THE PUBLIC INQUIRY AND THE PRESUMPTION OF INNOCENCE: THE PROSPECTS FOR MUTUAL SURVIVAL

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The suppression of public inquiries by the successful invocation of the presumption of innocence is only one of many devices which may be used to derail or handicap an inquiry. The terms of reference of the inquiry and the conduct of the proceedings, as well as the final report, must also meander through the minefields of division of powers and other sections of the *Canadian Charter of Rights and Freedoms*,[1] including ss. 7 (with emphasis on the right to silence, but including some additional potential support for the presumption of innocence beyond 11(d)), 11(c) (the right not to be compelled to be a witness against oneself) and s. 13 (the right not to have the witness' own incriminating testimony used to incriminate him or her). Many of the existing protections or proposed reforms for inquiries address the dictates of other *Charter* provisions. However, the threat presented by the use of the argument founded on s. 11(d) may ultimately provide the most damaging blow to the inquiry and this article will concentrate on responding to this challenge in particular.

Reining in the Emerging Judicial Attack on Inquiries

The public inquiry has become a vital institution in democratic societies, but it is under increasing attack in Canada as courts assert their vigilance to protect the rights of the accused individual. In a short period the judiciary has moved well beyond its previous position on public inquiries which dealt with their relationship to the *Charter* almost in passing. In *O'Hara*, the Supreme Court made only general statements concerning the impact of an inquiry on an individual's rights:

> [n]either a province nor Parliament may infringe the rights of Canadian citizens in establishing inquiries of this kind ... 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. ... I therefore express no opinion upon the nature and extent of rights guaranteed by the *Charter* and the 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.[2]

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

[2]*O'Hara and Kirkbride* v. *The Queen et al.* (1987), 45 D.L.R. (4th) 527 (S.C.C.) at 542-543.

By 1990, division of powers issues were beginning to fade in disputes over the mandates and conduct of public inquiries, with a concomitant increase in judicial attention to violations of *Charter* protected rights. In *Starr* v. *Houlden*,[3] the Supreme Court determined that it need not pronounce on "other constitutional questions", after deciding that the particular inquiry was *ultra vires* the province. The Court stated that the inquiry could not be "a substitute for an investigation and preliminary inquiry into specific individuals in respect of specific criminal offences."[4] It also observed that any provincial inquiry that touched upon allegations or suspicions of specific crimes must be carried out "in accordance with federally prescribed criminal procedure and not otherwise as, for example, by the inquiry process."[5] Only the dissenting judgment of L'Heureux-Dubé addressed the impact of the *Charter* on the inquiry process. Although this issue was given a relatively minor role in her overall judgment, she clearly saw the danger to public inquiries that would result from over-extending *Charter* protections:

> As an individual Ms. Starr may invoke section 7 protection. She claims that certain liberty interests have been violated for the aforementioned reasons. However, if one were to accept this line of argument then *all inquiries that may eventually be connected to some subsequent criminal proceedings would be constitutionally infirm*.[6] [emphasis added].

L'Heureux-Dubé J. determined that since the inquiry in question was "solely a recommendatory and not an adjudicative body ... any prospective threat to liberty is clearly speculative".[7] Her conclusion that there was no *Charter* violation was based upon a "combination of the internal limitations on the inquiry's scope, coupled with existing procedural safeguards designed to preserve fundamental justice. ... [T]he mere fact that some subsequent criminal proceeding may take place is far too fragile a hook on which to hang a *Charter* violation."[8]

In *Phillips* v. *Nova Scotia (Commission of Inquiry)*[9] the Nova Scotia Court of Appeal has established the current high water mark with respect to the protection of *Charter* rights within the public inquiry process. The court determined that an inquiry into the Westray Mine tragedy would deny the mine employees their right to remain silent and their right to a fair trial under s. 7 "if the commissioner by reason of the powers conferred on him under the *Public Inquiry Act*, compels the

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[3](1990), 68 D.L.R. (4th) 641 (S.C.C.).

[4]*Ibid.* at 674.

[5]*Ibid.* at 662.

[6]*Ibid.* at 696.

[7]*Ibid.* at 697.

[8]*Ibid.* at 698.

