A REQUIEM FOR THE ROYAL COMMISSION

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There are few people who like a sore loser, and judicial sore losers are perhaps more contemptible than most. One of the quirks of our legal system is that it gives litigants, but not judges whose decisions have been reversed by a higher court, certain rights of appeal. When litigants exercise those rights the matter is supposed to be closed. When, however, a worthy academic journal gives a judge who has been reversed by the highest court in Canada the opportunity to criticize that Supreme Court he may be so foolish as to accept their invitation.

This paper is premised on the belief that public inquiries, even those dealing with the conduct or misconduct of individuals, have an important role to play in our society. This role is being eroded by the Supreme Courts' insistence on safeguarding the rights of the individual at the expense of the public interest. By virtue of its decision in *Starr* v. *Houlden*,[1] the Supreme Court has effectively and unnecessarily restricted the scope of provincial and federal inquiries into misconduct of provincial or federal affairs.

In *Starr* the Supreme Court set aside an Ontario Commission of Inquiry into the alleged wrong doing of Patricia Starr and a real estate and development corporation, Tridel. Incidentally, in declaring the inquiry *ultra vires* the Supreme Court also overturned a unanimous Ontario Court of Appeal judgment upholding the validity of that inquiry. I was a member of the Court of Appeal panel that was reversed by the Supreme Court judgment – hence "the sore loser". I was also a commissioner in two very noisy commissions in the early 1980s. One was a federal inquiry into a train wreck in Mississauga. The second was an inquiry into the mysterious infant deaths at the Hospital for Sick Children in Toronto. It is doubtful whether these inquiries would have survived a challenge if *Starr* had been the law at the time.

There were many cases before *Starr* that dealt with the validity of public inquiries using a division of powers analysis, and I reviewed these in a speech given at the Pitbaldo Lectures in Winnipeg.[2] Almost invariably, a division of powers question arises when a public inquiry is established to look into alleged acts of misconduct. The inquiry is challenged on the grounds that it is infringing on the federal power over criminal law and procedure reserved to it under s.

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[1](1990), 55 CCC (3d) 472 (S.C.C.) [hereinafter *Starr*].

[2]The address given in Winnipeg forms the basis for this article. However, I have also noted recent developments that confirm the direst prophesies of my speech in Winnipeg.

91(27) of the *Constitution*.[3] The most important of these cases, and the only one directly on point decided after the *Canadian Charter of Rights and Freedoms*[4] was *O'Hara* v. *British Columbia*.[5] There, a prisoner was released after suffering serious injuries while in police custody. An inquiry under the *British Columbia Police Act*[6] failed to identify the person responsible. The province then ordered its own inquiry charged to investigate the manner in which the prisoner was detained, discover the identity of the person or persons responsible for his injuries and determine if any evidence had been suppressed in the earlier investigation. The constitutionality of the commission was upheld after the inquiry was challenged by the police officers under suspicion.

In *O'Hara*, Dickson C.J. set out the limits placed on provincial and federal inquiries by the division of powers under the constitution, though he refrained from analyzing the effect of the *Charter* on the inquiry:

> As stated, there are limits to a province's jurisdiction to establish an inquiry and equip it with coercive investigatory authority. Broadly speaking, those limits are twofold in nature. First, a province may not interfere with federal interests in the enactment of and provision for a uniform system of criminal justice in the country as embodied in the *Criminal Code*. An inquiry enacted solely to determine criminal liability and to bypass the protection accorded to an accused by the *Criminal Code* would be *ultra vires* a province, being a matter relating to criminal law and criminal procedure. This limitation on provincial jurisdiction is an acknowledgement of the federal nature of our system of self-government. Secondly, neither a province nor Parliament may infringe the rights of Canadian citizens in establishing inquiries of this kind. This limitation is of a different sort. It is an acknowledgement of a respect for individual rights and freedoms and is embodied in the common law, various acts of both levels of governments, including the *Canada Evidence Act*, R.S.C. 1970, c. E-10, and more recently, the *Canadian Charter of Rights and Freedoms*. Thus, neither level of government may establish and insist upon procedures which infringe fundamental rights and freedoms, such as the right against self-incrimination as it is defined in our law. It will suffice to say that while the appellants framed their arguments in terms strongly reminiscent of a challenge to the constitutionality of the inquiry based on the latter set of concerns, this court was asked only to address its constitutionality in terms of the distribution of powers between the two levels of government. I therefore express no opinion upon the nature and extent of rights guaranteed by the *Charter* and the

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[3]*Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Constitution*].

