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COLLISION COURSE: PUBLIC INQUIRIES AND CRIMINAL PROSECUTIONS

DAVID T.S. FRASER[†]

Public inquiries have become entrenched as an important part of the Canadian administrative state. Public inquiries are given numerous powers to execute their fact-finding missions—powers that sometimes collide with the rights of individuals. In ordinary criminal investigations, those suspected of having committed offences have the right to remain silent and to refuse to participate in their own conviction. Recent inquiries, most notably the Westray Inquiry, have been charged with investigating tragedies where criminal charges may be appropriate. This has raised important questions regarding the power of inquiries to compel all relevant testimony and “name names” where this may collide with the rights of accuseds to remain silent and to a fair trial. This article examines the most recent jurisprudence surrounding the intersection between public inquiries and criminal investigations. The author examines the present law of individual compellability and the subsequent use of derivative evidence that comes to light in the inquiry process. Examples from other jurisdictions are invoked to determine the proper method for balancing the public interest served by powerful fact-finding institutions and the right of accuseds to remain silent.

Les enquêtes publiques représentent aujourd’hui une partie importante de l’administration Canadienne. Elles possèdent de nombreux pouvoirs afin d’effectuer leurs missions de recherches factuelles; ces pouvoirs étant parfois en conflit avec les droits personnels des individus. Dans les enquêtes criminelles ordinaires, les individus soupçonnés d’avoir commis des offenses ont le droit de garder silence et de refuser de participer à leur propre condamnation. Des enquêtes récentes

[†] B.A. (Hons.) (British Columbia), M.A. (St. Mary’s), LL.B anticipated 1999 (Dalhousie). The author wishes to thank Mr. John Merrick, Q.C., for his invaluable assistance and insight, which greatly contributed to the research and writing of this article.

(notamment, l'enquête Westray) ont été chargées d'examiner les tragédies où des charges criminelles seraient appropriées. Ceci a soulevé d'importants questionnements au sujet des pouvoirs accordés aux enquêtes de soumettre tout témoignage pertinent et de révéler des noms, et ce, dans un contexte où le droit de l'accusé de demeurer silencieux et le droit à un procès juste et équitable peuvent entrer en conflit. Le présent article examine la jurisprudence la plus récente concernant le croisement des enquêtes publiques et des enquêtes criminelles. L'auteur examine le droit actuel concernant la contrainte individuelle ainsi que l'usage ultérieur de la preuve dérivée obtenue à la lumière du processus d'enquête. Une comparaison d'exemples d'autres juridictions permet de déterminer la méthode appropriée, afin de balancer l'intérêt public servi par les puissantes institutions de recherche de faits et par le droit des suspects de demeurer silencieux.

An explosion at the Westray Mine in Plymouth, Nova Scotia on May 9, 1992 killed twenty-six men working underground. Within a week, the Nova Scotia government appointed Supreme Court Justice K. Peter Richard as a commissioner under the *Public Inquiries Act*¹ and as a Special Examiner under the *Coal Mines Regulation Act*.² The Westray Commission of Inquiry had a broad mandate to investigate virtually all aspects of the tragedy, including whether it was preventable and whether it was occasioned by neglect.³

On October 5, 1992, fifty-two charges under the *Occupational Health and Safety Act*⁴ and the *Coal Mines Regulation Act*⁵ were laid against Gerald Phillips, Roger Parry, Glyn Jones, Robert Parry, and Curragh Resources Inc. The mine managers challenged the inquiry in the courts and, just over a month later, Glube C.J.T.D. held that the Inquiry's mandate was *ultra vires* the province of Nova Scotia.⁶ This

¹ R.S.N.S. 1989, c. 372.

² R.S.N.S. 1989, c. 73.

³ N.S. O.I.C. No. 92–504.

⁴ R.S.N.S. 1989, c. 320 [hereinafter *O.H.S.A.*].

⁵ R.S.N.S. 1989, c. 73.

⁶ *Phillips v. Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)* (1993), 116 N.S.R. (2d) 34, [1992] N.S.J. No. 451 (S.C.) (QL) [hereinafter *Phillips* (N.S.S.C. No. 2) cited to N.S.R.].

judgment was appealed, and on January 19, 1993, the Nova Scotia Court of Appeal reversed the specific *vires* holding of Glube C.J.T.D.⁷ Hallet J.A., writing for the Court, did not stop there. He considered the arguments of the accuseds, who contended that the work of the Inquiry jeopardized their section 7 rights under the *Charter of Rights and Freedoms*.⁸ Hallet J.A. agreed and held that the rights of the accuseds must prevail over public and state interest in the expedient work of the Inquiry. The Court ordered a stay of the Inquiry's proceedings until either trial, pleading or stay resolved all provincial charges. At that point, no criminal charges had been laid.

Not surprisingly, the decision of the Court of Appeal was again appealed to the Supreme Court of Canada. In the intervening time, the *O.H.S.A.* and *Coal Mines Regulation Act* charges were stayed by the Attorney General in preference of charges for criminal negligence. After the hearing but before the Supreme Court of Canada's decision was released, the accuseds (Gerald Phillips, Roger Parry, and Curragh) elected to be tried by judge alone.

This action, in the judgment of a majority of the Supreme Court of Canada, rendered the accuseds' *Charter* arguments moot.⁹ Sopinka J. wrote that the danger to the accuseds' *Charter* rights stemmed from the problem of adverse publicity prejudicing their right to a fair trial by jury. As the issue was moot, the majority of the Court declined to consider the *Charter* arguments. In two minority judgments, L'Heureux-Dubé and Cory JJ. considered the issues. Both would have upheld the Inquiry's appeal. However, all recognized that much of the issue was moot by the time the decision was written, although Cory J. noted that since there was a parallel criminal process operating, it was still a "live issue."¹⁰

The travails of the Westray Inquiry are not unique in recent Canadian history. The Krever Inquiry into the tainted blood tragedy was

⁷ *Phillips v. Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)* (1993), 117 N.S.R. (2d) 218, [1993] N.S.J. No. 11 (C.A.) (Q.L.) [hereinafter *Phillips* (N.S.C.A.) cited to N.S.R.].

⁸ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Charter*].

⁹ *Phillips v. Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)*, [1995] 2 S.C.R. 97, [1995] S.C.J. No. 36 [hereinafter *Phillips* (S.C.C.) cited to S.C.R.].

¹⁰ *Ibid.*, at para 73.

hounded by litigation on evidentiary matters,¹¹ as was the Somalia Commission.¹² The work of these inquiries—each investigating areas of public interest with the possibility of criminal culpability for the actions investigated—has been slowed and almost stopped by accuseds, potential accuseds, and suspects. However, these most recent examples do not appear to have significantly undercut the role of inquiries. In fact, inquiries are recognized for their ability to ferret out the truth in ways that civil or criminal trials cannot.¹³ Normal rules of evidence, developed over years with the rights of the criminally accused in mind, do not apply.¹⁴ Firm procedural practices built up over centuries of criminal prosecutions are not strictly adhered to.¹⁵ Public inquiries generally have one purpose: to investigate and report facts, and report upon systemic and collective problems, usually within governments. The very wide focus and the unrestricted analysis mean that unlike a criminal or civil trial, an inquiry can “get to the root” of fundamental, systemic, and social issues. However, an inquiry’s broad grant of power and its public nature raise problems for the rights of accuseds and potential accuseds.

Despite an enormous amount of litigation and some scholarly comment, questions remain. The Nova Scotia Court of Appeal held that the public interest in, and the concomitant media coverage of, the

¹¹ See *Canada (A.G.) v. Canada (Commission of Inquiry on the Blood System in Canada – Krever Commission)*, [1997] S.C.J. No. 83 (QL), aff’d [1997] F.C.J. No. 17 (C.A.) (QL), var’g [1996] F.C.J. No. 864 (T.D.) (QL).

¹² See *Labbe v. Canada (Commission of Inquiry into the Deployment of Canadian Forces in Somalia)*, [1997] F.C.J. No. 107 (T.D.) (QL); *Addy v. Canada*, [1997] F.C.J. No. 796 (T.D.) (QL); *Beno v. Canada*, [1997] F.C.J. No. 936 (T.D.) (QL), rev’d [1997] F.C.J. No. 509 (C.A.) (QL); *Boyle v. Canada*, [1997] F.C.J. No. 942 (T.D.) (QL); *Beno v. Canada*, [1997] F.C.J. No. 535 (T.D.) (QL).

¹³ See Law Reform Commission of Canada, *Administrative Law: Commissions of Inquiry* Working Paper 17 (Ottawa: 1977); Ontario Law Reform Commission, *Report on Public Inquiries* (Toronto: 1992); Alberta Law Reform Institute, *Proposals for the Reform of the Public Inquiries Act* Report No. 62 (Edmonton: 1992); Canadian Press, “Abuse victims call for inquiry” (27 April 1997 21:06) DB CP97 (QL).

¹⁴ *Re Huston* (1922), 52 O.L.R. 444 (Ont. C.A.) (holding that commissioner is not bound by rules of admissibility in court); *Bortolotti v. Ontario (Ministry of Housing)* (1977), 15 O.R. (2d) 617 (Ont. C.A.) (holding that all reasonably relevant evidence is admissible; only exclusionary rule is privilege).