[9](1993), 117 N.S.R. (2d) 218, 324 A.P.R. 218.

respondents charged with offences to testify before him."[10] The Nova Scotia Court was willing to go beyond the previous reluctance of the Supreme Court to deal with *Charter* issues:

> In my opinion the fair trial interest of the respondents charged with offences under the *Occupational Health and Safety Act* as guaranteed by section 11(d) of the *Charter* will be impinged upon if the inquiry proceeds to hear any evidence that could implicate any of them as being in any way responsible for the explosion. It is widely recognized that public inquiries attract a great deal of media attention and that persons subsequently charged may have difficulty in getting a fair trial.[11]

The Court ordered a stay of the inquiry until criminal charges, and charges under the *Occupational Health and Safety Act*, were disposed of by a trial court and stated that it was mindful of the need to "balance the interests of the state in determining what caused the explosion and how similar tragedies might be avoided in the future against the four respondent's *Charter* rights to silence and to fair trials."[12] The stay would ensure that individual interests prevailed over those of the state.[13] Given that this case has been granted leave to appeal to the Supreme Court, it may be premature to suggest that *Phillips* represents either a trend or the crest of a wave. However, it is preferable that such judicial assaults on the public inquiry be halted sooner rather than later.

The Public Inquiry and the Fabric of Democratic Societies

The Royal commission or public inquiry has emerged as an essential part of the institutional base of the modern liberal democratic state. Their ubiquity, influence and unique role in the interstices of government argue for their being characterized so prominently. Whether their functions are characterized as advisory, investigative or a hybrid of both, their significance has been widely recognized.

The Ontario Law Reform Commission's *Report on Public Inquiries* discusses many functions or values that have been generally agreed upon as being served by inquiries: (1) enabling the government to secure information to develop policy; (2) educating the public and the legislature; (3) eliciting public opinion; (4) investigating branches of government; (5) offering the public an opportunity

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[10] *Ibid.* at 240.

[11] *Ibid.* at 241.

[12] *Ibid.* at 258.

[13] *Ibid.*

to air their grievances; and (6) in some instances, postponing final action.[14] The OLRC also noted the potential for public inquiries to provide analyses of social causes and conditions, a feature that criminal prosecutions do not address.[15] Moreover, the commission acknowledged the "symbolic value of inquiries"[16] and discussed the social function of inquiries in terms of their capacity to transform popular perceptions and change Canadian society and institutions. The public inquiry has become part of the political process, with its features of interaction, conflict and potential for change. This aspect of the public inquiry sustains the hopes of many citizens for justice and transformation:

> Although in the restoration of public confidence, the inquiry may be merely performing the legitimation function which capital requires, it may also be unleashing an unexpected torrent of criticism and political activity against a state which has behaved not only badly but worse and in a more unbridled way than its elite masters would have permitted.[17]

The Alberta Law Reform Institute, while noting some of the commonly mentioned weaknesses of inquiries, highlighted the strengths of this institution, noting its independence and openness, as well as its ability to uncover facts and provide advice.[18] The Alberta Report did consider arguments for the abolition of public inquiries[19], but decided that improvement of the *Public Inquiries Act* was the desirable alternative. It also noted the salience of the independence of the inquiry with respect to the retention of public confidence.

The political significance of the commission of inquiry has also been acknowledged by the judiciary. As L'Heureux-Dubé J. has pointed out "[t]here is no doubt that commissions of inquiry at both the federal and provincial level have played an important role in the regular machinery of government."[20] Even a division of powers argument, she observed, could undermine "the province's ability to empower future commissions for fear that similar 'inferences' will subvert the federal criminal law prerogative."[21] It is ironic, however, that the judiciary may well be the branch of government that undoes the inquiry. As one might

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[14]The Ontario Law Reform commission, *Report on Public Inquiries* (Toronto: Queen's Printer, 1992) at 9 [hereinafter OLRC].

[15]*Ibid.* at 11.

[16]*Ibid.*

[17]H.A. Kaiser, "Legitimation and Relative Autonomy: The Donald Marshall Jr. Case in Retrospect" (1990) 10 Windsor Yearbook of Access to Justice 171-193, at 181.

[18]Alberta Law Reform Institute, *Proposals For The Reform of The Public Inquiries Act* (Report No. 62) (Edmonton: Alberta Law Reform Institute, 1992) at 1.

[19]*Ibid.* at 18-23.

[20]*Supra*, note 3 at 673.

[21]*Ibid.* at 685.

expect, in *Phillips* the court did not ignore the importance of the public inquiry, but determined that the benefit of a public inquiry into the mining disaster was outweighed by the threat posed by an inquiry to the mine manager's right to a fair criminal trial.

Although one can readily find references to scepticism concerning the cost and duration of public inquiries or the unresponsiveness of the legislative branch of government, these concerns pale in comparison to the number of times that there is a public outcry for the establishment of an inquiry, especially where there has been institutional or government negligence or wrongdoing. These requests often come from disempowered groups who are accustomed to their interests being ignored or relegated to the narrow objectives of the judicial process and criminal prosecution. The criminal justice system avoids the assumption of public and governmental responsibility that is inherent in the more contextualized view that an inquiry can offer. Often a criminal trial is chosen over an inquiry because the visibility and independence of an inquiry may be threatening to dominant interests. The possibility that the findings of an inquiry will be highly critical, or that its recommendations will demand new attention and resources, all contribute to the attractiveness of inquiries for disempowered individuals and to the reluctance of government to convene them.

