PUBLIC INQUIRIES, PROSECUTIONS OR BOTH?

Kent Roach*

It is becoming apparent that a government faced with a scandal or a disaster with overtones of wrongdoing is being forced to choose between appointing a public inquiry or conducting a prosecution for a criminal or regulatory offence. If both options are pursued, there is a possibility that either the inquiry or the trial could be terminated by the courts because of concerns about the fair treatment of those suspected or accused of wrongdoing.

Part I of this paper explains how emerging constitutional restraints on public inquiries are forcing governments to choose between inquiries and prosecutions. This is unfortunate because, as will be explained in Part II, inquiries and prosecutions are entirely different policy instruments. Much will be lost if only one can be used to respond to a scandal or disaster that shakes public confidence. Finally, in Part III, I will argue that the choice between an inquiry or a prosecution is not inevitable. They can co-exist if they each stick to what they do best. Legislatures should act to reform both public inquiries and criminal trials in order to reflect a new balance between the rights of those suspected or accused of wrongdoing and the public's interest in a full and open investigation. If governments continue to wait until they are presented with a crisis it will be too late. In the absence of legislative reform, inquiries and prosecutions will continue to exist in uncertainty and in danger of judicial nullification.

I. The Emerging Choice of Inquiries or Prosecutions

Public inquiries have encountered more than their share of legal troubles in recent years. This is not surprising given their increased use in cases of suspected wrongdoing, the high stakes of well publicized and televised inquiries and the increased awareness since the enactment of the *Charter*[1] of the rights of those suspected or accused of crimes.[2] Public inquiries have played an important role in Canadian history, but their inquisitorial nature places them at odds with the adversarial system of criminal justice as enshrined in the common law and now under the *Charter*.

---

*Of the Faculty of Law, University of Toronto.

[1]*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*].

[2]Constitutional restraints on coroner's inquests were established at an earlier date perhaps because their appointment is mandatory in certain cases of suspected wrongdoing. For example, in *Batary* v. *A.G. for Saskatchewan et al.* (1965), 52 D.L.R. (2d) 125 (S.C.C.), the Court held that a coroner's inquiry could not compel a person charged with an offence to testify concerning matters to be examined in the charge.

Public inquiries were first introduced in medieval times as an instrument of royal authority. They were criticized by both Coke and Dicey as an abuse of prerogative powers and a departure from trial by jury. Until 1880, people in Canada could refuse to testify at an inquiry on the grounds of their common law right against self-incrimination. When this protection was repealed by statute, there seems to have been an understanding that inquiries would not be used when criminal charges were expected.[3] This understanding continues to be given deference in Britain today. Many recent developments in Canada reflect a break-down in that understanding and a corresponding re-assertion of the values of an adversarial system which protects individuals from self-incrimination and provides trial by jury.

In 1984, the Ontario Court of Appeal restricted the activities of the Grange Inquiry into suspicious deaths at the Hospital for Sick Children. The court held that the inquiry should not "name names" or express conclusions of civil or criminal liability. During the inquiry, nurses suspected of wrongdoing were forced to testify in televised proceedings concerning their activities. In prophetic words, the Court of Appeal warned that "[a] public inquiry is not the means by which investigations are carried out with respect to the commission of particular crimes" because it involves "a coercive procedure ... quite incompatible with our notion of justice in the investigation of a particular crime and the determination of actual or probable criminal or civil responsibility."[4]

Six years later, the activities of another Ontario inquiry were terminated when the Supreme Court held in *Starr* v. *Houlden*[5] that the province had exceeded its jurisdiction by using a public inquiry "as a substitute for an investigation and preliminary inquiry into specific individuals in respect of specific criminal offences." The Court stressed that people should not be compelled to testify under oath regarding their involvement in a suspected criminal offence. The inquiry was struck down as an invasion of federal jurisdiction over criminal procedure, but it was clear that the Court was concerned with protecting the rights of the private individuals and corporations targeted by the inquiry. Only L'Heureux-Dubé J. clung to the traditional notion that inquiries did not threaten

---

[3]See generally, H. Clokie and J. Robinson, *Royal Commissions of Inquiry* (New York: Octagon Books, 1969); Law Reform Commission of Canada, *Commissions of Inquiry* (Working Paper No. 17) (Ottawa: Ministry of Supply and Services, 1977) at 8.