¹⁵ *R. v. Gunn*, [1977] 1 F.C. 125 (T.D.) (procedure is within the discretion of the commissioner); *Silberberg v. Caron*, [1951] Que. S.C. 131 (Québec *Code of Civil Procedure* does not apply unless it specifically is so stated in the statute).

Westray Inquiry would prejudice the defendants' section 11(d) Charter rights regardless of whether the accuseds testified. The solution was a stay of the inquiry's process. But what about charges and potential suspects who only come to light through the process of the inquiry? Is it unrealistic to expect a "start-stop" process as the potentially culpable emerge?

If parallel inquiries and penal processes are potentially too problematic, should an either/or regime be in place? Should the commissioner or cabinet be forced to decide on either pursuing an inquiry or criminal charges? This approach is also questionable. Even without the threat of penal or civil culpability, a finding of facts by the public inquiry has the potential to destroy the reputation of a person who is left with no avenue of appeal. *In camera* hearings and bans on publication of findings have also been suggested. These, however, destroy the public nature of the exercise and undermine an inquiry's reason for being.

The ability of inquiries to "name names," both through the hearings and in final reports, has been a large issue for those facing potential criminal charges or civil suits. A mandate to find facts will often lead to the finding of facts that are adverse to the interests of parties. A collection of facts will often amount to a civil cause of action, the elements of a criminal offence, or just enough unfavourable testimony to discredit an individual in his or her community. Does a restriction on naming names hobble an inquiry, or is it a necessary element of the balancing referred to earlier?

I. RIGHTS AND INTERESTS IN CONFLICT

A public inquiry can be categorised based on the overall objectives of each particular undertaking. On one hand are the very broad policy-setting inquiries such as the Laurendeau-Dunton Commission on Bilingualism¹⁶ or the Gordon Commission on Canada's Economic Prospects.¹⁷ On the other hand are inquiries chartered with a fact-finding

¹⁶ *Royal Commission on Bilingualism and Biculturalism*, Report (Ottawa: Queen's Printer, 1967).

¹⁷ *Royal Commission on Canada's Economic Prospects*, Final Report (Ottawa: Queen's Printer, 1958)

function, such as the Grange Commission.¹⁸ Many inquiries—such as the Marshall Commission¹⁹—are hybrids, focusing their inquisition on mixed fact and policy.

Neither federal nor provincial public inquiries can establish guilt or innocence in the criminal law sense.²⁰ Nor can they establish civil liability. Instead, this category is often composed of fact-finding undertakings that consequentially establish a pattern of facts that can give rise to either criminal or civil culpability.

As creatures of executive (or royal) charters, one might think of inquiries as tools of the executive branch of government. The prevalence of judges as commissioners and the quasi-judicial formality employed suggest a judicial role. Furthermore, the public nature of the inquiry and the strong independence of the judiciary remove inquiries from the ebb and flow of Canadian politics. The trappings of both branches are apparent in most—if not all—inquiries. Generally with one foot in each arena, inquiries are *sui generis* within the traditional conception of parliamentary government.

The rights protected and the interests served by public inquiries and public prosecutions are by and large similar: the underlying premise is the furtherance of a public interest. Public inquiries are charged with the investigation of certain actions and with producing independent recommendations of remedial policy. Criminal prosecutions, on the other hand, serve the public interest of deterrence and punishment of criminally culpable behaviour. Private actions—those between individuals—often intersect with criminal prosecutions in that the two proceedings can erupt from the same set of facts. For example, an injurious car accident may simultaneously give rise to a criminal charge of reckless driving and a private action for personal injury and property damage. As far as the accused is concerned, the parallel processes can present a conflict as the accused might be forced to testify in the civil matter. In the criminal trial, however, the accused cannot be compelled to give evidence. For criminal prosecutions and public inquiries, the

¹⁸ *Nelles v. Grange* (1984), 3 O.A.C. 40, 9 D.L.R. (4th) 79 (C.A.).

¹⁹ *Royal Commission on the Donald Marhsall, Jr., Prosecution*, Commissioners' Report: Findings and Recommendations (Halifax: 1989).

²⁰ For a federal inquiry it would not be *ultra vires* constitutionally, but federal commissions are, in practice, precluded from making such findings.

conflict is no less real but it is less clear which should prevail: both are actions by government agents acting in a clear public interest.

The question of what to do with the apparent conflict between inquiries and criminal prosecutions is the subject of this paper. Despite the large amount of litigation and study in this area, it is a question with considerable murkiness and the appellate courts have not conclusively answered the questions.

1. Charter Sections 13 and 7—Self-Incrimination and the Right to Silence

i. Generally

Inquiries that are founded to look into alleged misconduct have at their disposal a very powerful tool: the ability to subpoena persons and to compel their testimony. A person who is subject to criminal charges arising from the *res* of an inquiry is put in a very precarious position when his or her testimony is compelled.

The criminal process, in contrast with an inquiry's process, offers many protections to the rights of accuseds. In fact, the presumption of innocence and the right to silence are built upon the premise that the defendant can sit idly by while the Crown bears the complete burden of building and proving its case. Many of the fundamental legal rights enjoyed in Canada are built upon the foundation that the Crown cannot force an individual to participate in his own prosecution. The "case to meet" model is the cornerstone of the adversarial system:

In a civilized society that operates under the adversarial system of justice, a person should not be put in the position of explaining his or her actions until the state has shown that there is something that demands explanation according to the accepted rules of the society. Moreover, a person should not be subject to penalty by the state until the state has proven its right to punish at a high enough level to be beyond question.²¹

An accused is under no obligation to make any statements to the Crown, nor can the Crown compel statements of others as part of its investigations. A public inquiry, however, purports to be able to do

²¹ M.A. Stalker, "The Protection of Individual Rights and The Public Inquiry" (1994) 43 U.N.B. L.J. 427 at 429.

both: those under suspicion or charged are compellable witnesses and the inquiry can compel the production of statements and real evidence. In stark contrast to a police investigation, the public inquiry has much greater powers and an increased ability to jeopardize an accused, primarily by compelling his or her testimony. The danger this presents is evident, as there is always a risk that a public inquiry may be a colourable attempt to be a “super investigation” or a “super preliminary hearing.”²²

It does not take much creativity of thought to imagine a situation where an inquiry is proceeding concurrently with a police investigation, and the police are stymied by their inability to compel the attendance of suspects and witnesses. The inquiry, meanwhile, has subpoenaed those same witnesses and suspects. The process of the inquiry would be followed with great interest and would likely provide the police with helpful leads. Compelling the testimony from a potential suspect would clearly have the effect of providing the police with assistance that the suspect ordinarily would have an absolute right to refuse. Thus, intentionally or not, there is the danger that an inquiry may be used as a venue for compelled interrogation for a criminal investigation.²³

Compared with the American regime,²⁴ Canadian law has historically been less generous to the witness. There is no right to refuse to answer an inquiry’s questions that would tend to self-incriminate. Section 13 of the *Charter* reads:

13. A witness who testifies in any proceedings has the right not to have any incriminating evidence so given used to incriminate

²² Beyond endangering the rights of accused persons, a “super preliminary investigation” under the guise of a provincial inquiry will not stand for jurisdictional reasons as it will infringe the federal government’s criminal law powers under the *Constitution*. Such was the case in *Starr v. Houlden*, [1990] 1 S.C.R. 1366 [hereinafter *Starr*].

²³ As an example, it is worthwhile to note that during the Westray Inquiry, the R.C.M.P., who were concurrently undertaking a criminal investigation, took advantage of the Inquiry’s collection of documentation relevant to the tragedy. Once the Inquiry had amassed the collection, the R.C.M.P. served search warrants to gain access to it. Probably an inevitable incident of a parallel process, Inquiry officers quite rightly feared that the whole exchange might give the appearance that the Inquiry was cooperating and “feeding” the criminal investigation. This perception was part of the applicants’ argument before the Supreme Court of Canada. See *Phillips* (S.C.C.), *supra* note 9 at 180. It should be borne in mind that this example was the compulsion of documentary evidence, a process that is distinct from compelling oral testimony from an accused.

²⁴ See the section entitled “United States,” below.

that witness in any other proceedings, except in a prosecution for perjury or for the giving of contradictory evidence.

The *Canada Evidence Act* goes hand-in-hand with the *Charter*:

5. (1) No witness shall be excused from answering any question on the ground that the answer to the question may tend to criminate him, or may tend to establish his liability to a civil proceeding at the instance of the Crown or of any person.
- (2) Where with respect to any question a witness objects to answer on the ground that his answer may tend to criminate him, or may tend to establish his liability to a civil proceeding at the instance of the Crown or of any person, and if but for this Act, or the Act of any provincial legislature, the witness would therefore have been excused from answering the question, then *although the witness is by reason of this Act or the provincial Act compelled to answer, the answer so given shall not be used or admissible in evidence against him in any criminal trial or other criminal proceeding against him thereafter taking place, other than a prosecution for perjury in the giving of that evidence.* [emphasis added]²⁵

The Canadian solution is to compel the testimony in the first instance and allow limited protections later.

A right to prevent the subsequent use of compelled self-incriminating testimony protects the individual from being “conscripted against himself” without simultaneously denying an investigator’s access to relevant information. It strikes a just and proper balance between the interests of the individual and the state.²⁶

It would appear clear from the applicable statutes that the evidence given at the inquiry would not subsequently be used against that witness, but some obscurity remains and two important questions are unresolved.