The fact that the public inquiry is viewed by the powerless as a last resort in the process of public policy formulation is a sad comment on the state of Canadian democracy. Even the establishment of a public inquiry may not serve the interests of the powerless. Inquiries are frequently controlled by serving or retired judges or other public figures who may be conservative in their experience and ideology. If the government were genuinely open to public input and criticism and if the press were more vigilant, citizens would not have to search so desperately for friends in authority.

The attack on public inquiries represented by the interposition of the presumption of innocence and other unconstitutionally inspired objections has the potential for depriving the public of the many benefits of an inquiry, with few or no genuinely positive results for the individual accused, the criminal justice system or the Canadian public at large.

The Impact of Section 11(d)

The traditional common law content of the presumption of innocence, that the Crown must establish the guilt of the accused beyond a reasonable doubt, would not seem to be of any particular concern to the public inquiry process. Particularly in the post-*Charter* era, Canadian courts have tended to extend the

"golden thread" of *Woolmington* v. *D.P.P.*[22] well beyond its historic application. The question to be considered is whether the contemporary Canadian version of the presumption of innocence is being stretched too far when the judiciary uses it to restrict the ambit of the public inquiry.

Before examining s. 11(d) one should survey the potential use of s. 7 as a supplement to, or guarantor of, the presumption of innocence. The Supreme Court established very early in the post-*Charter* era that ss. 8 to 14 of the *Charter*:

> addressed specific deprivations of the "right" to life, liberty and security of the person in breach of the principles of fundamental justice, and as such, violations of s. 7. They are therefore illustrative of the meaning, in criminal or penal law, of "principles of fundamental justice".[23]

In *Pearson*,[24] the Supreme Court specifically addressed the relationship of the two sections: "consistent with this view, this court has held that the presumption of innocence, [a]lthough protected expressly in s. 11(d) of the *Charter* ... is referable and integral to the general protection of life, liberty and security of the person contained in s. 7 of the *Charter*."

Pearson determined that s. 11(d) "sets out the presumption of innocence in the context of its operation at the trial of an accused."[25] The court was clear, though, in its determination that "this operation of the presumption of innocence at trial, where the accused's guilt of an offence is in issue does not, in my opinion, exhaust the operation in the criminal process of the presumption of innocence as a principle of fundamental justice. ... In my view, the presumption of innocence is an animating principle throughout the criminal justice process."[26]

In determining that the presumption of innocence was a "pervasive presence throughout the criminal process",[27] the court was not opening the door to an extension of the presumption of innocence to the point of embracing the public inquiry with the ability to terminate or impair an inquiry. First, the public inquiry is not part of "the criminal process" of which the s. 7 based version of the presumption of innocence is the protector. Second, as noted in *Starr*, a commissioner appointed to conduct a public inquiry does not deprive a person of the right to life, liberty and security of the person, which would be required to engage s. 7 outside of the criminal process *per se*. The courts have determined

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[22][1935] A.C. 462.

[23]*Re s. 94(2) of Motor Vehicle Act* (1985), 23 C.C.C. (3d) 289 at 309.

[24](1993), 77 C.C.C. (3d) 124 at 137.

[25]*Ibid.* at 135.

[26]*Ibid.*

[27]*Ibid.* at 138.

that a commissioner merely reports and recommends but is not authorized to make orders, and specifically, is not able to intrude upon the individual's life, liberty and security of the person. Section 7 cannot be depended upon to expand the presumption of innocence to operate at the public inquiry stage. This is not to say that s. 7 might not be used with regard to other rights, such as the right to silence, in order to confer on a witness before an inquiry a right not to answer questions. Although references are made *infra* to this aspect of s. 7, this paper concentrates on the presumption of innocence and its effects on public inquiries. As it would appear that there is limited utility to making a s. 7 argument to enhance the presumption of innocence in respect of public inquiries, consideration must now be given to the more focused protection of the presumption of innocence presented by s. 11(d).