[4]*Re Nelles et al. and Grange et al.* (1984), 46 O.R. (2d) 210 at 215-16.

[5](1990), 55 C.C.C. (3d) 472 at 505 (S.C.C.) [hereinafter *Starr*]. See also *Castle* v. *Brownridge* (1990), 59 C.C.C. (3d) 77 (Sask. Q.B.).

rights because they were advisory as opposed to adjudicative bodies.[6] She also expressed the view that Patricia Starr would be adequately protected from self-incrimination because her compelled testimony at the inquiry could not be introduced in subsequent proceedings.

As has often been the case, the division of powers provided an indirect and awkward means to protect civil liberties. Although the majority of the Court in *Starr* did not find it necessary to consider *Charter* issues, the tone of the judgment suggests that the Supreme Court is prepared to take a serious look at the fairness of inquiries into wrongdoing under the *Charter*.[7] Three years earlier, it upheld a British Columbia inquiry into injuries suffered by a prisoner in custody on the grounds that the inquiry fell within provincial jurisdiction over the administration of justice, even though criminal charges against police officers might and, in fact, did result.[8] Dickson C.J. warned, however, that no *Charter* issue had been raised and that in the future "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."[9] The crucial question, of course, is the exact scope of the right against self-incrimination as defined in our rapidly changing criminal justice system.

It is relatively clear that testimony compelled at public inquiries cannot be used in subsequent proceedings by virtue of various statutory provisions and s. 13 of the *Charter*. S. 11(c) of the *Charter* protects people from being compelled to testify, but only if they are charged with an offence. In *Thomson Newspapers Ltd.* v. *Canada*,[10] the Supreme Court considered the protections provided under ss. 7 and 8 of the *Charter* for those compelled to testify and to produce documents

---

[6]She concluded: "the Charter has not been violated for much the same reason that the commission is *intra vires* the Province of Ontario. The alleged infringement of s.7 cannot be sustained as the commission is solely a recommendatory and not an adjudicative body. Determinations as to guilt or innocence, or civil or criminal liability, are specifically excluded from its functional description. Any prospective threat to liberty is purely speculative." *Ibid.* at 528. See also *Robinson* v. *British Columbia* (1986), 3 B.C.L.R. (2d) 77 (S.C.) aff'd 36 D.L.R. (4th) 308 (C.A.); *Copeland* v. *McDonald* (1978), 88 D.L.R. (3rd) 724 (F.C.T.D.). Public inquiries have increasingly been found to be bound by the duty of fairness even though they can be classified as administrative or advisory bodies. See *Mahon* v. *Air New Zealand*, [1984] A.C. 808 (P.C.).

[7]See also Hon. John Sopinka "Public Inquiries" (Address to the Canadian Institute for the Administration of Justice Conference, Winnipeg 24 August 1990) [unpublished]. Sopinka J., expresses the view that "underlying the decision in the *Starr* case is a more fundamental principle than the simple division of powers between the federal and provincial governments: when an individual is subjected to investigation and possible punishment by the state, then as a matter of necessity we must ensure that her rights are protected."

[8]*O'Hara* v. *British Columbia* (1987), 38 C.C.C. (3d) 233 (S.C.C.).

[9]*Ibid.* at 248-49.

[10](1990), 54 C.C.C. (3rd) 417 (S.C.C.).

pursuant to a combines investigation. Unfortunately, no clear consensus emerged. Wilson J., held that both compelling testimony and using evidence derived from the testimony was an unjustified violation of s. 7.[11] Similarly, Sopinka J., stated that s. 7 provided those compelled to testify with the right to silence.[12] La Forest J. objected to the implication that the only effective way to protect the individual from self-incrimination is to follow the American path and either allow a person to "take the Fifth" and remain silent, or provide full transactional immunity for those compelled to testify. Nevertheless, he conceded that the admission of derivative evidence that could not have been discovered without the use of compelled testimony would amount to unfair self-incrimination.[13] L'Heureux-Dubé J. stated that a person compelled to testify in a combines investigation was in the same position as a witness at a public inquiry and held that the protections provided under s. 13 of the *Charter* were sufficient.[14] She would adopt a similar position in her dissent in *Starr*. Lamer J. left to another day the crucial decision of whether taking away a person's right to refuse to testify on the grounds of self-incrimination was an unjustified violation of s. 7.[15]