First, the extremely public nature of the inquiry process would make any testimony given notorious. Routine criminal or civil trials are not surrounded by intense media interest and a general prohibition like section 5(2) of the *Canada Evidence Act* may be effective in keeping

²⁵ *Canada Evidence Act*, R.S.C. 1985, c. C-5, s. 5. The *Nova Scotia Evidence Act*, R.S.N.S. 1989, c. 154, s. 59, has virtually identical provisions.

²⁶ *Thomson Newspapers v. Canada (Director of Investigations and Research)*, [1990] 1 S.C.R. 425 at 541, [1990] S.C.J. No. 23 per La Forest J. [hereinafter *Thomson*].

prior testimony out of the courtroom. However, public inquiries are not routine. If compelled testimony is particularly harmful to the interests of the witness, it may cause considerable prejudice among the public at large, undermining the ability to empanel an unbiased jury and generally destroying the reputation of the witness. Secondly, the *Evidence Act* is silent with regard to the use of derivative evidence.

As far as the question of compellability of testimony is concerned, Iacobucci J.'s conclusion in *S.(R.J.)* is helpful:

Indeed, it is clear that Canada repeatedly resolved to maintain a position whereby witnesses are able to claim a protective mechanism which admits of certain application and which has a defined reach. While the longevity of the *Canada Evidence Act* approach is perhaps not a determinative consideration, its longevity has particular significance when one considers that the Canadian position has been the subject of unending scrutiny which it has always survived. The considered opinion of the legal community in this country has repeatedly advocated its retention.²⁷

As has been the trend in other areas of evidence, the question of self-incrimination before public inquiries would benefit greatly from a principled approach.²⁸ The question of whether to admit (or compel) evidence is a matter of balancing two important values. On one hand, there is a clear public interest in getting all relevant evidence before an inquiry that requires it and, on the other hand, there is a public interest clearly stated in sections 7 and 11(d) of the *Charter* expressing the right of an accused to a fair trial.

As the immediate authority over the fairness of an inquiry's proceedings, it is the responsibility of the commissioner to ensure that the proceeding is fair and that those appearing before it are not subjected to unfair prejudice. The best determinants of this are the principles expressed by the Supreme Court of Canada in *Branch*²⁹ and *S.(R.J.)*.³⁰ The commissioner would be required to balance the public interest

²⁷ *R. v. S.(R.J.)*, [1995] 1 S.C.R. 451, [1995] S.C.J. No. 10 at para 135 [hereinafter *S.(R.J.)*].

²⁸ A prime example is the movement away from strict, unbending rules to a more principled approach where trial judges are to return to first principles is the area of hearsay evidence and pigeon-holed exceptions. The Supreme Court of Canada dispensed with the artificial categories and thoroughly modernized the law of hearsay in *R. v. Khan*, [1990] 2 S.C.R. 531 and in *R. v. Smith*, [1992] 2 S.C.R. 915.

²⁹ *British Columbia Securities Commission v. Branch*, [1995] 2 S.C.R. 3.

³⁰ *S.(R.J.)*, *supra* note 27.

served by the inquiry and the necessity of the witness' testimony against the possibility of prejudice to the fair trial rights of that witness. Thus, if the commissioner can fulfil the mandate of the inquiry without the testimony of that particular witness, the necessity of compelling testimony is not acute.³¹ On the other hand, if that testimony is central to the inquiry's mandate and necessary for the functioning of the proceeding, then it must be asked what prejudicial effect the testimony might have. If the prejudice would be substantial and cannot be mitigated, then the balancing weighs against compelling that witness. This balancing act is not one that lends itself to easy expression or cold calculation, but it is a technique judges have become deft at applying.³²

It is a question that should be asked at every turn when the issue of compelling evidence rears its head. When an inquiry's subpoena is challenged, the commissioner should be considering the importance and the value of the subpoenaed party's evidence and balancing it against the likelihood and magnitude of prejudice that might result from the admission of that person's evidence. Nevertheless, considering prejudice is a speculation at that point, and the hurdle must be set high. The presumption in such cases would be in favour of admission and the subpoenaed party would have the burden of arguing the likelihood of prejudice. If the decision is made to compel the person's testimony, they shall have a further option to request a remedy from the courts at the time of their preliminary hearing or ultimate trial. The test then would be whether the testimony given at the inquiry and the accompanying publicity has adversely affected the accused's right to a fair trial. At that point, the trial judge would be in a better position to evaluate the possible prejudice suffered by the accused.

ii. Derivative evidence

The general prohibition against the later use of a person's compelled testimony prevents the state from having the benefit of that person's

³¹ It is interesting to note that the Westray Inquiry was able to produce a report that was very well received without the benefit of testimony from those who were charged criminally. While their testimony would have been an obvious benefit to the Inquiry, the absence did little to undermine the report's credibility.

³² Judges have shown their ability to reasonably and effectively use "principled approaches" to admissibility. See, generally, cases following *Khan*, supra note 28, and *Smith*, supra note 28; *R. v. Eisenhauer* (1998), 165 N.S.R. (2d) 81 (C.A.) and *R. v. Sterling* (1995), 102 C.C.C. (3d) 481.

assistance in a venue where testimony is not compellable. However, the witness does not have the same degree of protection when it comes to derivative evidence.

The law of derivative evidence in the United States is extremely pro-witness. The “fruit of the poisonous tree” doctrine is an exclusionary rule under which evidence that is derived from an inadmissible source (generally a search found to be unconstitutional) is excluded as being tainted by its source.³³ In the inquiry context, the exclusionary rule has been codified through the so-called “use and derivative use” statute.³⁴ In Canada, however, the independent existence of the evidence is not a consideration.

In Canada, most of the jurisprudence surrounding derivative evidence comes from illegal interceptions of private conversations.³⁵ By statute, the *Criminal Code* provides that derivative evidence in such situations is *prima facie* admissible unless “the admission thereof would bring the administration of justice into disrepute.”³⁶ The common law and constitutional jurisprudence in Canada do not afford accuseds or potential accuseds a similar degree of protection as that offered in the United States:

The test for exclusion of derivative evidence involves the question whether the evidence could have been obtained but for the witness’s testimony and required an inquiry into logical probabilities, not mere possibilities. The important consideration is whether the evidence, practically speaking, could have been located. Logic must be applied to the facts of each case, not to the mere fact of independent existence. There should be no automatic rule of exclusion in respect of any derivative evidence. Its exclusion ought to be governed by the trial judge’s discretion. The exercise of the trial judge’s discretion will depend upon the probative effect of the evidence balanced against the prejudice caused to the accused by its admission. The burden is on the accused to demonstrate that the proposed evidence is derivative evidence deserving of a limited immunity protection.³⁷

³³ See *Wong Sun v. United States*, 371 U.S. 471; *Duncan v. State*, 278 Ala. 145, 176 So.2d 840 at 865.

³⁴ 18 U.S.C. § 6002.

³⁵ See e.g. *R. v. Parsons* (1977), 17 O.R. (2d) 465, 80 D.L.R. (3d) 430 (C.A.); *R. v. Dennison* (1984), 15 C.C.C. (3d) 510, 6 O.A.C. 235 (C.A.); *R. v. Samson (No. 5)* (1982), 37 O.R. (2d) 42 (Co. Ct.); *R. v. Li (No. 2)*, [1976] 6 W.W.R. 146 (B.C. Co. Ct.).

³⁶ *Criminal Code*, R.S.C. 1985, c. C-46, s. 189(2).

³⁷ *S.(R.J.)*, *supra* note 27 [Quotation from the S.C.R. headnote].

Iacobucci J. founded this reasoning under the *Charter*'s protection against self-incrimination. La Forest J., in *Thomson Newspapers*,³⁸ rooted a similar principle in the common law duty of judges to protect a fair trial by excluding evidence by balancing prejudicial effect and probative value:

[D]erivative evidence that could not have been found or appreciated except as a result of the compelled testimony . . . should in the exercise of the trial judge's discretion be excluded since its admission would violate the principles of fundamental justice.³⁹

In Canada, the admission of derivative evidence is a matter of the trial judge's discretion and both Iacobucci and La Forest JJ. describe a straightforward, principled test for the exercise of that discretion. Unfortunately, however, it is wanting in the inquiry context.

Unlike a criminal or civil trial, inquiry mandates are very broad in scope and inquiry counsel have much wider latitude in the interrogation of witnesses. Where prosecutors must confine their questioning to matters that are relevant to the immediate charge, inquiries are on a mission to uncover facts and the elements that underlie them. Strict procedural limitations on the scope of a commissioner's inquiry would undermine much of the effectiveness of the institution. This, however, increases the danger that inquiries might venture into the grey area of substitute police investigation.⁴⁰ Although the exact words of the witness may not be admissible later, that person's testimony would be a valuable source—to use Wigmore's phrase—of “clue facts”: “[a fact] which increases the probability that a subordinate fact will be discovered and thus that an ultimate fact, and the crime, will be proved.”⁴¹ Inquiry counsel, wittingly or not, will be in the role of compelling the witness to produce testimony and clues of substantial benefit to the Crown.

This was a substantial part of the submission made in favour of an injunction to the Nova Scotia Supreme Court in *Phillips v. Nova*

³⁸ Thomson, *supra* note 26.

³⁹ *Ibid.* at 561.

⁴⁰ For an example of an inquiry stayed as a “substitute police investigation,” see *Starr*, *supra* note 22.