Section 11(d) of the *Charter* is one of nine subsections following "Any person *charged with an offence* has the right ... ." On its face, this would appear to confine its application to only those persons who are accused, in the sense that an information has been laid against them. Indeed, the Supreme Court in *Wigglesworth* v. *The Queen*[28] seems to have taken a narrow approach to construing this qualifier to the various s. 11 rights, determining that a matter could fall within this section only when it was by its very nature a criminal proceeding or when a conviction may lead to a true penal consequence. In neither sense would a properly conceived inquiry seem to provide an entry point to the various s. 11 protections. An inquiry is not criminal in nature (following *Starr*), nor does it lead to any type of penalty. *O'Hara* seems to support this argument, as do several other decisions where the subject matter was arguably more criminal or at least more punitive than a public inquiry.[29]

There are additional authorities which confine s. 11(d) to criminal trials. In *Re Milton et al.*,[30] s. 11(d) was held not to apply to a hearing to determine a person's interest in certain items seized pursuant to the *Fisheries Act*. Similarly, in *R.* v. *Mead*, the section was said not to apply to a "Wilson application" brought by the accused to set aside an authorization to intercept private

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[28](1987), 60 C.R. (3d) 193, 37 C.C.C. (3d) 385.

[29]See *Re James and Law Society of British Columbia* (1982), 143 D.L.R. (3d) 379, one of several cases dealing with types of discipline proceedings. See also *MacBain* v. *Canadian Human Rights commission et al.* (1984), 11 D.L.R. (4th) 202, where the court considered a human rights tribunal that had the power to impose punitive damages. Neither of these cases were said to enable the applicants to call upon s. 11 of the *Charter*.

[30](1986), 32 C.C.C. (3d) 159, 37 D.L.R. (4th) 694 (B.C.C.A.).

communications.[31] In the same vein, *Douglas* v. *Saskatchewan Human Rights Commission*[32] found that s. 11(d) had no application to inquiry proceedings.

Overall, the case-law maintains that s. 11 does not apply to inquiries given that charges have not been laid and the proceedings are not criminal or penal, but are investigative and recommendatory in nature. This is certainly consistent with the common law origins of s. 11(d) which tend to confine the presumption of innocence to the criminal justice system *simpliciter* and to the trial in particular. *R.* v. *Oakes*[33] might offer some latitude to applying s. 11(d) to inquiries, although the language of the Supreme Court in that decision consistently emphasizes that the person must be accused of criminal conduct in order to be afforded the protection of the section. The Court held that s. 11(d) was essential to protecting the fundamental liberty and dignity of any person accused by the state of criminal conduct and said that it was necessary in a society committed to fairness and social justice. Though the *Oakes* case was decided in a context where Parliament sought to reverse the onus of proof, this did not affect the role of the courts in protecting the rights of accused individuals.

Section 11(d) has many aspects and emphasis may be placed on the general significance of the presumption of innocence, the subsumed ability to make full answer and defence or the right to a fair hearing before an independent and impartial tribunal. Arguably, any of these components may be infringed by a public inquiry which convenes prior or concurrently to an accused's trial, but most objections centre on the potential detrimental effects of the publicity generated by an inquiry on an accused's subsequent criminal trial.

Once the theoretical possibility of conflict between s. 11(d) and the public inquiry is admitted, it may be tempting to simply state that an inquiry should be suppressed until the final disposition of all criminal proceedings. This outcome would jeopardize the role of public inquiries as instruments of government, over-extend the boundaries of s. 11(d), and avoid the possibility of a reconciliation between public inquiries and the presumption of innocence. It is possible for public inquiries to continue performing their valuable functions in Canadian society, while simultaneously protecting the rights of accused persons under s. 11(d) without imposing a false dichotomy between the two.

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[31](1988), 71 Nfld. & P.E.I.R. 265 (P.E.I.S.C.).

[32][1990] 1 W.W.R. 455, 79 Sask. R. 44.

[33](1986), 24 C.C.C. (3d) 321; 50 C.R. (3d) 1.

The Cost of Exaggerating The Risk of Conflict Between Public Inquiries and The Presumption of Innocence

The first casualty of overstating the conflict between the public inquiry and the presumption of innocence will be the public inquiry itself. Given the vital advisory and investigative functions of this institution, its demise has serious implications for Canadian democracy. Society will have lost a major mechanism for understanding the causes of many complex events. Government will also be hampered in its efforts to prevent further occurrences of misconduct.

The reduction of the effectiveness of public inquiries would also be a consequence of any partial remedies that courts may be tempted to assert, such as delaying an inquiry until the conclusion of any criminal proceedings. Just as justice delayed may be justice denied, an inquiry delayed may be explanation thwarted. In the event that inquiries are so impaired by the courts, governments may determine that they should not establish an inquiry in the first place. The public will not support investigations that drag on endlessly and are needlessly constrained. It is not irrational to suggest that waiting until the termination of all prosecutions would mean the effective end of the inquiry as an institution.

