# PUBLIC INQUIRIES AND THE JURY TRIAL

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In 1989 and 1990 a number of people were charged with sexual offences in Newfoundland arising out of the care of children at the Mount Cashel Catholic Orphanage staffed by Irish Christian Brothers. The charges stemmed from allegations of abuse levelled by former residents who resided at the home between the years 1973 to 1976. Informations charging the accused were laid in January 1989. Preliminary inquiries were held in the spring and summer of that year. In June of 1989, while the preliminary inquires were being held, a Royal Commission of Inquiry was appointed pursuant to the Newfoundland *Public Inquiries Act*.[1] The Royal Commission of Inquiry was given a broad mandate. It was asked to review the police investigation that was conducted in 1976 into allegations of abuse at the orphanage to determine if there had been a coverup of the abuse. The Commission of Inquiry held public hearings concerning the allegations and had these hearings broadcast by a local cable company to cable subscribers in the St. John's area.

During the course of the inquiry, nearly all of the persons who had complained of being abused in 1973 through to 1976 were called to testify at the public hearings. Their evidence was taken under oath and televised. Broadcasting the complainants' evidence generated a tremendous amount of ancillary publicity. The highlights of the evidence were broadcast on the nightly news, reprinted in the newspapers and spawned two books. One of the books, entitled *Unholy Orders*,[2] acknowledged that the primary source of materials for the book was the Hughes Commission of Inquiry. The other publication was the memoirs of one of the complainants.[3] Both of these books were published prior to the trials of the accused.

An accused person faced with this situation who wishes to protect his or her right to a fair trial, or more specifically, his or her right to a jury trial, has limited options. One possible course of action is to apply to the Supreme Court for an order to stay the proceedings of the inquiry. This is usually achieved by means of an injunction, as was done in *Starr* v. *Houlden*.[4] To be granted a stay, the applicant has to establish that the inquiry complained of is, in effect, a substitute for a preliminary inquiry which is a matter falling outside the jurisdiction of the

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[1]R.S.N. 1970, c. 314.

[2]M. Harris, *Unholy Orders: Tragedy at Mount Cashel* (Toronto: Penguin Books, 1991).

[3]D. O'Brien, *Suffer Little Children: An Autobiography of a Foster Child* (St. John's: Breakwater, 1991).

[4](1990), 55 C.C.C. (3d) 472 (S.C.C.).

Province. The onus appears to be a heavy one as illustrated by the Newfoundland Court of Appeal in *R.* v. *English*[5] where the majority held:

> [T]hat the Hughes Inquiry was essentially an investigation into the criminal justice system of Newfoundland in so far as it pertains to the events alleged to have occurred at Mount Cashel in the 1970s. None of its terms of reference primarily involved the determination of whether or not anyone had sexually abused another or have been sexually abused by another is not a criminal investigation and was not a substitute for a preliminary inquiry.

The fact that the evidence generated by the inquiry was essentially the same evidence that would have been called at a preliminary inquiry was not a factor in the majority's decision. The court considered the issue as confined to the terms of reference of the inquiry itself. The troubling aspect of this development from the point of view of the accused is that it appears to place a positive onus on the accused to protect his or her own right to an impartial jury trial, unimpaired by this type of publicity. Alternatively, the majority decision suggests that the accused would be unsuccessful in an attempt to obtain a stay of proceedings or other *Charter*[6] relief on the grounds of pre-trial publicity alone. Certainly no such application would be entertained by a Court until after the jury selection procedure has been tried and has failed to produce an impartial jury. In *R.* v. *Vermette*,[7] Madam Justice L'Heureux-Dubé stated:

> In my view, a stay of proceedings was, in this case, premature. It is only at the stage when the jury is to be selected that it will be possible to determine whether the respondent can be tried by an impartial jury ... In deciding the question, one must not, in my view, rely on speculation ... In an extreme case (and the present certainly qualifies) such publicity should lead to challenge for cause at trial, but I am far from thinking that it must necessarily be assumed that a person subjected to such publicity will necessarily be biased.[8]

The only avenue left open to the accused is to apply to challenge potential jurors for cause. The method of challenge for cause is outlined in s. 638 of the *Criminal Code of Canada*.[9] This procedure was extensively considered in *R.* v. *Hubbert*.[10] Presently, the procedure requires the Judge to randomly select two persons, usually from the jury panel, to try potential jurors for cause. These two persons must decide whether or not a juror is indifferent towards the accused and

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[5](1994), 111 Nfld & P.E.I.R. 323 at 339.

[6]*Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Charter*].

[7](1988), 41 C.C.C. (3d) 523.

[8]*Ibid.* at 530.