The Court was less troubled with the compelled production of documents because of the low expectation of privacy over business documents relevant to the combines inquiry. L'Heureux-Dubé J. stated that requiring the same standards as needed for a search warrant under the *Criminal Code* would frustrate the purposes of official investigations into wrongdoing.[16] Wilson and Lamer JJ. dissented and would have required such standards.[17]

One of the most extensive judicial examinations of how inquiries might violate the *Charter* has been provided by the Nova Scotia Court of Appeal in their decision to stay the proceedings of the inquiry into the Westray mine disaster until all possible criminal charges against the mine managers have been completed.[18] The Court of Appeal held that the inquiry was within provincial jurisdiction to regulate coal mines, but that allowing it to continue would result in a probable

---

[11] *Ibid.* at 458-59.

[12] *Ibid.* at 551.

[13] *Ibid.* at 508-20.

[14] *Ibid.* at 533.

[15] *Ibid.* at 429-30.

[16] *Ibid.* at 540ff.

[17] *Ibid.* at 470, Wilson J.; at 428, Lamer J.

[18] *Phillips* v. *Nova Scotia (Commission of Inquiry)* (1993), 100 D.L.R. (4th) 79 (N.S.C.A.). Leave to appeal has been granted by the Supreme Court of Canada. At time the managers were charged with regulatory offences, but a criminal investigation was ongoing and criminal charges have subsequently been brought.

violation of the managers' rights to silence and to a fair trial. Hallett J.A. held that because the managers are charged with a criminal offence, they are within the power of the state, and thus entitled to a right to silence under s. 7 of the *Charter*. Even if the Supreme Court should decide that the right to silence does not apply in this context, it will still have to address the fairness of compelling people, whether charged or not, to testify or produce documents at a public inquiry when that information may be useful in subsequent prosecutions. The Court of Appeal also concluded that prejudicial pre-trial publicity from the inquiry threatened the right to a fair trial under s. 11(d) of the *Charter* by making it difficult for an impartial jury to be assembled. Even if the Supreme Court should decide that it was premature to decide this issue of pre-trial publicity,[19] a criminal trial court may, nonetheless, be faced with the difficult task of deciding whether a fair trial is possible after a highly publicized and controversial inquiry.[20]

These cases demonstrate that the activities of public inquiries are being curtailed or terminated because of concerns that they are unfair to those, such as Patricia Starr, who at the time of inquiry are suspected of wrongdoing, or those, such as the Westray managers, who are already accused of regulatory or criminal offences. A public inquiry may also place a subsequent prosecution in jeopardy by tainting the jury pool through pre-trial publicity or by allowing the police to discover evidence derived from testimony compelled at the inquiry. A government that wishes to ensure that a prosecution will not be jeopardized may have to forgo the appointment of an inquiry, at least until the charges are disposed of. The delay may easily amount to years eroding the usefulness of an inquiry. If a government decides that a public inquiry is necessary to respond to an immediate crisis of public confidence and to prevent a reoccurrence of the scandal or disaster, it must run the risk that a subsequent prosecution may be stayed by the courts, or that crucial evidence derived from the inquiry may be excluded. Under the present law, governments will, in many cases involving suspected wrongdoing, have to choose between appointing a public inquiry and conducting a prosecution.

---

[19]The Supreme Court has held that courts should generally wait until trial to decide whether a fair trial is possible and that they should presume that jurors can put aside pre-trial publicity and decide on the basis of the evidence. See *R.* v. *Vermette* (1988), 41 C.C.C. (3d) 523 (S.C.C.); *R.* v. *Kearney* (1992), 76 C.C.C. (3d) 480 (S.C.C.); *R.* v. *Sherratt* (1991), 61 C.C.C. (3d) 193 (S.C.C.).