⁴¹ J.H. Wigmore, *Evidence at Trials at Common Law* vol. 8, J.T. McNaughton, rev. (Boston: Little, Brown & Co., 1961) §2260 at 371; cited in *S.(R.J.)*, *supra* note 27 at para 58 per Iacobucci J.

Scotia.⁴² At the time that the application was made, the Westray Inquiry was just beginning and criminal investigations were ongoing. The mine managers were fearful that the combination of the police investigation and the parallel inquiry would amount to a super-investigation that would significantly compromise their rights. Compelled testimony before the inquiry would provide substantial derivative evidence to the police without any of the normal procedural protections. Glube C.J.T.D., in chambers, granted the complainants' application for a temporary order prohibiting the inquiry from commencing its public hearings on the basis that there was a serious question of constitutional jurisdiction and the balance of convenience was in the complainants' favour.⁴³ Later, Glube C.J.T.D. made the temporary stay permanent on the basis that the inquiry was *ultra vires* the province of Nova Scotia as it "encroache[d] on the Federal criminal law and procedure powers pursuant to section 91(27) of the Constitution Act, 1867 [*sic*]."⁴⁴

The argument that the Order-in-Council infringed the section 7, 8, and 11(d) rights of the applicants was dismissed as the matter was disposed of with the *ultra vires* holding. However, Glube C.J.T.D. did consider the *Charter* issues in *obiter*.

An inquiry, although not a trial, is a proceeding. The issue is, what can be made of compelled testimony in another proceeding? Section 13 of the *Charter* would protect against the use of the evidence of a witness who testifies at the Westray Inquiry from being used to incriminate that same person in another proceeding. *The main concern, however, is derivative evidence.* By allowing the Westray Inquiry to continue under its present terms of reference, both the Department of Labour and the R.C.M.P. could become the beneficiary of derivative evidence without being obliged to pursue their options of obtaining warrants. This has been mentioned previously under division of powers. Both the police and the Department could obtain evidence which would not be available to them in an ordinary investigation.

I am inclined to the view that under the existing terms of reference, there could be a *Charter* violation of the applicants [*sic*] right to silence upon being compelled to testify at the Westray Inquiry,

⁴² *Phillips v. Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)*, [1992] N.S.J. No. 391, 116 N.S.R. (2d) 30, 8 Admin. L.R. (2d) 107 (S.C.) [hereinafter *Phillips* (N.S.S.C. No. 1) cited to N.S.R.]

⁴³ *Phillips* (N.S.S.C. No. 2), *supra* note 6 at 60–61.

⁴⁴ *Phillips* (N.S.S.C. No. 1), *supra* note 42 at 45.

particularly if derivative evidence was elicited It is very uncertain what derivative evidence there is, if any. I am also not prepared to say that obtaining derivative evidence through compelled testimony would automatically mean that there was a *Charter* violation which could be successful against the Westray Inquiry. [emphasis added]⁴⁵

When Glube C.J.T.D.'s judgment was appealed, the Nova Scotia Court of Appeal overturned her holding that the inquiry was *ultra vires* the provincial government. However, Hallett J.A., continued the stay by considering the *Charter* issues that Glube C.J.T.D. had only considered in *obiter*. Hallett J.A. considered the leading cases of *Starr*⁴⁶ and *Thomson Newspapers*⁴⁷ and adopted a position that approximates the strong dissenting opinions of Wilson and Sopinka JJ. in *Thomson*:

[I]n their opinions the power to compel testimony under the *Combines Investigation Act* at the investigative stage infringed s. 7 *Charter* rights for the reason that persons compelled to respond to orders testify issued under the authority of the Act were not accorded the normal protections afforded to persons who are being investigated for suspected offences that carry penal consequences.⁴⁸

Hallett J.A. also favourably considered the reasoning of Professor Edward Ratushny in his argument that an accused's interests can be seriously compromised by a compulsion to testify at another hearing:

The earlier hearing might be used as a "fishing expedition" to subject the witness to extensive questioning with a view to uncovering possible criminal conduct. The questioning might also be used to investigate a particular offence. For example, the accused might be required to reveal possible defences, the names of potential defence witnesses and other evidence. Moreover, the publicity generated by the hearing may seriously prejudice the likelihood of a fair trial.

The problem is that the initial hearing is likely to have none of the protections guaranteed by the criminal process. There will be no specific accusation, no presumption of innocence, no protections against prejudicial publicity, no rules of evidence and so on. It is submitted that there is a serious crisis of integrity in a criminal process

⁴⁵ *Phillips* (N.S.S.C. No. 2), *supra* note 6.

⁴⁶ *Starr*, *supra* note 22.

⁴⁷ *Thomson*, *supra* note 26.

⁴⁸ *Phillips* (N.S.C.A.), *supra* note 7 at 236, interpretation of *Thomson*, *supra* note 26 per Hallett J.A.

whose detailed protections may so easily be ignored. Nor are these merely theoretical problems.⁴⁹

Justice Hallett finally concluded that the peril to the accuseds' interests would be dislodged by the adoption of a regime similar to those that prevail in the United Kingdom and the United States: full immunity for those who are being investigated by inquiries.

On further appeal to the Supreme Court of Canada,⁵⁰ the majority⁵¹ held that the foundation for the complaint had disappeared once the accuseds elected to be tried by judge alone. The majority of the Court declined to consider the question of compellability as it was premature. A minority⁵² held that the existing *Charter* jurisprudence of sections 11(d), 13, and 7 provide sufficient protection for the accuseds. Furthermore, the rule from *R. v. S.(R.J.)*⁵³ protects them from the use of derivative evidence.

L'Heureux-Dubé J. reiterated her test from *S.(R.J.)* based on "fundamentally unfair" conduct on the part of the Crown:

Fundamentally unfair conduct will most frequently occur when the Crown is seeking, as its predominant purpose (rather than incidentally), to build or advance its case against that witness instead of acting in furtherance of those pressing and substantial purposes validly within the jurisdiction of the body compelling the testimony. The Crown will be predominantly advancing its case against the accused when, by calling the witness, it is engaging in a colourable attempt to obtain discovery from the accused and, at the same time, is not materially advancing its own valid purposes. Such action would bypass the safeguards to the dignity of the individual under the *Charter* and fundamentally undermine the integrity of the judicial system. The principles of fundamental justice under s. 7 do not allow the state to have a general power of interrogation, that is, to permit the state to pass a law requiring all suspected persons to answer pre-trial questions, even if such a law prevented the later use of those statements at trial.⁵⁴

⁴⁹ E. Ratushny, "The Role of the Accused in the Criminal Process" in W.S. Tarnopolsky & G.A. Beaudoin, eds., *The Canadian Charter of Rights & Freedoms: Commentary* (Toronto: Carswell, 1982) at 364–5 quoted in *Phillips* (N.S.C.A.), *supra* note 7 at 245 and *Phillips* (S.C.C.), *supra* note 9 at 146.

⁵⁰ *Phillips* (S.C.C.), *supra* note 9.

⁵¹ Per Lamer, C.J., La Forest, Sopinka, Gonthier, and McLachlin JJ.

⁵² Per Cory, Iacobucci, and Major JJ.

⁵³ *Supra* note 27.

⁵⁴ *S.(R.J.)*, *supra* note 27 at 608–9, quoted in *Phillips* (S.C.C.), *supra* note 9 at 120.

The protection espoused by L'Heureux-Dubé J. would be activated either during questioning before the inquiry or at trial. Derivative evidence elicited during the inquiry would be subject to the *S.(R.J.)* test.

With respect, in a situation like the Westray Inquiry where the questions put to the managers would almost completely overlap with the facts sought by the police, the effect of the questioning would be identical to that which would occur if the Crown were to question the accuseds with the primary—and fundamentally unfair—purpose of building its case. An investigative inquiry has an obvious interest in and right to hear the facts that will be elicited, but ultimately the effect upon the accused will be the same as if he or she was directly interrogated by the police. The interrogation before a public inquiry is completely unlike the context of overheard conversations and illegally obtained confessions. The accused is being involuntarily enlisted in an investigation that might very well lead to his conviction. A presumption of admissibility coupled with placing the onus upon the accused to prove that the information could not have been found but for the derivative evidence is contrary to the principles underlying sections 7 and 13. Fairness to the accused would require that the onus be placed upon the Crown to prove not only that the evidence they propose to admit *could* have been found absent the accused's testimony, but that it *would* have been found. This satisfies the requirements to get all relevant testimony before the inquiry without unduly prejudicing the rights and interests of the accused.

2. Section 11(d)—Part I

Implicit in the findings of the majority of the Supreme Court of Canada in *Phillips* is that the right to a fair trial is not compromised by the publicity of potentially incriminating testimony if the accused is not being tried by a jury. Because the Westray managers had elected to be tried by a judge alone, the majority found that the basis of the appeal to the Supreme Court had disappeared.⁵⁵ The Court was unanimous in outcome, but only four members of the Court considered the substantive issues raised in the appeal.⁵⁶ Cory J.'s opinion thoroughly canvassed the

⁵⁵ *Phillips* (S.C.C.), *supra* note 9 at 110.

⁵⁶ Cory, Iacobucci, Major, and L'Heureux-Dubé JJ.

issues raised with regard to the publication of adverse evidence and its possible impact upon the accused's section 11(d) right to a fair trial.