The diminution of the inquiry indicates that a fundamental realignment of governmental institutions may be occurring. The executive branch of government may be unable to ensure that issues of significance to the public are properly investigated. Simultaneously, the role of the judiciary may be considerably strengthened, if not exaggerated. The investigation of wrongdoing will be largely confined to the criminal justice system, which is highly constrained by its focus on individual responsibility for a specific charge in a rigidly controlled juridical and evidentiary environment. The potential for exposing a wrong in its systemic context will be largely removed. Those in positions of power and authority who fear the prospective disruption of the status quo will be protected by the inability to hold an inquiry. One can think of examples from quite disparate contexts which illustrate the destabilizing potential of the inquiry. The report concerning the assassination of Benigno Aquino reverberated through Filipino society after its release.[34] Similarly, the report of the Marshall inquiry in Nova Scotia had ripple effects far beyond what was originally anticipated by the government that had reluctantly established it.[35] Although a criminal conviction may have a similar salutary effect on the control by dominant interests, it would be very much an incidental by-product of the criminal justice system.

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[34]See K. Umino, "Investigating the Assassination of Benigno S. Aquino: Lessons From the Agrava commission" (1986) 18 Columbia Human Rights L. Rev. 169.

[35]T.A. Hickman, L.A. Poitras and G.T. Evans, *Royal commission on the Donald Marshall Jr., Prosecution* (Prov. of N.S., 1989), seven volumes.

The second major institutional victim of a s. 11(d) purge may be the jury system. The right to a jury trial is considered so significant that it merited separate protection under s. 11(f) of the *Charter*. Beyond its importance to the criminal justice system as a fact finding entity, the jury is recognized as a crucial institution in a parliamentary democracy.[36] The message of the *Phillips* case is that the extensive publicity generated by a Royal Commission would make it more difficult to ensure that an accused has a trial before impartial jurors. The strength of the jury system, with respect to selection, trial procedure and jury deliberations is undermined by these paternalistic assumptions. Rather than imparting confidence to the jury, the courts have questioned its role on the grounds that a whiff or a cloud of publicity will bring the jury as a viable institution into question. This outlook ignores the numerous examples of juries that have returned verdicts which ran against the tide of public opinion or that defied the legal directions of the presiding judge. The overloading of s. 11(d) protections jeopardizes the public inquiry and portrays the jury as a weak and transient part of the legal system.

The hesitation or unwillingness to rely upon juries has been seen recently in the publication ban decisions in *R* v. *Bernardo (Teale)*[37] and the case involving the mini-series "Boys of St. Vincent."[38] These cases show a similar predilection towards undervaluing the fairness and sophistication of potential jurors. One is left with the impression that only those who approach their jury duties with a *tabula rasa* may be considered appropriate jurors. The futility of finding such citizens should be apparent, but the affront to the criminal justice system and the trustworthiness of the body politic is also manifest.

These intrusions upon the territory of the jury and the inquiry fly in the face of many modern aspirations of the criminal justice system. The Law Reform Commission of Canada in one of its final publications highlighted the general principle of participation:

> Participation comprehends the values inherent in involvement and consensus. In any system of laws, particularly one dealing with crimes, it is of fundamental importance to involve the citizen in a positive way. ... Participation reinforces and

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[36]The Law Reform commission of Canada, *The Jury in Criminal Trials* (Working Paper 27) (Ottawa, 1980) at 5-17, has noted that the jury system serves the public in many important ways: The jury is the conscience of the community, bringing community values to bear on judicial decisions; it is the citizens ultimate protection against oppressive laws and enforcement of the law; it is a genuine educative institution; it legitimizes the criminal justice system; it relieves the judge of some heavy responsibilities; it deflects criticism from the courts; it approaches each case afresh, without the same kinds of predispositions which judges acquire; it reaches its decisions in the absence of tainted evidence; and it dispenses and decentralizes authority.

[37]See *R.* v. *Bernardo*, [1993] O.J. No. 2047 (Ont. Ct. of Justice, General Division), now on appeal.

[38]*C.B.C.* v. *Dagenais et al.* (1992), 12 O.R. (3d) 239. Leave to appeal from the judgment was granted by the Supreme Court of Canada on 21 May 1993 [hereinafter "Boys of St. Vincent" case].

> demonstrates the integrity of basic democratic values. ... Openness is a corollary of participation. ... Open processes also serve the principle of accountability. Public scrutiny of official behaviour is a democratic safeguard which can only be effectively employed where the process is an open one.[39]

In conjunction with the attack on the public inquiry and the jury, one sees an elevation of the degree of control of the legal profession over policy and political agenda. Public inquiries, according to *Phillips* and other authorities, threaten the presumption of innocence. Juries are said to be incapacitated if there is extensive publicity surrounding the public inquiry in the news media. However, the judiciary would have us believe that the legal profession and its judicial representatives deserve the full confidence of the public to ensure that the accused's right to a fair trial is protected.