[20]In *R.* v. *Kenny* (1992), 68 C.C.C. (3d) 36 at 74 (Nfld. S.C.T.D.) Barry J. found the appointment of the Mount Cashel inquiry did not result in an abuse of process in the subsequent trial of one of the priests. He did, however, find that the accused's right to a fair trial had been violated by the pre-trial publicity caused by the inquiry. Nevertheless, he concluded that a stay of proceedings was not an appropriate remedy because an impartial jury could still be empanelled. Other courts may take a different view of whether a fair trial is possible after a highly publicized inquiry, and whether any remedy less than a stay of proceedings is appropriate to respond to the violation of the accused's right to a fair trial. See K. Roach, *Constitutional Remedies in Canada* (Aurora: Canada Law Book, 1994) at 9.300-9.330.

II. The Limitations of the Choice of Inquiries or Prosecutions

The judicial decisions outlined above may well persuade governments not to appoint public inquiries at all. Some cynics and deficit watchers may not be disturbed by this prospect, but in my view it would be an unfortunate development. The appointment of a public inquiry signals official recognition of a systemic problem. Inquiries, therefore, play an important role in stimulating public awareness of social problems.[21] Addressing these broad, societal concerns solely by launching a prosecution may have a cathartic effect, but a backlash may develop if there is an acquittal or the results of a conviction are perceived as either too severe or lenient. Relying on prosecutions or civil suits to respond to events such as the systemic wrongdoing of the Royal Canadian Mounted Police's Security Service, the wrongful conviction of Donald Marshall Jr., or the death of J. J. Harper would have proven an inadequate and frustrating response to the larger social, political and organizational problems that were revealed when inquiries were held into these events.[22] Similarly, relying solely on criminal prosecutions in sexual abuse cases may not address the larger social and organizational issues that a well run inquiry could explore. It is also unlikely that the prosecutions in the *Phillips* will be a substitute for a full investigation of the regulatory and economic environment that may have contributed to the disaster.

Public inquiries and criminal prosecutions serve very different purposes. The aim of a criminal trial is to apply pre-existing standards to a discrete event in the past. The state bears a high burden of proving guilt beyond a reasonable doubt and the court enforces restrictive rules of evidence, largely designed to protect the rights of the accused. An acquittal does not indicate that an event could not have been prevented, or that the state itself was not culpable in allowing the event to occur. Some of our most influential public inquiries into wrongdoing have taken place in contexts where criminal prosecutions proved difficult or impossible.

Due to their adversarial nature, criminal prosecutions often do not serve the same wide range of interests as public inquiries. Pleas may be accepted, the accused may not put forth a vigourous defence and affected interests may be denied standing. In contrast, inquiries are conducted in an inquisitorial fashion. They can be tailored to address certain issues and can facilitate public participation in their deliberations. Unlike courts, they can formulate and apply

---

[21]G. Le Dain, "The Role of the Public Inquiry in our Constitutional System" in J. Zeigel, ed., *Law and Social Change* (Toronto: Osgoode Hall, 1973).

[22]For a more detailed discussion of the utility of these inquiries see K. Roach, "Canadian Public Inquiries and Accountability" in P. Stenning ed., *Accountability for Criminal Justice* (Toronto: University of Toronto Press, forthcoming).

new standards of conduct[23] and can collect evidence from many different sources including research studies and personal observation.[24] Although they may investigate a past event, inquiries are equally concerned with preventing similar events in the future.[25]

If a choice must be made, I would generally prefer a well-run inquiry to the risks of a criminal prosecution. There is always a danger that an inquiry's report will be shelved, but even a successful prosecution does not mean that steps will be taken to prevent the wrong in the future. Moreover, an unsuccessful prosecution may leave the public with the erroneous impression that nothing is wrong. I, like many other Canadians, expect more from my government than behaviour that does not break the law. There is much to be said for the view expressed by Mr. Justice Krever who recommended that no prosecutions be undertaken against those who he criticized during his inquiry into the confidentiality of health records:

> Prosecutions would involve a diversion of energy from the main and important task at hand, namely that of the fostering of sensitivity in order to ensure that infractions that were committed in the past are not repeated in the future. I am reasonably confident that the publicity surrounding our proceedings has had a demonstrable inhibiting effect on the ability of those inclined to do so to commit infractions of the kind we have seen ... To undertake prosecutions would smack of a search for scapegoats despite the fact that the climate in which the activities described in these pages, and which have been carried on until recently, is something for which all of us should feel responsible.[26]

It may be desirable to follow this advice, but it is not always possible. As a practical matter, it may be imprudent to announce at the commencement of an inquiry that a decision not to prosecute has been made because all the facts may not be available. Attorneys-General and other prosecutors face demands from a suspicious and cynical public that prosecutions be undertaken to respond to abuses of governmental or corporate power. Although they should not succumb to popular pressures, it is proper for prosecutors to recognize that the public interest

---

[23]In the wake of the McDonald Commission, controversy arose because the commission determined whether activities were improper and not authorized by law, as opposed to whether they were illegal.