[4]Part I of the *Constitution Act, 1982*, being schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Charter*].

[5]*Robinson* v. *British Columbia*, [1987] 2 SCR 591, (*sub nom. O'Hara* v. *British Columbia*) (1987), 45 D.L.R. (4th) 527.

[6]R.S.B.C. 1979, c. 331.

> law of evidence as they relate to the inquiry's proceedings except to say that those rights, of course, must be respected by the relevant authorities.[7]

Three years later the Supreme Court was faced with another challenge to the validity of a public inquiry in *Starr*. Patricia Starr was the President of the Toronto chapter of the National Council of Jewish Women. Newspaper articles had accused her of making contributions out of the coffers of the charity to certain politicians, and had printed reports of her association, along with the National Counsel of Jewish Women's association, with Tridel Corporation Inc., a real estate development corporation. During the time of the publication of these articles it was revealed that Gordon Ashworth, an assistant to the Premier of Ontario, had received a refrigerator and some painting work on his house provided by a Tridel-related company. This latter incident prompted Mr. Ashworth to resign and the Premier to establish the Inquiry. The Premier made the following statement laying out the terms of reference of the inquiry:

> I have today ordered a judicial inquiry into the facts surrounding the relationships between Patricia Starr, any person or corporation she may have acted for, including Tridel, and any elected and appointed officials, including Gordon Ashworth.
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> The recent allegations are deeply disturbing and profoundly worrisome. I am very troubled by this situation and I think that it is essential that there be an immediate and independent public inquiry to get to the bottom of it. I am determined that in the carrying out of this inquiry, that no stone be left unturned, that every lead be followed up on, that every allegation be thoroughly and exhaustively investigated until all of the facts have been laid bare before us.
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> Nothing is more important than the public trust. I will do everything in my power to ensure that it is protected. I believe very strongly that the democratic system depends on the public's trust and faith in the integrity of their public officials. People must be confident that public officials, *all* public officials, whether elected or appointed, are people of integrity. They must be confident that their officials are operating in an honest, impartial and objective manner free of prejudice, free of bias, and free of unwarranted partisanship. Most importantly, public officials must be open to public scrutiny, and in doing so must be found to be beyond reproach, and acting in accordance with the highest ethical standards. I am confident that this judicial inquiry will uncover those who have not functioned in this manner. I give you my personal assurance that those whose performance has been found wanting will be discovered, those who have erred will be punished, and those who have broken the law will be prosecuted.

The terms of reference required the Commissioner, without expressing any conclusion of law regarding the civil or criminal responsibility of any individual or organization, to inquire into dealings between Patricia Starr, Tridel or Tridel-

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[7] *Supra*, note 5 at 542.

related companies and elected or unelected officials of the province. Its purpose was to determine if any benefits were conferred on officials of the province by Ms. Starr or Tridel. The phrasing used to describe the mandate of the inquiry was very similar to s. 121 of the *Criminal Code* concerning frauds on the government.[8] The validity of the inquiry was challenged on three main grounds:

(1) The inquiry was invalid because it related to criminal law which is within the exclusive jurisdiction of Parliament;
(2) the inquiry would inevitably infringe *Charter* rights; and,
(3) the Commissioner could not obey his mandate to inquire "without expressing any conclusion of law regarding the civil or criminal responsibility of any individual or organization," something he was forbidden to do by the terms of reference.

The majority of the Supreme Court of Canada determined that the inquiry was a colourable transgression on the federal power over criminal law. The inquiry was, in effect, a substitute police investigation and preliminary inquiry. The majority reached this conclusion by examining the terms of reference or mandate given to the inquiry and the background facts of the case. The true purpose of the inquiry was the investigation and determination of facts relating to a specific criminal offence. Lamer J., in finding the inquiry *ultra vires* emphasized the fact that there was a criminal investigation underway concerning two individuals named in the inquiry. He also pointed out that the terms of reference of the inquiry incorporated for the most part s. 121 of the *Criminal Code*.