Matters of significance to the public are supposed to be adequately investigated using the concept of crime and Her Majesty's Courts. Given the many miscarriages of justice which have discredited the criminal justice systems of Canada, the United States, Great Britain and Australia over the last two decades, this "trust us" attitude is a tragic and ironic exhortation. It is only members of the legal profession that truly believe that lawyers and the judiciary deserve credit for the protection of the integrity of the criminal trial process. The self-serving aspects of this pretence are readily challenged by the many instances where the criminal courts have let the public down.

This attempt at controlling the criminal justice decision making apparatus is consistent with the posture of the legal profession in the post-*Charter* era. As Michael Mandel has eloquently argued, the *Charter* has become the vehicle by which politics in Canada have been legalized. The elevation of the rights of at least some individuals and the legal profession's determination to exclude others from the debating arena, while controlling a greater share of the policy and political concerns of the public, represents a radical restructuring of Canadian political life:

> Despite all the heavenly expectations, the *Charter* has merely handed over the custody of our politics to the legal profession. The defence of the status quo has followed from that as naturally as night follows day. The *Charter* would be a mute oracle without a legal priesthood to give it life.[40]

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[39]The Law Reform commission of Canada, *Report on Our Criminal Procedure* (Number 32), (Ottawa, 1988) at 27. Basically, the commission was reiterating one of the warnings urged above with respect to the public's confidence in the criminal justice system. That is, a system that places less faith in its citizens or fundamentally excludes them, risks the public's alienation and even hostility. The move away from the public inquiry and the destabilizing assumptions about juries will tend to reduce the public's tremulous sense of ownership of the criminal justice system.

[40]M. Mandel, *The Charter of Rights and the Legalization of Politics in Canada* (Toronto: Wall and Thompson, 1989) at 308.

This boundary revision is apparent in the attack on the public inquiry represented by *Charter*-inspired restrictions. Hobbling the public inquiry gives the criminal justice system, and more particularly the legal profession greater control over the public's ability to learn about and prevent societal problems. The broad investigative and advisory missions of the public inquiry are being silenced and Canadians will be left with what lawyers and judges want them to know.

The rationales which have been offered for this simultaneous evisceration of the public inquiry and elevation of the criminal justice system with its concomitant control by the legal profession are not given sufficient attention in the cases. The few authorities that have considered the relationship between the *Charter* and the public inquiry have not faced these vital questions. The jurisprudence on s. 11(d) has not adequately set forth the nature of the interests which are protected by this section of the *Charter* and risks stretching the section beyond recognition.

The link between the accused's right to a fair trial and the procedure of a public inquiry rests upon largely untested assumptions. In *Phillips*, the argument based upon the presumption of innocence was apparently accepted as a relatively straightforward proposition. The court equated publicity with threats to the trial process, without examining how they arrived at this assumption or how large a risk to the jury trial system publicity represents. The same type of leap has been made in other cases involving different types of publicity and its threat to fair trials. In the "Boys of St. Vincent" case, four accused were successful at the trial and appellate level in arguing that the broadcast of the television drama should have been postponed until their trials were concluded. While the court paid a half-hearted tribute to the jury,[41] it concluded that the risk of prejudice was substantial enough if the film were to be shown that "the possibility of impartial jury selection virtually anywhere in Canada would be seriously compromised."[42] The Ontario Court of Appeal stated that, "if there is a conflict between freedom of expression and a fair trial, then the right to a fair trial is held to be paramount."[43] It concluded that the trial judge did not err "in the exercise of her discretion in directing that the airing of the film be postponed"[44] and seemed to ratify her conclusion that a jury trial would be seriously jeopardized if the film were broadcast.

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[41]The judge stated, "I, too, have great faith in the jury system, as indicated in the cases, and by counsel before me. Juries are not stupid. They come for the most part, from a variety of sophisticated backgrounds and can understand and follow instructions from a Judge." See *Supra*, note 32 at 313.

[42]*Ibid.* as cited by the Ontario Court of Appeal at 314.

[43]*Ibid.* at 315.

[44]*Ibid.* at 316.