[24]Bruce Wildsmith has reported that the visit of the commissioners to Donald Marshall's reserve may have influenced them to accept systemic racism as a contributing factor to Marshall's wrongful conviction. See B. Wildsmith, "Getting at Racism: The Marshall Inquiry" (1991) 55 Sask. L.Rev. 97 at 106, 111. On the limitations of judicial involvement in civil trials see *Phillips* v. *Ford Motor Co.* [1971] 2 O.R. 637 (C.A.).

[25]L. Salter, "The Two Contradictions in Public Inquiries" and P. Robardet, "Should We Abandon the Adversarial Model in Favour of the Inquisitorial Model in Commissions of Inquiry" in P. Pross *et al.*, ed., *Commissions of Inquiry* (Toronto: Carswell, 1990) at 186, 111.

[26]*Ontario Report of the Royal Commission of Inquiry into the Confidentiality of Health Information* (vol. 1)(Toronto: Queen's Printer, 1980) at 5, cited in Ontario Law Reform Commission, *Report on Public Inquiries* (Toronto: Queen's Printer, 1992) at 23 [hereinafter OLRC].

is, at times, served by undertaking prosecutions in high profile cases involving scandals and disasters. The symbolic value of applying the rule of law to all is as important today as it ever was. A government that forgoes prosecutions in favour of a public inquiry may risk undermining public confidence in the administration of justice, not to mention the subsequent inquiry. In some cases, both prosecutions and public inquiries will be in the public interest. The question remains whether they can co-exist.

III. Beyond the Choice of Inquiries or Prosecutions

The cautious attitude of courts toward public inquiries is related to the formidable powers that public inquiries possess under Canadian legislation. All Canadian jurisdictions automatically grant public inquiries the power to compel testimony and the production of documents from any person with any information relevant to the mandate of the inquiry. The majority of procedure in inquiries is unregulated. In recent years, inquiries have allowed their hearings to be televised. It is not always clear whether they have the power to close hearings or otherwise restrict publicity to protect rights to a fair trial. Serious consideration should be given to updating and reforming the statutes that exist in all Canadian jurisdictions governing the conduct of public inquiries.

Despite taking an expansive view of the rights of those targeted by an inquiry, the Nova Scotia Court of Appeal in *Phillips* appeared to suggest that legislative reform of the inquiry process could allow public inquiries and prosecutions to co-exist. Hallett J.A. outlined the recommendations made by the Ontario Law Reform Commission in the wake of *Starr*. The OLRC proposed that a public inquiry should not compel a person to testify or produce evidence concerning a pending criminal charge, and private individuals should have the statutory right to refuse to testify at public inquiries on the grounds that their testimony may incriminate them. Hallett J.A. concluded: "There is a great deal of merit in a regime which requires a government to either lay charges or conduct a public inquiry but not to do both *except* with the safeguards proposed by the OLRC."[27] [emphasis added]. At this point, I should confess that as the Director of its project on public inquiries, I am heartened that the OLRC's report has been noticed in another province, especially since it has not yet been seriously considered for implementation in Ontario. However, I am disturbed that the failure of legislatures to respond to concerns raised by the OLRC and others has forced the termination, for the time being, of such an important public inquiry.

---

[27] *Supra*, note 18 at 115.

The OLRC is not the only body that has called for reform of public inquiries. The last significant reform of Ontario's *Public Inquiry Act*[28] followed recommendations made by the McRuer Inquiry into Civil Rights.[29] These reforms included the right to receive notice of misconduct, respect for evidentiary rules of privilege and provisions for increased judicial review of the activities of inquiries. Following McRuer's recommendations, public inquiries were deprived of their powers to hold people in contempt and were required to state a case for contempt to Divisional Court. Both cabinet and judicial authorization is now required before inquiries could have witnesses detained or their property searched. However, many provinces have not chosen to duplicate these pre-*Charter* reforms,[30] let alone respond to the challenge of the *Charter*.