The following conclusions may be drawn from the majority judgment of the Supreme Court:

(1) If a court determines that a provincial inquiry is "pith and substance" an investigation into criminal matters, the inquiry will be ruled *ultra vires*;
(2) a conclusion that an inquiry is *ultra vires* is more likely if specific names and specific criminal offences are set out in the terms of reference of the inquiry; and,
(3) the Supreme Court of Canada has given notice in *Starr* that it is more likely today than in the past to conclude that an inquiry is pith and substance an inquiry into crime if the inquiry is looking into conduct that may result in criminal charges.

The rationale behind the majority judgment stems from the court's increasing concern with the protection of individual rights. The majority judgment is peppered with statements expressing this concern. Nowhere in their judgment is reference made to the equal concern that governments should have the ability to

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[8]R.S.C. 1985, c. C-34 [hereinafter *Criminal Code*].

investigate conduct within its ranks or that the public has an interest in knowing of such misconduct.

In my opinion the dissenting judgment of Madam Justice L'Heureux-Dubé balances the rights of the individual and the public interest far more effectively. She accepted the judgment of the appeal court that the inquiry was, "in relation to a provincial matter namely the relationship between provincial government officials, both elected and non-elected and other named individuals and corporations; it relates to matters of undoubted provincial concern ... ." L'Heureux-Dubé J. further held that the inquiry fell within provincial jurisdiction set out in ss. 92(4), (7), (14) and (16).[9] Moreover, the naming of individuals in the terms of reference served only to limit and focus the inquiry. The similarity between the terms and s. 121 of the *Criminal Code* was to delineate the scope of the circumscribed investigation wherein, by the terms of reference, criminal findings were expressly prohibited.

In examining the case-law, she noted that in the past numerous inquiries in Canada had dealt with specifically named persons being investigated for specific wrongdoing, and the Supreme Court had validated these inquiries. Traditionally, the court recognized that the purpose and effect of an inquiry were different from a judicial proceeding. In an inquiry there is no *lis*, no accused, no criminal consequences and no penalties involved. Although the terms of reference of an inquiry may be similar to that of the *Criminal Code*, the purpose of the terms of reference is quite different from that of the *Criminal Code*. She then concludes:

> On the question of division of powers, I do not know of any general postulate which would restrict or impede provincial inquiries into matters that are otherwise explicitly within provincial jurisdiction. I do not believe that the combination of several factors, each of which is *intra vires*, can render an inquiry constitutionally infirm. It is unnecessary for the present purposes to probe more deeply into constitutional theory regarding provincial competence to investigate public officials for alleged improprieties. However, a legislative enactment must seek to accomplish objectives that lie beyond the boundaries of its jurisdictional limits before it can be stamped *ultra vires*. Given the context and the scope of this inquiry, the circumscribed language of the terms of reference, and the pronouncements of this court, particularly in *Keable* and *O'Hara*, I cannot find that the Order in Council at issue is *intra vires* the Province of Ontario.
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> This inquiry is, in my view, a legitimate exercise by the province of Ontario of its powers to investigate a purely provincial matter. At the end of the day, the irresistible conclusion is that this inquiry is not an inquiry solely into a specific crime committed by specific named persons such as to encroach upon the federal law power. Its wider function becomes apparent when assessed in the context of

[9] *Supra*, note 3.

its establishment, upon a careful examination of the terms of reference, and in light of this court's decisions in similar cases.[10]

Although I wholeheartedly concur with L'Heureux-Dubé J.'s judgment, the fact remains that in the end it is a dissenting judgment, and therefore, not binding on us lesser mortals.

I might add as a footnote that following the courts decision in *Starr* the inquiry was immediately wound up. Ms. Starr was subsequently convicted of a criminal offence, sent to jail for a spell and has since written a book blaming everyone else but herself for her predicament. Though she may be right, I would have preferred to hear about her and the other alleged miscreants from the Commissioner of the inquiry.

I was of the view in Winnipeg in 1990 and am of that view today that *Starr* and *O'Hara* cannot live together. I concede that the terms of reference in *Starr* were inelegantly drawn, but surely the fundamental question is whether the inquiry's pith and substance transgresses the federal law power over criminal law and procedure.

One has only to compare the nature of the inquiries in *Starr* and *O'Hara* to see the conflict between the two decisions. *O'Hara*, an inquiry into whether the police had mistreated a prisoner, is a far more colourable usurpation of the federal power over criminal law; whereas *Starr* is more an inquiry of provincial concern, that is, whether the president of a charity had illegally contributed to the election funds of Members of the Legislative Assembly and whether public officials had received benefits from developers. Yet *O'Hara* was upheld by the Supreme Court as a valid inquiry, while *Starr* was declared *ultra vires*. Clearly the Supreme Court has applied an inconsistent division of powers analysis in these two cases.