In *Bernardo*[45] another Ontario court was faced with similar issues. There, the accused, who faced two charges of manslaughter, sought a publication ban. However another accused, Paul Bernardo (Teale), who was implicated in the same and additional incidents, opposed the application arguing that "the remedies under the Code in respect to challenge for cause and as to venue are the protections available for the empanelling of an impartial jury."[46] The Court determined that s. 11(d) had to be considered in the context of s. 26 of the *Charter* which guarantees "the societal right to a fair trial"[47] and s. 8(2) of the *Criminal Code*[48] as a common law source. Although the justice referred to the courts having "regularly paid due deference to the capacity of juries to dissociate from their minds what they have heard, saw or read and try the case on the evidence,"[49] the court, in the absence of any evidence concerning the likelihood of empanelling an impartial jury, decided to exercise its discretion and banned publication of proceedings concerning the accused Karla Bernardo (Teale). The various safeguards in the jury selection process were found to be inadequate to ensure that an impartial jury could be empanelled.

In *Phillips*, *Dagenais* and *Bernardo*, the courts appear content to infer that the risk to selecting an impartial jury is so grave that it requires them to use their powers to halt an inquiry, enjoin a film or ban publication of a related accused's proceedings. The questions which should have been interposed between the statement of the risk and granting of the remedy were never fully canvassed. For example, one might try to assess how great the publicity would be in each instance, what the correlation between the extent of publicity and exposure of the potential members of a jury panel would be, and whether it is realistic to expect that the jurors' oath can overcome any prejudice even if the various events are allowed to proceed.

This reluctance to recognize the strength of the jury system does not seem to be shared in change of venue applications, where the applicant is able to argue that there is a higher risk of prejudice to a fair trial. In this context, an accused has already been brought before the courts and will normally have had a preliminary inquiry which is usually the subject of a separate publication ban. In any event an accused seeking a change of venue is merely asking for a change of location to another part of the same province. The venue cases indicate that the accused must show on a balance of probabilities that his or her right to a fair trial with an impartial jury would be seriously imperilled by the process going ahead in

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[45] *Supra*, note 37.

[46] *Ibid.* at paragraph 7.

[47] *Ibid.* at paragraph 33.

[48] R.S.C. 1985, c. C-46.

[49] *Supra*, note 37 at paragraph 122.

the present venue. In contrast to other applications discussed in this article, the courts seem reluctant to grant a change of venue and depend heavily on other methods of protecting the integrity of the jury system.[50]

In several important change of venue cases, even the intense glare of publicity has not been sufficient to persuade the judiciary that the site of the trial should be changed. Many of the cases not only show that there has been extensive television, radio and newspaper coverage, but also that there have been spontaneous and organized displays of hostility towards the accused or sympathy for the victim. Nonetheless, the courts demonstrate a reluctance to interfere with the jury system. Outside the change of venue context, it appears that the judiciary is increasingly willing to accept that a speculative link between publicity and a fair trial should dictate a remedy, whether the source of the publicity is a public inquiry or certain types of broadcast. This willingness to permit a pre-emptory application flies in the face of the traditional reluctance of the courts to permit a *Charter* remedy to be used before a risk has crystallized or harm has occurred. In the context of inquiries there is a double layer of speculation when charges have not yet been laid.

Inevitably, unless this trend is reversed, the courts will take over increasing parts of the public's agenda on flimsy grounds and without adequate canvassing of remedial alternatives or the eventual implications. One fears that the culmination of this will either be the elimination of public inquiries, their being delayed to the point where the attention of the public has been lost, or a severe limitation in their scope. This outcome is frustrating given that there are many protections available that have the capacity to protect the rights of the individual to a fair trial. These protections would afford the accused the full benefit of a vigorous presumption of innocence, while at the same time preserving the public's right to inquire into and deal with major societal problems. The increased legalization of politics may well serve the unarticulated needs of the legal profession and the judiciary, but it is difficult to maintain that the public interest is being respected and advanced.

Protecting the Accused's Presumption of Innocence (and other Rights) in the Criminal Justice and Public Inquiry Systems

There are a wide range of protections available to the accused to ensure that he or she has a fair trial before an impartial jury if this is the mode of trial that the accused elects. Keeping in mind that the jury trial is fundamental to our system, most of the cases turn on the premise that the jury would be prejudiced by the publicity of a public inquiry. The criminal justice system already affords an

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[50]See *R.* v. *Lawrence* (1990), 74 O.R. (2d) 696 (Ont. H.C.) for a discussion of many of the judicially proposed alternatives to a change of venue.