In 1979, the Law Reform Commission of Canada recommended that the federal act be amended so that the government would have an option of appointing either an "advisory" inquiry without coercive powers to compel testimony or the production of documents, or an "investigatory" inquiry with such powers. They also recommended that notice of allegations of misconduct and an opportunity to respond be provided, and that an inquiry have the ability to conduct closed hearings if required because of "public security, privacy or financial matters, the right of anyone to a fair trial or any other reason that outweighs the interest of the public in open hearings."[31]

More recently, the Alberta Law Reform Institute has issued a report proposing major reforms to that province's *Public Inquiries Act*.[32] Among their recommendations are: that inquiries be granted the power to restrict publication of its proceedings on various grounds including the right to a fair trial; that people required to appear before a commission be entitled to reasonable expenses for appearing; that a commission's report not be admissible in subsequent proceedings to prove facts found by it; that a commission not express conclusions of legal liability; and that a commission be unable to compel testimony or the production of evidence from a person about a subject matter of an outstanding charge.[33] A majority of the ALRI decided that it was inadvisable to follow the OLRC and

---

[28]R.S.O. 1990, c. P-41.

[29]*Royal Commission of Inquiry into Civil Rights* (Toronto: Queen's Printer, 1968) vol. 1 at 463ff.

[30]See for example *Inquiries Act*, R.S.N.B. 1973, c. 1-11, s. 6(2). Regulations have, however, been passed providing that answers given by a witness at an inquiry are not receivable in civil trials in the province. N.B. Reg. 83-167.

[31]Law Reform Commission of Canada, *Advisory and Investigatory Commissions* (Report 13) (Ottawa: Supply and Services, 1979) Draft Act ss. 5 and 12.

[32]R.S.A. 1980, c. P-29.

[33]Alberta Law Reform Institute, *Proposals for the Reform of the Public Inquiries Act* (Report No. 62) (Edmonton: Alberta Law Reform Institute, 1992) [hereinafter ALRI].

grant those compelled to testify at a public inquiry the right to refuse to answer on the grounds of self-incrimination.[34] They noted that the Supreme Court of Canada's views about the scope of protection from self-incrimination provided by s. 7 of the *Charter* were unclear, and concluded that the protection provided in s. 13 against the use of compelled testimony in subsequent proceedings was sufficient.

The proposed statutory revival of the individual's right to refuse to testify on the grounds of self-incrimination is the most controversial part of the OLRC's report. It can be argued that allowing individuals to "take the Fifth" americanizes public inquiries and threatens to rob them of their effectiveness. Nevertheless, the statutory protections against self-incrimination proposed by the OLRC are not absolute. They do not apply to documents which are often crucial to understanding organizational wrongdoing. Moreover, they do not apply to those required to testify about the execution of official governmental duties or to anyone who has been granted immunity by the proper prosecutorial authorities. In cases where a private individual's testimony is deemed crucial to an inquiry, the government may have to choose between securing immunity from prosecution for a crucial witness compelled to testify at the inquiry or conducting a prosecution rather than an inquiry.[35] In most other cases, however, this choice should not be necessary. In my view, inquiries that are properly examining the broader dimensions of wrongdoing should not collapse because of the refusal of specific individuals to testify.[36] Inquiries are best at following the paper trail of misconduct, creating their own working paper and focusing on the organizational and socio-political determinants of wrongdoing.

Reform of the inquiry process, even significant reforms such as those proposed by the OLRC, will not be enough to ensure that inquiries and prosecutions can co-exist. Much of the present predicament is related to the fragile nature of fair trial rights under Canadian criminal law. In *Phillips*, for example, the Court of Appeal was concerned that the managers' right to a fair trial would be prejudiced by publicity, even if they were not required to testify at the inquiry. It is likely that similar concerns would be expressed if the managers were allowed to "take the Fifth" as proposed by the OLRC. Some members of the public would no doubt

---

[34] *Ibid.* at 101-02, note 140. A minority of the commissioners were apparently of the view that the public interest in full inquiries does not justify compelling a witness to give self-incriminating evidence.