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

[10](1975), 29 C.C.C. (2d) 279, aff'd [1977] 2 S.C.R. 267 [hereinafter *Hubbert*].

the Crown. The test to be used by the two triers is described in the *Hubbert* decision as follows:

> In this era of rapid dissemination of news by various media, it would be naive to think that in the case of a crime involving considerable notoriety, it would be possible to select 12 jurors who had not heard anything about the case. Prior information about a case, and even the holding of a tentative opinion about it, does not make partial a juror sworn to render a true verdict according to the evidence.[11]

The questioning of the potential jurors by the challenger was further circumscribed by the Supreme Court in *R.* v. *Sherratt*:[12]

> If the trial judge is satisfied that there is some "foundation" to the challenge, then the trial of the truth proceeds. The questioning of the prospective juror must be relevant. This is another reason why the trial judge must be given an adequate explanation for the challenge outside of the mere words of the section. Questioning in this phase should not become a "fishing expedition" ... . While it is no doubt true that trial judges have a wide discretion in these matters and that jurors will usually behave in accordance with their oaths, these two principles cannot supersede the right of every accused person to a fair trial, which necessarily includes the empanelling of an impartial jury.[13]

Curiously, the procedure, as outlined in s. 638, is silent as to any questioning of the initial two randomly chosen triers. This problem arose in *R.* v. *Kenny*:[14]

> Relying upon the expert testimony and the other evidence placed before the Court, defence counsel submitted that, because the jury pool has been bombarded for so long and in such an intensive manner with specific information about the allegations against the accused and with other prejudicial information about him, and because there is evidence that prejudices are still strongly held, and because potential jurors and triers are not capable of recognizing their prejudices and so may not excuse themselves, and because the normal safeguards of jurors' oaths, judicial admonitions and challenge for cause will likely not be effective, a real question arises as to whether the court can be satisfied that the accused's right to a fair trial by an impartial jury can be met at all in the circumstances of this case.[15]

If the trial judge does not allow questioning of the two randomly chosen triers, then the jury selection process may be tainted by the two triers' inability to recognize partiality in other potential jurors. This problem is further exacerbated by the selection procedure itself. The trial for cause takes place before the jury

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[11] *Ibid.* at 291.

[12] [1991] 1 S.C.R. 509 [hereinafter *Sherratt*].

[13] *Ibid.* at 527, 532.

[14] (1991), 92 Nfld. & P.E.I.R. 318 [hereinafter Kenny].

[15] *Ibid.* at 331.

panel. Consequently, during the questioning process of the potential jurors the jurors themselves may express dislike towards the accused, offer opinions of guilt about the accused or give additional information about the accused in answer to the questions put to them. All of this may elevate the atmosphere of bias toward the accused. The challenge procedure undertaken before the jurors are ultimately selected subjects them to a lengthy parade of other potential jurors, a great number of whom express opinions as to the accused's guilt. Ultimately, the jurors who are selected cannot help but be influenced by these opinions. In addition, as observed by the Supreme Court of Canada in *Sherratt*, "information obtained upon an ultimately unsuccessful challenge for cause may, however, lead the challenger to exercise the right to challenge peremptorily or to stand aside the particular juror."[16]

Ideally, counsel for the accused in a case where there has been extensive publicity must examine potential jurors as to the degree of their knowledge and opinion about the case. Counsel for the Crown should then use pre-emptory challenges to eliminate jurors with little or no knowledge of the facts surrounding the case, based on the information revealed in the challenge process. But as Cory J. noted in *R.* v. *Bain*:[17]

> The impugned provisions permit the Crown to obtain a jury that would at the very least appear to be favourable to its position rather than an unbiased jury. It is suggested the Crown Attorney, as an officer of the Court, would never act unfairly in the selection of a jury. Yet the most exemplary Crown might be so overwhelmed by community pressure that just such a step might be taken.

In the circumstances of a case where adverse publicity has generated massive amounts of negative publicity, it would be naive to think that the Crown Attorney would be immune to community pressure during the jury selection process. Despite the obvious difficulties that have arisen in the jury selection process in cases of this nature, the courts have been reluctant to question the underlying tenant of the jury process – that jurors will abide by their oaths despite the amount of extrinsic information about the accused they may have been subjected to. In *Kenny*, Barry J. was faced with this issue insofar as expert evidence was called suggesting that it would not be possible to select an unbiased jury. He stating that:

> Dr. Ogloff also submitted that the challenge for cause procedure is likely to be ineffective in selecting impartial jurors in the present case ... . In the circumstances I believe I should heed the direction of Dickson C.J.C., that "until the paradigm is altered by Parliament, the court should not be heard to call into question the capacity of juries to do the job assigned to them." I realize that there have been more recent studies, such as that of Kerr, Kramer, Carroll and Alfini,

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[16] *Supra*, note 12 at 533.

