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Bryan Schwartz warns about the dark side of public inquiries

OF late, there has been a spate of public inquiries in Canada. Names such as Sinclair Stevens, Susan Nelles and J.J. Harper may come to mind. An inquiry is usually called because there is a public outcry. There are innocent victims who rightly engage our sympathy and respect; there is the appearance of impropriety, even brutality, on the part of officials in a position of trust. We may welcome a public inquiry as the most powerful and sweeping means of exposing the truth - and lose sight of the damage it can inflict on civil liberties.

Criminal trials proceed according to well-established rules that protect unpopular defendants from hasty judgments or excessive retribution. With inquiries, the rules are invented to suit the occasion. A government picks a general mandate and broad format that suits its purposes. It usually leaves the people in charge of the inquiry to improvise some more. If they get caught up with the righteousness of the cause or their own heroic status, the abuse of civil liberties can be severe. Too much depends on the character of the person heading the inquiry. Intelligence and self-restraint are needed. You might get a Eugene McCarthy, but you might also get Charlie or Joseph.

In a trial, neither the prosecution or the defence is allowed its choice of judge. But inquiries are staffed by the government of the day. If the issue is the government's own misconduct, it can ensure that the inquiry is headed by a kindred spirit. For added safety, the government can equip the inquiry with a sweeping mandate and a distant reporting date. By the time the results are in, no one will care. If the inquiry is about the wrongdoing of others, the government can install a righteous avenger. While an inquiry cannot impose fines or jail terms, its critical comments can surely destroy reputations and careers.

An ordinary trial can be hard on witnesses. They may be compelled to disclose intimate or embarrassing facts about themselves or information received from others in confidence. In a trial, there is at least a defined focus, and a judge can prevent questioning that strays too far from it. In an inquiry, the focus may be fuzzy and constantly shifting. Witness after witness may be dragged in, and asked almost any sort of question. You may be examined by a hostile inquiry counsel, then cross-examined four or five more times by lawyers for others interests. If the inquiry is on television, the interrogations are liable to be lengthy and histrionic.

A criminal trial is usually quick, a matter of days or weeks. If you are on the wrong end of an inquiry, you may find yourself at risk for months or years, never knowing when the searchlight is going to next return to you. And once the inquiry is over, you may still face a barrage of other proceedings, including a criminal trial.

If you are suspected of a crime, you ordinarily have a right to remain silent. You don't have to talk to the police, or testify at your trial. What happens, though, if you are hauled before an inquiry? Canadian law is not clear on whether your right to remain silent still counts for much. You might be compelled to testify at the inquiry. Your own words may alert the police to your case, inspire them to charge you with a crime, and help them in gathering evidence against you. At your trial, the prosecution usually cannot quote what you said at the inquiry. But your inquiry testimony may have already provided the police and prosecutors with all the help they needed.

Here are some suggestions for reform:

Inquiries should be used sparingly. Each one should require the approval of the legislature, not just the cabinet. If a person is likely to be charged with an offence, we should generally wait for a proper trial. If the government's own conduct is under fire, an independent prosecutor could be brought in to investigate or present the case.

Legislatures should pass an "inquiry bill of rights." No one forced to testify at an inquiry could ever be charged with a related criminal offence. There would be more protection against the compelled disclosure of personal, embarrassing or confidential information.

We should avoid mixing inquiries into individual cases with policy-making inquiries. Doing justice to an individual with respect to a particular transaction is a sufficient end in itself; it should not be trivialized or prejudiced by the pursuit of a larger social cause, however worthy.

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