[35] The OLRC concluded that their recommendations were based on a recognition that "in light of the Charter and decisions such as *Starr* v. *Houlden*, governments will in some cases have to choose between conducting a public inquiry and pursuing subsequent prosecutions. Our proposals allow this choice to be made." See *supra*, note 25 at 197.

[36] As Lord Scarman stated at the start of the Red Lion Square Inquiry, the emphasis in an inquiry should "be on the course of events not on particular individuals who took part in those events." See *Supra*, note 25 at 161.

conclude that they were guilty simply because they exercised their right to refuse to testify. This might make it impossible to find an unbiased jury at a subsequent criminal trial. If the jury is so susceptible to pre-trial publicity, thought should be given to making it easier to conduct trials without a jury. S. 11(f) of the *Charter* only guarantees jury trials for offences in which the accused faces 5 years imprisonment or more. The *Criminal Code* has traditionally provided the prosecutor with the option of requiring trial by jury.[37] Perhaps the time has come to allow the prosecutor to impose trial by judge alone within the constraints provided by ss. 11(f) and 1 of the *Charter*.

The option of jury trials may still be necessary in cases where serious wrongdoing is suspected. The Nova Scotia Court of Appeal noted the Canadian tendency to restrict pre-trial publicity because of the fear of tainting the pool of prospective jurors or juries that are already empanelled. Canadian law restricts not only pre-trial publicity much more than American law, but also the ability to challenge prospective jurors because of their exposure to pre-trial publicity.[38] Some reform of the jury selection process can be made by courts[39], while other reforms will require legislative initiative. It may no longer be desirable, as presently required in the *Criminal Code*, to have two members of the public or the jury determine challenges for cause. Similarly, the number and procedures of peremptory challenges may have to be reconsidered, as may common law and *Criminal Code* restrictions on change of venue. Canadian courts may also have to re-think their traditional aversion to sequestering a jury[40] should a public inquiry be conducted at the same time as a criminal trial. In reforming the jury, I suspect we have much to learn from the Americans.

In *Kenny*, Barry J. concluded that although pre-trial publicity accompanying the Hughes Inquiry made it more difficult to empanel an impartial jury, "proper attention to the selection of triers and jurors, the proper use of challenge for cause and peremptory challenge procedures, and proper judicial instructions to the jurors at trial will neutralize the risk."[41] I am not in a position to know whether this

---

[37]*Criminal Code* R.S.C. 1985, c. C-34, s. 568 [hereinafter *Criminal Code*].

[38]Hallett J.A. concluded that "the challenge for cause provisions of the Code are not necessarily the best answer for the problem of pre-trial publicity when other options are available." *Supra*, note 17 at 119.

[39]In *R.* v. *Parks* (1993), 15 O.R. (3d) 324, the Ontario Court of Appeal has recently expanded challenge for cause procedures to allow questions designed to discover racist bias.

[40]In *Keegstra* v. *One Yellow Rabbit Theatre Assn* (1992), 91 D.L.R. (4th) 532 at 536, the Alberta Court of Appeal dismissed as "monstrous" a suggestion that sequestering a jury was an alternative to a publication ban.

[41]*Supra*, note 20 at 75.

was successful,[42] but the difficult task of selecting an impartial jury could have been made easier by reform of the jury selection process. Legislatures must act before a crisis of a terminated inquiry or prosecution makes vivid the cost of legislative inertia in the age of the *Charter*.

IV. Conclusion

Public inquiries play an important role by helping us see the social, political, economic and organizational factors that play a role in wrongdoing and which must be changed if wrongs are to be prevented. If legislative reforms are not enacted to ensure that inquiries stick to these broader issues and better protect the rights of those suspected or accused of wrongdoing, they may wither away leaving governments to rely on prosecutions to deal with cases of suspected wrongdoing. This, I suspect, will make us more like the United States, where prosecutions and civil suits are relied upon to respond to scandals and disasters and where legality is, at times, confused with proper conduct. Somewhat ironically, a partial americanization of both our inquiry and trial processes may be necessary to allow public inquiries into the causes of wrongdoing to continue to make their unique and important contributions to the governance of Canada.

[42] In part because it is still a crime in Canada to ask jurors questions about their deliberations. See *supra*, note 37 at s. 649. Note that in *Kenny*, there was expert social science evidence on the difficulty of finding impartial jurors because of the wide spread publicity of graphic testimony at the inquiry.