential that the government have the necessary powers to enable it to perform this function. Otherwise, it is arguable that there is little point in giving this function to government in the first place. This is not to say that governmental power should be unlimited; the balance between this power and individual protections should be maintained. Governmental power has a valid and necessary place within this analysis of the public inquiry, and should not be viewed as evil *per se*.

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<sup>3</sup>*Supra*, note 1 at 8. The Alberta Law Reform Institute stated that, "the formal purposes of a public inquiry are to provide (a) factual information and assessment, and (b) policy advice, to (c) a government through an open process."

<sup>4</sup>See for example, Ontario Law Reform Commission, *Report on Public Inquiries* (Toronto: Queen's Printer, 1992) at 11-13.

<sup>5</sup>*Supra*, note 2 at 38.

## V. Interaction of the Public Inquiry and the Protection of Individual Rights

### (i) Negative Effects of the Inquiry Itself

As discussed above, the public inquiry may have a negative impact on an individual even without further legal proceedings. In a public inquiry, there is no potential for direct government-imposed consequences, but there is the potential for extra-legal consequences fuelled by the nature of the public inquiry process.

It is important, in assessing whether these extra-legal consequences are acceptable, to address the question of whether there is a legitimate distinction between legal and extra-legal consequences. It is my position that there is such a distinction. The reactions of society to the findings of a public inquiry are not within the control of government. It is not up to the government to take responsibility for them, even though the government launched the inquiry that exposed the situation to the public. If the government decision to establish an inquiry is legitimate, the fact that it may have consequences beyond the control of the state on an individual simply becomes one factor to balance in determining whether the inquiry is an appropriate exercise of governmental power. It is not sufficient grounds for an absolute prohibition of the inquiry process. However, it is essential that an inquiry allow a person, who may be harmed by the information that the inquiry has uncovered, to respond. If this is done, the fact that a legitimately established inquiry may have potentially harmful consequences for an individual is not unfair.

This is supported by the fact that the particular protections of individual rights that are at risk in an inquiry were developed specifically within a criminal law framework. While they have been extended to other quasi-criminal state functions, such as regulatory offences, there is clearly some dispute as to whether they apply in such situations as strongly as they do in criminal cases.<sup>6</sup> Arguably, then, when the result is not legally imposed, they have even less application.

### (ii) Effect of an Inquiry on a Subsequent Trial.

It is important to note that Canada has a long tradition of applying fewer individual protections when an accused or other witness is required to testify in another proceeding. An accused is not able to avoid testifying when called as a witness in other criminal or civil proceedings. The only protection available to the individual is that his or her testimony may not be used as evidence in subsequent

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<sup>6</sup>See, for example, the judgment by Cory J. in *R. v. Wholesale Travel Group Inc.* (1991), 67 C.C.C. (3d) 193 (S.C.C.) at 244-249 and 254-261. There he discussed the rationale for the distinction between crimes and regulatory offences and for a different content for the presumption of innocence when used in the regulatory context from its content in the criminal law context.

criminal proceedings. Moreover, the fact of the prior hearing does not automatically prejudice the subsequent proceedings. The reason for this is that the concerns about arbitrary governmental power on which these protections are based do not arise in these other contexts. The limits on the use of other proceedings ensure, for the most part, that they cannot be used in an arbitrary manner. Any gaps in protection are supplied by the rules that protect the individual in any subsequent criminal proceedings.

One must question whether similar limitations exist in the public inquiry. In criminal proceedings there must be an action against a specific person, and the evidence must be relevant to those charges. There are, therefore, natural limitations within the criminal justice system that would make it difficult to use another criminal trial as an investigative procedure. These limitations do not exist on a public inquiry.

In the case of civil proceedings, there is unlikely to be any government involvement or control. Therefore, the compelled investigative elements, such as discovery, are not as offensive as they are not in the hands of those who may bring criminal proceedings (although we must remember that private prosecutions are a possibility). Moreover, the realities of the actual implementation of the civil law mean that:

- 1) it is not usually worth a victim's while to bring such action against someone who has engaged in criminal conduct;
- 2) if the action is brought, it is usually settled, with the settlement kept confidential between the parties and, therefore, unavailable for further use;
- 3) if the case actually goes to court and gives rise to testimony that might be used in an investigation against the defendant, it is usually so long after the event that the case may be too stale for prosecution.