There certainly exists the possibility that a judge may be influenced subconsciously by notorious public hearings, but the Court found nothing in the record to even consider this possibility. It would be illogical to hold in a system where the trial judge can supervise a *voir dire*, find evidence inadmissible and then judge the case—supposedly minus the inadmissible evidence—that the judge must not even be exposed to inadmissible evidence. This seems clear, though the subject would have benefited from a more probing analysis from the country's top court.

The situation, however, is radically different when the accused is being tried by judge and jury. Only the minority concurring judgments from *Phillips* consider this in any depth, but their reasoning is very instructive. Cory J. noted that the threshold for an injunction to restrain the operation of an inquiry in anticipation of a possible *Charter* breach later on is a high one: “relief will only be granted in circumstances where the claimant is able to prove that there is a sufficiently serious risk that the alleged violation will in fact occur.”⁵⁷ This balancing involves considering, on one hand, that the right to a fair trial is the foundation upon which our justice system has been built. On the other hand, Cory J. observed that the “applicant will always have the opportunity to apply for relief at the trial court once the prejudice, flowing, for example, from the publicity, is more easily ascertainable and demonstrable.”⁵⁸

The danger to the rights of the accused, generally, comes not from the inquiry itself but from the publicity and media attention surrounding it. The danger can be mitigated, almost eliminated, by a publication ban on an inquiry's proceedings, but as Cory J. observed, such a ban would completely undermine the inquiry:

the public is much more likely to have confidence in an open system. The benefits of openness are not restricted to the criminal justice system but apply as well to civil proceedings: *Edmonton Journal v. Alberta (Attorney General)* The conduct of a public inquiry is no different, although it may differ from a criminal trial in that *the inquiry process itself may be more important than the result*.

⁵⁷ *Phillips* (S.C.C.), *supra* note 9 at 158.

⁵⁸ *Ibid.* at 159.

Open hearings function as a means of restoring the public confidence in the affected industry and in the regulations pertaining to it and their enforcement. As well, it can serve as a type of healing therapy for a community shocked and angered by a tragedy. It can channel the natural desire to assign blame and exact retribution into a constructive exercise providing recommendations for reform and improvement. [emphasis added]⁵⁹

There is a high premium placed upon open hearings and the presumption in favour of openness should only be dislodged in very clear cases. At the same time, there exists a presumption that juries are composed of capable and intelligent citizens who can discharge their duties fairly.

The solemnity of the juror's oath, the existence of procedures such as change of venue and challenge for cause, and the careful attention which jurors pay to the instructions of a judge all help to ensure that jurors will carry out their duties impartially. In rare cases, sufficient proof that these safeguards are not likely to prevent juror bias may warrant some form of relief being granted under s. 24(1) of the *Charter*.⁶⁰

The proper time to challenge the possibility of prejudice to section 11(d) rights is at the time of jury selection.

At the conclusion of his section 11(d) analysis, Cory J. offered what he entitled "Guidelines for the Commissioner." In this, he concluded that the testimony of the applicants would run a sufficiently high risk of prejudicing the accuseds' constitutional right to a fair trial by jury. Therefore, "the Commissioner could, upon the application of Roger Parry and Gerald Phillips, consider imposing a ban on the publication of all or a part of their evidence."⁶¹ Furthermore, the Commissioner should allow the accuseds to review the final report before it is made public in order that an application might be entertained to preclude its release until after the criminal trials have been concluded.

In summarising the possible adverse effects upon the accuseds' section 11(d) rights, Cory J. in *Phillips* closed with the following "Guidelines":

1. Public inquiries often play an important role in satisfying public interest and concern as to the cause of a tragedy, the safety of

⁵⁹ *Ibid.* at 161.

⁶⁰ *Ibid.* at 169.

persons involved in the operation of the institution or industry to be investigated, the nature of the applicable safety regulations, the governmental enforcement of those regulations and procedures, and recommendations for the future safety of the industry or institution.

2. The right to a fair trial is of fundamental importance and must always be carefully considered in determining whether *Charter* remedies should be granted in order to protect that right.
3. The importance of public inquiries requires that all persons with relevant evidence to be given will be subject to subpoena and compellable to testify as witnesses.
4. The rights of those witnesses are generally protected by the provisions of the *Charter*, particularly ss. 11(d), 13 and 7.
5. Not only will the witness have the right not to have the testimony given used to incriminate him or her, there will also be protection from the use of “derivative evidence” as provided by *S. (R.J.)*.
6. Those seeking to have the court ban the publication of evidence have the burden of establishing the necessity of the ban. That is to say they must demonstrate that the effect of publicizing the evidence will be to leave potential jurors irreparably prejudiced or so impair the presumption of innocence that a fair trial is impossible. Before relief is granted in order to preserve the right to a fair trial, satisfactory proof of the link between the publicity and its adverse effect must be given.
7. Assessment of the effect of the publicity on the right to a fair trial must take place in the context of the existing procedures to safeguard the selection of jurors. Further, the nature and extent of the publicity must be considered.
8. The applicant seeking the ban must establish that there are no alternative means available to prevent the harm the ban seeks to prevent.
9. The remedy should not extend beyond the minimum relief required to ensure the fair trial of the witness.
10. In some circumstances proceeding with the public inquiry may so jeopardize the criminal trial of a witness called at the inquiry that it may be stayed or result in important evidence being held to be inadmissible at the criminal trial. In those situations it is the executive branch of government which should make the decision whether to proceed with the public inquiry. That

decision should not, except in rare circumstances, be set aside by a court.

11. If the accused elect trial before a judge alone then pre-trial publicity will not be a factor to be taken into consideration in assessing the fairness of the trial.⁶²

Ultimately, while an application may be more appropriately made at the time of trial, it is the

individual charged with the conduct of the inquiry [who] is best suited to assess the potentially harmful effects of evidence introduced at the inquiry. The judicial use by a commissioner of flexible *ad hoc* measures adapted to overcome individual threats to fair trial rights represents the most efficient means of protecting constitutional rights during the inquiry process and the criminal proceedings.⁶³

3. Extra-Legal Effects

The accused's interests may be significantly compromised by adverse findings or intimations of misconduct that might arise before the inquiry. The public nature of the inquiry's proceedings and the very intense media interest make any such findings or intimations notorious. While not as pressing as the section 11(d) right to a fair trial, the individual's reputation and livelihood may be placed in peril.

Edward Ratushny has written on this topic and has concluded that the procedures of inquiries may imperil the interests of an individual, leaving him or her with neither appeal nor judicial review to "clear his or her name." These extra-legal consequences are briefly commented upon by Stalker,⁶⁴ who approves of the use of this discrete category as "[t]he reactions of society to the findings of a public inquiry are not within the control of the government."⁶⁵ She further states:

It is not up to the government to take responsibility for them, even though the government launched the inquiry that exposed the situation to the public. If the government decision to establish the inquiry is legitimate, the fact that it may have consequences beyond the control of the state on an individual simply becomes one factor to balance in

⁶¹ *Ibid.* at 160.

⁶² *Ibid.* at 172–74.

⁶³ *Ibid.* at 181.

⁶⁴ Stalker, *supra* note 21 at 431.

⁶⁵ *Ibid.*

determining whether the inquiry is an appropriate exercise of governmental power However, it is essential that an inquiry allow a person, who may be harmed by the information that the inquiry has uncovered, to respond. If this is done, the fact that a legitimately established inquiry may have potentially harmful consequences for an individual is not unfair.⁶⁶

Stalker gives the extra-legal interests of the individual in this context short-shrift. The right to respond and challenge any adverse findings is extremely important. But is it enough? The ultimate question is fairness, both in the criminal trial context, and generally.

The courts would do well to import L’Heureux-Dubé J.’s “fundamentally unfair” doctrine in this context.⁶⁷ The commissioner of an inquiry has the ultimate obligation to ensure the fairness of the endeavour. This extends to ensuring that evidence or testimony being elicited is relevant to the issues in question. While not closely constrained in the same way as a judicial tribunal, when the inquiry is considering evidence that may have a detrimental effect upon an individual, the commissioner should make every effort to ensure that the questioning stays on track and does not meander into areas of only slight relevance that might adversely effect individuals in question. This is a difficult task in a proceeding that is not constrained by the rigid rules of relevance and where the questioning, of necessity, is less scripted and more improvised. Nevertheless, if an inquiry takes on the appearance of an attempt to needlessly slur the reputation of an individual, the threshold of “fundamentally unfair” has been crossed and the commissioner has the obligation to rein-in the proceedings.

The danger to reputations is much more acute in the inquiry context. Unlike trials, where both the Crown and the defendant have ample time to amass, test, and prepare their cases, inquiries do not operate with such a luxury. Facing the daunting task of amassing and processing mountains of information, inquiry staff often do not have all the evidence at their fingertips when preparing for the public hearings. Nor can they necessarily predict the testimony of individual witnesses. In contrast to judicial proceedings, the public hearings are usually a learning experience for the commission, not just a venue to present

⁶⁶ *Ibid.*

⁶⁷ *S.(R.J.)*, *supra* note 27 at 608–9.

findings. To use the Westray example, even after the preliminary investigations and the beginnings of the public hearings, the Inquiry had no indication that a number of witnesses would be adversely represented in testimony. In many cases, the adverse representations were surprising and from the witness' own testimony.⁶⁸ In such cases, it would have been impossible to provide the witnesses with notice and it would have derailed the inquiry to allow counsel to cross or examine-in-chief, as such an exercise would have required weeks of preparation. The only answer, as long as significant interruptions and delays are unacceptable, would be a system that precludes surprising evidence by thorough preliminary investigations.⁶⁹ Rare cases of surprise that get past the preliminary investigations can then be dealt with as they emerge.