In both inquiries the commissioner was specifically forbidden by the terms of reference to express any conclusion of criminal responsibility. The Commissioner in *Starr* stated that he was well aware of that restriction and intended to abide by it. However, the Supreme Court did not give him the opportunity. Apparently, the majority of the Supreme Court of Canada thought the task would be too difficult, if not impossible.

Given the Supreme Court's decision in *Starr*, courts will not wait for an inquiry to overstep its bounds before declaring it invalid. An inquiry that may reveal any evidence of specific crimes will have a short and precarious life. It will be stopped before it has a chance to transgress. I consider this an unfortunate consequence. Commissioners are not automatons who are incapable of exercising their discretion

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[10] *Supra*, note 1 at 525.

to avoid such transgressions. Many of them can think for themselves and have a well-developed sense of justice.

This, then, is the future that awaits us. No counsel worth his salt will allow a question to be posed to his client at an inquiry that might reflect the commission of a criminal offence without challenging the whole proceeding in court. Indeed counsel may well proceed against the commissioner before his client is called. He may not always be successful but the time taken up will be intolerable. The besetting sin of commissions, aside from their cost, is the time taken for their completion. The time will be infinitely extended if they are required to justify their conduct time and time again, yet *Starr* has opened the door for this possibility.

In *Starr*, as I have said, the majority found it unnecessary to deal with the *Charter*. However, this issue was dealt with very thoroughly by the Nova Scotia Court of Appeal in *Phillips* v. *Nova Scotia*.[11] In *Phillips* a provincial inquiry had been established to inquire into the matter of a fatal explosion in the Westray Mine. The terms of reference of the inquiry required the Commissioner to investigate the "occurrence", determine whether it was preventable and ascertain whether there was neglect or non-compliance with statutes or mismanagement in the mine itself leading to the disaster. Certain mine managers at Westray challenged the validity of the Commission on the grounds that it was *ultra vires* as being an encroachment on criminal law and that it violated their rights under the *Charter*.

The trial judge accepted the first argument and declared the Order-in-Council setting up the Commission *ultra vires*. She therefore did not need to consider the *Charter* argument. The Court of Appeal disagreed with the trial judge's decision on the first issue. It held that the dominant purpose of the inquiry was to look into the coal mining disaster and make recommendations to prevent its repetition. This purpose was clearly within the constitutional competence of the province. On the *Charter* issue the Court found that the rights of the mine managers under ss. 7 and 11 were infringed because the managers could be compelled to testify concerning matters on which they might be found criminally liable. Accordingly, while the Court set aside the *ultra vires* order, they ordered a stay of the inquiry until all proceedings under the Nova Scotia *Health Act*[12] and the *Criminal Code* had been disposed of.

Leave to appeal in *Phillips* has been granted by the Supreme Court of Canada giving the court the opportunity to revisit the issues addressed in *Starr*. I can only

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[11](1993), 100 D.L.R. (4th) 79 [hereinafter *Phillips*].

[12]R.S.N.S., 1989 c. C-195.

say that I regret the way the law seems to be going. I said at the beginning that the restrictions the courts have put upon commissions have been both effective and unnecessary. In balancing the interests of the individual against the public interest, the courts have decided squarely in favour of the individual to the extent of eliminating the public interest, all to protect and advance private rights considered to be in jeopardy.

What are those individual rights that are in such jeopardy? Today, anyone who is remotely suspected of anything that the inquiry might reveal has counsel to represent him or her, usually at the public's expense. This is the case even though under all of the provincial inquiry acts, no finding can be made against a person without due notice to that person. It has long been established that no one accused of a crime can be compelled to testify at his trial or any other relevant proceeding. Even if the individual is only a witness at the inquiry, the *Canada Evidence Act*,[13] provincial inquiry acts, and the *Charter* all prohibit the use of that evidence in any subsequent proceedings.

While there may be a slight possibility of derivative evidence being obtained from testimony that may be damaging, there is always a discretion vested in the commissioner to refuse the evidence if it will work unfairly to the witness. In the inquiry into the baby deaths at the Hospital for Sick Children I was concerned about forcing any witness to testify if he or she claimed it would incriminate or otherwise prejudice him or her. However, no such claim was ever made. I should like to add, very much tangentially, that contrary to popular belief no witnesses were subpoenaed and forced to testify at that Inquiry. Everyone appeared and testified willingly. The only subpoenas issued were at the request of witnesses whose employers required them, or for those who needed them for the purpose of having their travelling expenses reimbursed.