Nonetheless, theoretically, there is no protection for accused persons in such circumstances.

Unlike these procedures, the public inquiry is *ad hoc* and has a primarily investigative function. There is the potential for abuse of the inquiry process if it is used as a substitute for a proper criminal investigation. This is a legitimate concern, especially given that its broader procedure would give the police access to more information than they would normally have. However, there are ways to avoid this danger. The first would be to allow no testimonial compulsion at all. However, this would substantially limit the effectiveness of the inquiry. Another measure would be to allow no criminal proceedings after the inquiry, thus requiring any criminal proceedings to be completed before the inquiry takes place. This would limit the effectiveness of the inquiry, given that a public inquiry must be held quickly in order to fulfil its investigative function. This function would be

severely impaired if the prior criminal prosecution were to suffer from many delays. Inevitably, if this proposal were followed, the government would be forced to choose between conducting a public inquiry or undertaking a criminal prosecution against the individual. This would be unfortunate because both proceedings are independently valid and each has a function that cannot be performed by the other. The cost of either of these methods of avoiding abuse is too high.

## VI. Legitimate Government Actions

The basic argument of this paper is that as long as the use of judicial procedure, including testimonial compulsion, is legitimate, there is no unfairness to any individual involved. If, as with a criminal or civil trial, the public inquiry is a valid governmental activity, there is no problem with the impact it may have on an individual in another proceeding. The question, then, is what makes a public inquiry legitimate, and what is a valid object for the use of strong governmental powers? Specifically, is it a valid object to investigate events that may have criminal elements so that efforts can be made to avoid them in the future?

If the public inquiry did not have the potential for encroaching on matters of criminal law there would be no doubt as to its legitimacy. In order for society and government to function smoothly, they must be self-correcting and responsive to current situations affecting the public interest. They must have flexible and strong provisions to accomplish these aims. The concerns about the abuse of an inquiry's powers that have run through this discussion need a strong instrument if they are to be controlled. It is a legitimate function of government to provide this instrument. If testimonial compulsion and other coercive powers are unnecessary to do the job effectively, they should be removed from the procedure of all public inquiries, not only the ones where individual interests are at stake. If, however, government determines these powers to be legitimate, then their use by an inquiry does not create unfairness for an affected individual.

Ultimately then, the essential step is to ensure that the inquiry has a legitimate governmental purpose, and is not a colourable attempt to punish or gather evidence against an individual. One way to accomplish this is to be specific in the identification of the terms of reference of the inquiry. There are limits now as to what those terms can be.<sup>7</sup> However, the terms cannot be so restrictive that they limit the effectiveness of the inquiry. For example, it may be necessary for an inquiry to identify crimes and perpetrators in order to identify appropriate responses and protections. In the end, there will always be some room for abuse. However, fear of abuse must not make legitimate and important government action impossible. Rather, it is important that the possibility of abuse remain a

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<sup>7</sup>See for example, *Starr v. Houlden* (1990), 68 D.L.R. 641 (S.C.C.) and the cases discussed therein.

consideration, and that those traditional techniques for controlling abuse – publicity, legal action and even public inquiries – remain available for use.

## VII. Conclusion

Making people responsible for their actions is not a bad thing *per se*. Nor is asking individuals about their involvement in activities that exploit the public trust, and identifying what went wrong. The presumption of innocence and right against self-incrimination exist not to shield individuals from public accountability, but to prevent the abuses that government can make of their own powers. Therefore, as long as those potential abuses are controlled, there is no need for the presumption of innocence and the right to silence to operate to protect the individuals. This may seem unfair because it appears that people in these circumstances have fewer rights than others. But to equalize the rights of individuals within the criminal justice system and the individuals who are the subject of a public inquiry without consideration of the purposes of those rights and the other needs of society is an abuse of the sophisticated instrument that is our justice system. To remove the possibility of having effective public inquiries would be to remove one of the most important mechanisms for protecting against government abuse and misconduct. Thus, the very fears that the use of public inquiries raise – such as government's abuse of this power – indicate the need for public inquiries to control this abuse. Once we acknowledge the need for public inquiries, we must accept their consequences, including the consequences that they may have on individuals. Efforts should be placed on ensuring that public inquiries are used only in legitimate and fair ways, not on denying society their use.