The Westray Inquiry also offers concrete examples of extra-legal effects of an inquiry's process. The Nova Scotia provincial Crown has since withdrawn the criminal charges directed at the mine managers and the now defunct company. At least three government employees were dismissed following the Inquiry's report and their reputations have been thoroughly destroyed.⁷⁰ The consequences of adverse findings stretch well beyond the legal realm and can have a devastating effect upon an individual's standing in the community. Although legal recourse is available as a matter of employment law, effects upon reputation can neither be appealed nor reviewed.

Ultimately, as far as extra-legal consequences are concerned, the protections offered by the right to answer adverse evidence and the discretion of the commissioner are sufficient to protect the rights of individuals. The commissioner must remain aware that legal and extra-legal interests are at stake and, often, the extra-legal interests are more imperilled as there is little possibility of later vindication. As far as is possible, the inquiry should preclude surprising revelations and should give ample opportunity for challenges to adverse evidence. It is clear that on purely collateral matters that are not the subject of criminal

⁶⁸ Conversation with John Merrick, Q.C., counsel for the Westray Inquiry.

⁶⁹ See the section entitled "Israel," below.

⁷⁰ Those dismissed are Pat Phelan, Executive Director of Minerals and Energy for the Department of Natural Resources, Claude White, Director of Mine Safety; and Albert McLean, Mine Inspector. Canadian Press, "Westray Official Loses Job, Another Reprimanded" (20 April 1998 19:53 EST) DB CP98 (QL).

investigation, the individual has no “right to silence” and answering the allegations is what is required to protect one’s secondary, extra-legal interests.

II. INTERNATIONAL PERSPECTIVES

1. The United States

The regime for the equivalent of public inquiries in the United States is significantly different from that in Canada. In the tri-partite system of republican government, the executive and the legislatures can both spawn inquiries. Congress’s powers of investigation derive not from statute but are “an essential and appropriate auxiliary to the legislative function” granted in Article I, Section I of the U.S. Constitution.⁷¹ The Canadian analogue of the Congressional Committee or commission is a special or standing committee of Parliament, and as in Canada, these committees are often seen as being tainted by political interests.⁷²

Nevertheless, the congressional committee is the most prevalent investigative form in the United States. It is a venue that has witnessed among the most destructive abuses of individual rights and disregard of procedural fairness: the Senate Committee on Government Operations under Senator Joseph McCarthy⁷³ and the House Un-American Activities Committee. J. Parnell Thomas, chairperson of the latter committee, summed up the prevalent attitude toward procedural fairness when he told an unfortunate witness: “[t]he rights you have are the rights given to you by this Committee. We will determine what rights you have and what rights you have not got before the committee.”⁷⁴ Partially in response to these abuses, the United States Supreme Court has made pronouncements regarding the protection of individual interests before investigative committees of the U.S. Congress on a

⁷¹ *McGrain v. Daugherty*, 273 U.S. 135 at 174 (1926).

⁷² Z. Segal, “The Power to Probe Into Matters of Vital Public Importance” (1984) 58 Tul. L. Rev. 941 [hereinafter “Matters of Vital Public Importance”].

⁷³ Other famous congressional inquiries have been Teapot Dome, Watergate and, more recently, the Iran-Contra hearings.

⁷⁴ Quoted in J. Hamilton, *The Power to Probe: A Study of Congressional Investigations* (New York: Random House, 1976) at 247 [hereinafter *Power to Probe*].

number of occasions. Congress is required to respect the Fifth Amendment privilege against self-incrimination,⁷⁵ and the Fourth Amendment protections against unreasonable search and seizure.⁷⁶ Furthermore, the Court has also dictated that in the interests of due process, the Congress must clearly state the scope of its delegated investigatorial power to the committees.⁷⁷ The ability of congressional committees to investigate matters that might disclose criminal wrongdoing is well established,⁷⁸ as is the principle that the Fifth Amendment provides a right to refuse to testify on the grounds that the testimony might incriminate the witness.⁷⁹

The law in the United States is clearly in favour of the notion that “the public has the right to every [person’s] evidence.”⁸⁰ The exception—a very broad exception by Canadian standards—to this wide rule of compellability is a

limited privilege of refusing to testify as to matters which may lead the testifier to jail. Since the only consequence which the privilege against self-incrimination avoids is a criminal prosecution, if government promises in advance not to prosecute, then one has no right to remain silent.⁸¹

Thus, in order to get such testimony before the committee, a system providing “use and derivative use immunity” has been devised.⁸²

⁷⁵ *Quinn v. United States*, 349 U.S. 155 at 161 (1954). See also, 98 C.J.S. Witnesses § 450.

⁷⁶ *McPhaul v. United States*, 364 U.S. 372 at 382–83 (1960).

⁷⁷ *Watkins v. United States*, 354 U.S. 178 at 201 (1956). See generally, L. Boudin, “Congressional and Agency Investigations: Their Uses and Abuses” (1949) 35 Va. L. Rev. 143; M. Shapiro, “Judicial Review: Political Reality and Legislative Purpose: The Supreme Court’s Supervision of Congressional Investigations” (1962) 15 Vand. L. Rev. 535.

⁷⁸ *McGrain v. Daugherty*, 273 U.S. 135 (1927); *Sinclair v. United States*, 279 U.S. 263 (1929); *Eastland v. United States Servicemen’s Fund*, 421 U.S. 491 (1975).

⁷⁹ See note 82, *infra*.

⁸⁰ The Sixth Amendment gives the criminally accused person the right to “compulsory process for obtaining witnesses in his favour.”

⁸¹ D. Fellman, *The Defendant’s Rights Today* (Madison: University of Wisconsin Press, 1976) at 325–26.

⁸² 18 U.S.C. § 6002 (Immunity generally), provides:

Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding before or ancillary to

- (1) a court or grand jury of the United States,
- (2) an agency of the United States, or
- (3) either House of Congress, a joint committee of the two Houses, or a committee or a subcommittee of either House,

Immunity is not granted by the committee *per se*, but by the Federal Court upon the request of two-thirds of the committee. The Attorney General can simultaneously pursue a criminal charge before immunity is granted, but the executive cannot prevent the award. Nevertheless, once the threat of imprisonment is removed, the witness no longer has any ground to refuse to testify.

The immunity granted by the U.S. Congress has had a varied and interesting history.⁸³ Beginning in 1857, Congress passed its first immunity law to protect those who appeared before it.⁸⁴ The statute was worded so broadly that it resulted in “immunity baths” whereby witnesses confessed to all their misdeeds before congressional committees (whatever the relevance to the business at hand) and automatically received permanent immunity from prosecution.⁸⁵ The statute was tightened up in 1862 to produce a scheme known as “simple use” immunity. The new system was struck down in 1892 as contrary to the Fifth Amendment because it did not protect against the derivative use of compelled testimony. To be valid, immunity granted by Congress must “afford absolute immunity against future prosecution for the offence to which the question relates.”⁸⁶ Returning to the drawing-board, Congress fashioned the “transactional” use immunity statute that stood until 1970. Facing mounting criticism that congressional immunity grants were resulting in too many aborted prosecutions, the Congress enacted the “use and derivative use” scheme in place today. When challenged in *Kastigar v. United States*, the U.S. Supreme Court upheld the law and stated that the earlier “transactional use” immunity was overbroad in protecting Fifth Amendment rights.⁸⁷ From a practical

and the person presiding over the proceeding communicates to the witness an order issued under this title, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.

⁸³ For an interesting historical perspective, see R.S. Ghio, “The Iran-Contra Prosecutions and the Failure of Use Immunity” (1992) 45 Stan. L. Rev. 229.

⁸⁴ Act of 14 January 1857, ch. 19, 11 Stat. 155–56.

⁸⁵ K. Strachan, “Self-Incrimination, Immunity, and Watergate” (1978) 56 Tex. L. Rev. 791 at 797–98.

⁸⁶ *Counselman v. Hitchcock*, 142 U.S. 547 at 586 (1892).

⁸⁷ *Kastigar v. United States*, 406 U.S. 441 at 462 (1972).

point of view, *Kastigar* places an affirmative duty on the government at the subsequent prosecution to prove that all of its evidence to be adduced against the past witness/present defendant is legitimate and derived at independently from the compelled testimony.⁸⁸ The law of 1970 has not lived up to expectations. The high hurdle of the special evidentiary hearing has effectively barred prosecutions.⁸⁹ The “use and derivative use immunity” has, in function, become more akin to transactional immunity.

Unlike Canada and the United Kingdom, the United States has little tradition of *ad hoc* executive inquiries. Among the most famous, high-profile inquiry commissions were the Warren Commission charged with the investigation of the assassination of President Kennedy, the Roberts Commissions investigating the surprise attack at Pearl Harbour, and the investigation into the Space Shuttle Challenger Disaster. Most modern executive bodies are governed by the *Federal Advisory Committee Act*,⁹⁰ which is a statute that does not confer any special powers upon committees constituted by the President. Nevertheless, in the rare instances where such a committee is investigating criminal activity, the immunity provisions noted above, embodied in Title 18 of the United States Code, also apply to the executive arm of American government.⁹¹ Thus, an inquiry staged by a government agency can seek immunity for a witness on the same basis allowed for congressional committees.