[17] (1992), 87 D.L.R. (4th) 449 at 479.

> which continue to find evidence that the present system of trying to select impartial juries is ineffective. I am not persuaded, however, that there is anything so significantly new and startling in these, in comparison to what was previously available to Parliament and the Supreme Court of Canada, as to require me to strike down the jury system which dates back to the *Magna Carta* of 1215.[18]

Though it seems reasonable for the Court to balance the interests of the media's right to publish information about trials against the rights of the accused to a fair trial process, the question that remains is whether it is reasonable to attempt this balancing act in situations where publicity and media attention have been generated directly from the appointment of a commission of inquiry. The nature of the publicity generated by a public inquiry is very different from that of routine media coverage. Ordinarily, a newspaper or television story does not include statements taken under oath at a formal hearing. Moreover, the fact that these statements are coming from an officially sanctioned source greatly enhances their impact and believability.

The accused suffers a two-fold effect from a public inquiry. First, there is the effect of the publication of detailed allegations against him or her. Second, the accused's right to remain silent about the allegations is infringed. An accused, therefore, has two choices. He or she can testify at the public inquiry, deny the allegations and be subjected to cross-examination at the hearing, though this may not afford ordinary protections equivalent to a court hearing, or the accused can leave the allegations unanswered in the media to prejudicial effect.

In *Phillips* v. *Nova Scotia (Commission of Inquiry)*[19] the Nova Scotia Court of Appeal considered the legality of the inquiry into the circumstances surrounding the explosion in the Westray Mine, given that there were a number of charges in relation to the explosion before the courts. The Court stated that:

> It seems to me that if the Westray Inquiry proceeds to hear evidence prior to disposition of the charges laid against the four respondents there is a high degree of probability that the respondents' s. 11(d) fair trial interests on those charges will be infringed. In addition to the risks posed because of pre-trial publicity the right to silence of the respondents charged entitles them, for the reasons previously stated, to refuse to testify before the inquiry. This will mean that incriminating testimony will likely be given that may go unanswered.[20]

The court went on to consider the English experience concerning public inquiries:

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[18]*Supra*, note 14 at 334-35.

[19](1993), 100 D.L.R. (4th) 79 (N.S.S.C.A.D.). Leave to appeal has been granted by the Supreme Court of Canada.

[20]*Ibid.* at 109.

> In England there is a general rule that if Parliament has established a public inquiry to investigate a matter of public concern, no matter what comes out of the inquiry, charges will not be laid. As a general rule witnesses who testified at an inquiry are given immunity from prosecution.[21]

The Nova Scotia Court of Appeal elected to order a stay of the inquiry stating that:

> There is a temptation to apply *Vermette* and simply say that any *Charter* infringement issues can be dealt with at the trial of the charges under the *Occupational Health and Safety Act*. While such a course of action might be satisfactory to deal with the effect of pre-trial publicity in the respondents right to a fair trial, it would not take into account the unfairness that is created by the Commissioner's ability to conduct an investigation in the respondents' involvement, if any, leading up to the explosion without the respondents having the protection of normal criminal law procedures relating to investigations of offences carrying the possibility of penal consequences. What is in issue if the inquiry proceeds before the trials is not only the effect of pre-trial publicity but also the infringement of the respondents' right to silence and the state's potential use of the inquiry as an investigative tool that is not limited by the standard procedural safeguards imposed on the state when investigating the possibility of criminal offences having been committed. We cannot overlook the fact that there is an ongoing criminal investigation and that the four respondents charged already have their liberty interest at risk.[22]

The effect of this would appear to be that the Court has recognized that the appropriate time to grant *Charter* relief to an accused whose right to a fair trial has been infringed by the actions of the commission of inquiry is at the outset of the inquiry before the investigation has begun. If *Charter* relief is sought after the inquiry takes place, the problem arises as to what is an appropriate remedy for the accused pursuant to s. 24(1) of the *Charter*. It is clear that the jury selection process in its present form cannot adequately protect the accused and enable the selection of impartial jurors.

The most appropriate method of dealing with this problem lies with the legislature. When faced with allegations of public misconduct, the legislature (or Parliament) must decide whether or not civil or criminal action would resolve the matter. If neither criminal nor civil action will suffice, they can elect to establish an inquiry. In most instances, there is no reason to assume that a public inquiry cannot effectively be carried out *following* the resolution of any criminal charges. The public interest would not be served by jeopardizing criminal trials through the establishment of an inquiry before outstanding criminal charges are resolved.

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[21] *Ibid.* at 112.

[22] *Ibid.* at 117.