accused many protections in instances where there has been the glare of publicity. Although reliance on s. 11(d) of the *Charter* provided an impediment to the Westray Inquiry in *Phillips*, the interaction of recent case-law and studies from two provincial law reform commissions on the public inquiry suggests that additional protections can be made available for an accused. *Phillips* also highlighted the importance of s. 7 as a source for arguing that an accused has a right to silence in proceedings where individuals are compelled to testify before a Royal Commission. The OLRC recognized the salience of this right and provided suggestions which would preserve the efficacy of the public inquiry. Similarly, the rights against self-incrimination represented by s. 11(c) of the *Charter* and emphasized by s. 13, extend safeguards for accused individuals beyond the right to silence represented by s. 7. In contemplating these provisions, the OLRC urged that there should be a right to refuse to testify, with some exceptions, although in general, inquiries should continue to have coercive powers.[51] Indeed, the Ontario recommendations would provide special protection against being summoned by an inquiry if an information has been laid (recommendation 4) in addition to the statutory "right to refuse to testify on the grounds that such testimony might incriminate him or her" (recommendation 5(1)).

The Alberta Law Reform Commission also recommended the continuation of the power to compel testimony before commissions (recommendation 20(1)) although they too were sensitive to this coercive power being limited to circumstances where a person has actually been charged, recommending that "[n]o person should be summoned to testify or produce evidence at a public inquiry about any matter in relation to which they have been charged with an offence unless the charge has been finally disposed of."[52] On the other hand, the Alberta proposal did not go so far as Ontario in providing for a general statutory right to refuse to testify. Rather, in recommendation 29 they advised that a new act should not confer "any special privilege or immunity against self-incrimination on a witness in respect of testimony given in a public inquiry in addition to the use immunity conferred by s. 13 of the *Charter*."

The Supreme Court of Canada has already determined that the inquiry should not be a substitute for the criminal process or a preliminary hearing and should not be able to establish criminal culpability.[53] Both the Ontario and Alberta reports (recommendations 12 and 27 respectively) echoed this theme, stating that there could be no conclusions drawn regarding civil or criminal liability. The Ontario and Alberta recommendations include a duty to give notice of allegations

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[51] *Supra*, note 14 at 214.

[52] *Supra*, note 18 at 110.

[53] *Supra*, note 3 at 674.

of misconduct and an opportunity to rebut any adverse findings.[54] An accused would still have the opportunity to protect himself or herself against determinations of discreditable conduct.

In both documents, there is extensive discussion of the need to ensure that an inquiry provides the full panoply of *Charter* protections while conducting its valuable work. Fairness, the fundamental value said to be protected by s. 11(d) of the *Charter* and other aspects of the presumption of innocence, were keynotes in the recommendations for retaining the public inquiry. The Alberta Report, while reciting the formal position that "the report has no legal effect,"[55] nonetheless emphasized that "the law should ensure that individuals are treated fairly by a commission's report"[56] and that "private rights are best protected by ensuring that commissions of inquiry stay within their mandates and that they give affected individuals fair treatment."[57] The Ontario Report mirrored the Alberta discussion, emphasizing that "[t]he prejudice suffered by individuals affected by public inquiries should be minimized"[58] and that "efforts should be made to enhance the effectiveness and efficiency of public inquiries, while respecting the need for fairness, independence and participation."[59] The specific protections which the provincial law reform commissions have posited reflect a concern for fairness and are reasonably consistent with the *Charter* itself. Statutes governing the establishment and conduct of public inquiries should be amended and these features incorporated in all future commissions. Even prior to such statutory revisions, the mandates and rules for any particular inquiry should be drafted to ensure that proceedings function consistently.

Conclusion: Keeping the Inquiry Alive and Well Without Sacrificing the Individual

The fact that the rights of accused persons are given increased attention by the courts as they examine the mandate and conduct of public inquiries in light of the presumption of innocence is generally a development to be celebrated. What is lamentable is that the courts are, without fully assessing the implications of their decisions, fettering, suppressing and perhaps even extinguishing the public inquiry as a legitimate investigative and advisory sub-branch of government. This trend,

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[54]Recommendations 9 and 14 respectively.

[55]*Supra*, note 18 at 81-82.

[56]*Ibid.* at 82.

[57]*Ibid.*

[58]*Supra*, note 14 at 189.

[59]*Ibid.*

exemplified by *Phillips*, is all the more regrettable when one sees that there are many carefully designed public inquiry reform proposals which have the potential to better protect the rights of the individual while preserving the integrity of the inquiry. Here is one instance where it is possible for societal *and* individual interests to be reconciled, as long as overarching assumptions and remedies are not employed by the judiciary. Any tendency by the judiciary and the legal profession to continue to use the presumption of innocence or other rights to usurp valid mechanisms for dealing with public policy matters should be stopped before the executive branch, and more importantly the public at large, loses further control of Canadian politics. It is not a pious hope to suggest that the individual rights of suspects and persons accused can be respected in a public inquiry process that is vigorous, authoritative, accessible and potentially transformative.