2. The United Kingdom

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.⁹²

⁸⁸ *Ibid.*; Strachan, *supra* note 85 at 818.

⁸⁹ For example, see the failed prosecutions of Oliver North and John Poindexter following the Iran-Contra Hearings: *United States v. North*, 910 F.2d 843 (D.C. Cir. 1990); *United States v. Poindexter*, 951 F.2d 369 (D.C. Cir. 1990). For an interesting analysis of the immunity-related fall-out of the hearings, see R.F. Wright, “Congressional Use of Immunity Grants After Iran-Contra” (1995) 80 Minn. L. Rev. 407.

⁹⁰ 5 U.S.C. App. 1.

⁹¹ 18 U.S.C. § 6001.

⁹² *Phillips* (N.S.C.A.), *supra* note 7 at 247.

This position in Great Britain came about following the Royal Commission on Tribunals of Inquiry, chaired by Salmon L.J.⁹³ The government constituted the Salmon Commission following a number of unpleasant investigations that caused a public outcry:

The [*Tribunals of Inquiry (Evidence)*] Act, which came onto the statute book in a curiously unpremeditated fashion, created a formal instrument of compulsory interrogation with a censorial jurisdiction of some potency

Yet these powers are exercised without the protection offered by normal rules of procedure, no charges are preferred, there is no justicable dispute between the parties, ordinary rules of evidence and relevance do not apply throughout. It is like a powerful locomotive running without rails.⁹⁴

Salmon L.J. considered the lack of procedural protections and identified what he called “the six cardinal principles” to “largely remove the difficulty and injustice with which persons involved in an inquiry may be faced”:

1. Before any person becomes involved in an inquiry, the Tribunal must be satisfied that there are circumstances which affect him and which the Tribunal proposes to investigate.
2. Before any person who is involved in an inquiry is called as a witness he should be informed of any allegations which are made against him and the substance of the evidence in support of them.
3. (a) He should be given an adequate opportunity of preparing his case and of being assisted by legal advisers.
(b) His legal expenses should normally be met out of public funds.
4. He should have the opportunity of being examined by his own solicitor or counsel and of stating his case in public at the inquiry.

⁹³ *Royal Commission on Tribunals of Inquiry*, Report of the Commission under the Chairmanship of The Rt. Hon. Lord Justice Salmon (London: HMSO, 1966) [hereinafter *Salmon Commission*].

⁹⁴ Editorial, (26 April 1963) *The Times* (London); quoted in R.E. Wraith & G.B. Lamb, *Public Inquiries as an Instrument of Government* (London: Geo. Allen & Unwin, 1971) at 214 [hereinafter *Public Inquiries*].

5. Any material witnesses he wishes called at the inquiry should, if reasonably practicable, be heard.
6. He should have the opportunity of testing by cross-examination conducted by his own solicitor or counsel any evidence which may affect him.⁹⁵

Salmon L.J. identified many defects with the existing *Tribunals of Inquiry (Evidence) Act, 1921* and his report contained fifty recommendations.⁹⁶ In the years since the Salmon Report, the Act has not been amended though the intention to do so was announced in 1973, seven years following the report of the Commission's findings in 1966.⁹⁷

Though the Salmon Report's recommendations did not result in amendments to the Act, the practice of providing immunity to witnesses who appear before Tribunals of Inquiry coupled with the much more limited use of such tribunals respond effectively to the desire to protect the interests of those who might be investigated.

Of particular note in this context is that inquiries of the sort allowed under the *Tribunals of Inquiry (Evidence) Act, 1921* are, compared to Canada, very rare indeed. In their 1971 monograph, Wraith and Lamb cite that only sixteen Tribunals of Inquiry had been constituted in that first fifty years of the Act.⁹⁸ Many investigations which would most likely be undertaken by public inquiries in Canada are still undertaken by "inside investigations" and *ad hoc* judicial investigations with few of the powers of tribunals of inquiry. Nevertheless, calls for tribunals under the 1921 Act are common in Great Britain, as is criticism of the prevalent form of inquiry.⁹⁹

⁹⁵ *Salmon Commission*, *supra* note 93 at 17–18.

⁹⁶ *Ibid.* at 44–47.

⁹⁷ *Government Views on Commission of Tribunals of Inquiry and the Interdepartmental Committee on the Law of Contempt as It Affects Tribunals of Inquiry*, CMD., No. 5313 (1973) (presented to Parliament in May 1973), cited in "Matters of Vital Public Importance," *supra* note 72 at 943.

⁹⁸ *Public Inquiries*, *supra* note 94 at 212.

⁹⁹ See D.I.B. Body, "Letter: BSE Inquiry" (3 Dec. 1997) *The Independent*; V. Elliott, "Blair and Ashdown Urge Full Inquiry on Hamilton" (9 Oct. 1996) *The Times (London)*; A. Watkins "Major Asked the Question; Now He's Got the Answer They Cannot Complain That This is a Probe Too Far" (11 Feb. 1996) *The Independent* 12; E. Symons "Letter: Leaks, Gags and Trial by Media" (8 June 1995) *The Times (London)*; C. Brown & N. Cohen, "The Arms for Iraq Scandal: Judicial Inquiry Condemned as Weak" (11 Nov. 1992) *The Independent* 3; V. Bogdanor, "Whitewash or Witch-hunt?" (3 Dec. 1992) *The Times (London)*.

3. Israel

Perhaps somewhat surprisingly, Lord Justice Salmon's fifty recommendations were most closely heeded in Israel. Shortly after presenting his report, Salmon L.J. lectured on the subject at the Law Faculty of the Hebrew University in Jerusalem.¹⁰⁰ Not long thereafter, in 1968, the Israeli Knesset passed a *Commission of Inquiry Law*,¹⁰¹ mostly based upon Britain's 1921 *Tribunals of Inquiry (Evidence) Act*, but also incorporating many of Salmon's recommendations.

In Israel, as in Canada, the United Kingdom, and the United States, the decision of whether to launch a public inquiry rests with the government.¹⁰² But the decision of who to appoint has been taken from the hands of the politicians and vested in the President of the Supreme Court. This provides the public with a large measure of confidence at least with regard to the independence of the commission. Furthermore, the Israeli Law requires that the chair of the commission be a judge of either the Supreme Court or of a district court.¹⁰³ With regard to witnesses, the Israeli system provides additional important safeguards. Salmon L.J. recommended that witness immunity be extended, precluding the use of either oral or documentary evidence at any subsequent litigation.¹⁰⁴ As in the U.K. and Canada, Israeli witnesses enjoy no privilege against giving self-incriminating testimony. Thus, the testimony is compelled with the promise of later protection.

The Israeli model is also remarkable because of additional structural and procedural safeguards that further protect the interests of witnesses. The process of inquiry is divided into two parts. The first is a basic investigation for the commissioners to "form a preliminary picture of the matter being investigated and of the identity of the persons who seem to be involved."¹⁰⁵ The second part forms the bulk of the investigation. Following the preliminary investigation, the commission will issue notices to those who might be adversely affected by the

¹⁰⁰ Published as C. Salmon, "Tribunals of Inquiry" (1967) 2 *Isr. L. Rev.* 313.

¹⁰¹ 23 Laws of the State of Israel 32 (1968), am. by 26 Laws of the State of Israel 30 (1972), and 33 Laws of the State of Israel 100 (1979) [hereinafter *Israeli Law*].

¹⁰² Following Salmon's recommendation, *Salmon Commission*, *supra* note 93 at 29.

¹⁰³ Following Salmon's recommendation, *ibid.*

¹⁰⁴ *Israeli Law*, *supra* note 101 at s. 19.1

¹⁰⁵ "Matters of Vital Public Importance," *supra* note 72 at 965.

commission or its findings.¹⁰⁶ Those persons will be presented with any relevant documents and will be able appear before the commission either in person or via counsel. In addition, the Israeli regime also provides the right to examine witnesses before the commission, even if those witnesses have previously testified.

The bifurcated Israeli model is similar in arrangement to what is commonly the informal norm in Canada. Before the formal public hearings, inquiry staff assemble and investigate the basic contours of the inquiry to establish the parameters of the undertaking. Following this investigation, the commissioners would have an idea of who to summon and what their general line of inquiry will be. Additionally, in the federal context, it would be at this point that section 13¹⁰⁷ notices would be issued to those against whom an adverse finding might be made. The Israeli model formalizes and mandates what has become a common—but discretionary—practice in federal inquiries.

In considering the possibility of parallel inquiry and criminal processes, Salmon L.J.'s report recommended that the traditional immunities enjoyed by witnesses be extended so that

neither the evidence before the Tribunal, nor his statement to the Treasury Solicitor, *nor any documents he is required to produce* to the Tribunal, shall be used against him in any subsequent civil or criminal proceedings except in criminal proceedings in which he is charged with having given false evidence before the Tribunal or conspired with or procured others to do so. [emphasis added]¹⁰⁸

As mentioned above, the Israeli Law followed Salmon L.J.'s recommendations and under section 12, neither compelled testimony nor compelled documents may be admitted into evidence at a subsequent proceeding against that person. This provision is well beyond what is the practice in Canada.

¹⁰⁶ Similar to the notice provisions of Canada's *Inquiries Act*, R.S.C. 1985, c. I-11, s. 13.