The Supreme Court of Canada has implied that it is more important that these individual rights that are already largely protected be given iron clad protection, than it is for the government to be able to investigate misconduct to satisfy the public interest. I respectfully disagree with this approach but, like a good soldier, I will concede that I am wrong, and at least for the present, that they are right. This disagreement on my behalf is not to say that I do not believe in civil rights. It is just that I do not believe that they are the only rights worth believing in and protecting, especially when individual rights are already substantially protected. As L'Heureux-Dubé, J. noted in *Starr*:

> Recalling the limitations on the Commission's powers and function, it is worth noting the many procedural protections awarded the appellants in the *Public Inquiries Act* and the Commissioner's own rulings: standing at the inquiry; cross-

[13]R.S.C. 1985, c. C-5.

> examination of witnesses; right to counsel; opportunity to call witnesses to introduce evidence; privileges available to witnesses in court, such as solicitor-client privilege; and the opportunity to move for *in camera* hearings. Parties with standing or limited standing are entitled to funding of their costs at legal aid rates. Again, it cannot be overemphasized that the Commissioner is precluded from expressing any opinions regarding civil or criminal liability, or from levying any sanctions against the named appellants or other individuals called upon to testify at the public inquiry.[14]

Hallett J.A. for the Court of Appeal in *Phillips* gave earnest consideration to balancing the rights of the public against those of the individual and resolved the issue by postponing the inquiry. This may ultimately be the solution favoured by the courts, but it cannot be totally satisfactory. Postponing an inquiry only serves to focus attention on the besetting sins of inquiries – time and cost. Every time an inquiry is postponed, more money and time is wasted. It also throws the hard work done by the inquiry into chaos and may ultimately destroy its usefulness.

I sometimes think bitterly that one of the underlying reasons for the Supreme Court's position on public inquiries is that the judiciary does not trust commissioners to do the right thing. This rationale is odd because generally it is judges who are appointed commissioners of inquiries. In my view, commissioners should be expected to behave like judges when faced with a threat to civil rights or a potential breach of the *Charter*. As I said earlier, the commissioners in *Starr* and in *Phillips* knew that they were restricted from expressing conclusions of criminal responsibility, and intended to abide by that restriction. They were stopped by the courts before they could show how they were going to accomplish this. This, I fear, is the future that awaits us.

Though this may indeed sound like sour grapes over the Supreme Court of Canada's reversal of the Ontario judge's unanimous opinions in *Starr*, this article is more than an intemperate attack by a sore loser. It stems from a deeply held conviction that public inquiries can and do serve the public interest and have generally proved themselves to be valuable additions to government and sources of comfort and knowledge to the public. They are very difficult to conduct and I cannot understand why the courts want to burden them with unnecessary restrictions. Any commissioner worthy of appointment wants to do the best he or she can, and wants to do it quickly. These new restrictions, in my view, make it difficult to do either. If you start from the premise that inquiries are useless and a waste of time and money, then you will welcome these new restrictions. If the legislatures adopt this position then the appropriate remedy should be a statutory abolition of the public inquiry. The following, however, are the two foundations that I believe the law should be based on:

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[14] *Supra*, note 1 at 529.

(1) The government has a right to investigate and the public has a right to know and these rights are entitled to protection.
(2) An individual being investigated or questioned also has a right to protection, but that right is already protected by provisions of the *Inquiries Acts* and the *Charter*. If those are not enough, the individual can be further protected by the commissioner or the judge at trial.

As the law now stands, any effort by provincial or federal governments to investigate wrongdoing will have a stormy path through the courts and may well be unable to function at all. Certainly, any potential commissioner will be well advised to think hard before accepting the appointment. In fact, I would not blame any potential commissioner of a proposed provincial inquiry into wrongdoing to require a joint federal and provincial appointment, together with a reference to the Supreme Court of Canada on the validity of the terms of reference and a definition of their scope before commencing the difficult task.

With these statements I have probably precluded myself from ever being asked to head another commission, and if there is one thing that the Supreme Court of Canada and I can agree upon respecting public inquiries, it is that this is not such a bad idea.