¹⁰⁷ *Inquiries Act*, R.S.C. 1985, c. I-11, s. 13.

¹⁰⁸ *Salmon Commission*, *supra* note 93 at 26. While Salmon L.J. wrote that the recommendation would bring Great Britain's law "into line in this respect with similar provisions in the legislation of Canada," it should be noted that neither the *Canada Evidence Act* nor the *Charter* provide protection against the subsequent use of compelled documents.

4. Lessons to be Learned Internationally

Limited use immunity represented by Israel's process is similar to that in Canada today, with one very important distinction: the prohibition against the subsequent use of compelled documents. Even if the witness were liable to be criminally prosecuted or civilly sued on the facts that gave rise to the founding of the commission, this documentary preclusion effectively eliminates what would be the most important trove of evidence for that proceeding. Most of the protections offered to witnesses are to prevent the inquiry from damaging the individual's right by its extraordinary powers. (For example, an inquiry can compel testimony from a person suspected of a crime while a criminal proceeding cannot.) In Canada, an ordinary criminal or civil proceeding can compel the production of any documents in the possession of the defendant. An exercise of such power by the inquiry would not be extraordinary, in contrast to the power to compel oral testimony. A subsequent use prohibition would be excessive and would impair any subsequent litigation disproportionately compared to the possible prejudice. Of course, if in any particular instance compelling the documents would be unfairly prejudicial, the overseeing judge would be within his or her discretion as the overseer of trial fairness to disallow its admission.

When considering other possible lessons for Canada that can be drawn from the Israeli and United Kingdom experience, it must be remembered that in Canada the public inquiry is a much more prevalent form of public investigation. In the former two countries, the public inquiry is a tool reserved for when matters "of vital public importance [need] clarification or investigation to avert a nationwide crisis of confidence." Canada's use of the public inquiry shows that it has become one of the hallmarks of our modern administrative state, used to investigate a wide range of matters. It is not reserved only for circumstances that might topple the government or destroy public confidence. Events that might be the subject of more routine administrative examination in the U.S., the U.K., or Israel are commonly put under the public looking glass in Canada. A blanket prohibition against subsequent (or concurrent) criminal prosecutions or civil actions would be excessive unless Canada adopted the stance of only launching inquiries in cases of dramatic crisis. The public inquiry has become an important part of the Canadian administrative landscape

and much would be lost if the bar was moved that high. As government and public cynicism have grown over the last decades, periodic impartial examinations of “the system” are important to maintain confidence in government institutions.

Assuming that the threshold level for the calling of a public inquiry remains roughly the same, there will be few instances where the public interest clearly calls for a preclusion of all criminal and civil consequences so that systemic or administrative problems might be solved. Very seldom will the issue be amenable to a bright-line test. The balancing of the public interests served by inquiries against the public interests served by prosecutions will require, in the Canadian context, finer balancing. When individual criminality and systemic neglect converge, administrative investigation and criminal prosecution—if properly balanced—can complement one another. Inflexible rules of evidence should not be crafted to automatically preclude that possibility.

As mentioned, the Israeli model uses a bifurcated approach, beginning with an informal investigation followed by the issuance of notices of possible adverse findings, followed by the public hearings. This model formalizes what happens unofficially in most public inquiries in Canada, but mandated rigidity should not be imported to the Canadian context. That the practice occurs in Canada suggests that it is an approach that works. That it would also preclude many “surprises” on the stand and would provide counsel with greater background before beginning the public hearings further underscores the benefit. Nevertheless, mandating such a structure would impair the ability of the inquiry to change directions and investigate new allegations as they come to light during the public phase. Emphasis should be placed on preliminary investigations without limiting the flexibility that Canadian inquiries enjoy during the public hearings. Both can be achieved without statutory re-adjustments.

III. CONCLUSION

Royal Commissions and public inquiries are ideal tools to investigate circumstances of immense public importance that fall into the “grey areas” between the government and the judiciary. In such cases,

however, the possibility is very real that the rights of individuals may be significantly jeopardized in the legitimate search for the truth. Every step of the process is fraught with peril to individuals, and careful balancing should be used to minimize the possible harm to individuals while allowing properly constituted inquiries to do their job. The existing jurisprudence is not entirely clear or instructive and there are certainly many areas where Canada might learn from foreign examples. Wholesale reform is not recommended as the present system, shepherded by diligent political leaders, commissioners, inquiry counsel, and judges, can accomplish the difficult balancing required.

Of course, the very first step is asking the question of whether or not an inquiry is even necessary. In cases where facts surrounding a particular incident can be exposed or dealt with through the normal judicial process, the effort and expense of an inquiry is not warranted. Further, it is only in those circumstances where the normal tools of investigation and justice will not adequately serve the public interest that the public inquiry should be used. The powerful fact-finding machinery of the Royal Commission must not be unleashed unless it is to establish the facts about a matter of material public importance. The bar should not be as high as it is in the U.K. or in Israel, but the cost, expense, and possible danger to individual rights should limit its use. Whether or not a criminal trial might be foreseeable is not relevant at such a stage, because the value being judged is whether or not there is sufficient public interest served by convening a public inquiry. If the matter can be properly investigated by existing investigative bodies, or by an “indoor investigation,” there is no need to engage the *Inquiries Acts* because the exercise would be superfluous.

Considering the establishment of a public inquiry examining a subject that might also have the possibility of criminal charges will necessarily involve a careful consideration of the possible interchange between the two processes. The question must be asked whether the public interest demands that one take precedence over the other. Is the public best served by deterrence and punishment, or by careful public investigation of systemic and individual shortcoming? Is the government willing to abide the possible derailing of any criminal charges in the pursuit of the truth, or is the mission of the public inquiry so important that absolute immunity should be granted so that it may proceed without any hindrance? These are difficult questions to put to

the political leadership and the strong public pressure following a disaster or in the midst of scandal are not conducive to clear, rational, and long-range thinking. Nevertheless, to the extent that they can be answered, they must be. The decision to proceed with an inquiry must be made with the knowledge that if it proceeds prior to, or in parallel with, a criminal prosecution, the criminal proceeding may be jeopardized.

Once the government has inaugurated an inquiry, the commissioner (or commissioners) is the master of the inquiry's process and is ultimately responsible for conducting the inquiry in a fair and even-handed way. When criminal charges are either a reality or a possibility, that responsibility takes on an even greater significance as the inquiry may be jeopardized, delayed, or otherwise hindered by allegations of unfairness or possible prejudice to the rights of those who are the subject of criminal investigation. At every step of the way, the rights of those persons must be carefully considered, particularly with regard to compulsion to testify and the possibility of undermining the fairness of subsequent trials.

When considering compelling the testimony of a person who might be the object of a criminal investigation, the commissioner should follow the principled approach that balances the value of a person's testimony to the inquiry against the possibility of prejudice. If the inquiry is able to fulfil its mandate without the testimony of the potential accused, then that person should not be compelled to testify. However, since any evaluation of future prejudice at this stage is necessarily speculative, the commissioner should consider probabilities of prejudice, not mere possibilities. Furthermore, if a possible witness has only a tangential connection to the instant proceeding and the possibility exists that the information brought before the inquiry will be of greater assistance to the criminal prosecution than to the inquiry, that person should be excused from testifying as the "fundamentally unfair" threshold will be crossed. Perceptions—accurate or not—that an inquiry is a substitute or adjunct police investigation must be avoided.

In addition, as the guardian of this process, the commissioner should consider what steps he or she can take to minimize any adverse publicity that might impair the possibility of a fair trial for the accuseds. A minority of the Supreme Court of Canada has offered clear guidance for such a situation.¹⁰⁹ When an accused will be tried before a judge

¹⁰⁹ *Phillips* (S.C.C.), *supra* note 9.

alone, adverse publicity will have no effect upon his or her section 11(d) rights. The situation is more complicated when the accused has opted for a trial by jury or has not yet made the choice. Only in the clearest of cases will a stay of the inquiry's process be necessary or desirable. Otherwise, the proper place to seek a remedy for a section 11(d) breach is before the trial judge. Nevertheless, the commissioner can take steps to minimize any possible prejudice that might abort the future prosecution. Publication bans on the testimony of the accused or a delay in releasing the final report until after the trial are possible responses. Although the commissioner is ultimately responsible for the inquiry, he or she should take whatever steps are necessary to preserve the fairness of both the inquiry and any subsequent trials.

Among the greatest dangers to an accused is the general admissibility of derivative evidence. The legal doctrine that underlies *Charter* section 13 and the provincial evidence acts is that a person must testify if compelled because protections against self-incrimination will be offered subsequently. The jurisprudence in this area is mostly based on intercepted communications and illegally obtained confessions, and has simply been transferred to the inquiry cases. The situation presented by an examination by experienced inquiry counsel covers a much broader range of evidence while probing much more than a conscripted confession. Furthermore, the incriminating information is extracted from the suspect under the threat of imprisonment. Precluding the Crown from using derivative evidence in trial would provide the accused with a greater incentive to cooperate with the inquiry and, in the process, the Crown would be no further behind than they would be in a normal prosecution. The present state of the law does not agree. Therefore, the greatest protection presently offered is the oversight of the inquiry's commissioner and a commitment to ensure that the inquiry does not inadvertently stray beyond what is relevant and absolutely essential to the inquiry.

A commissioner is primarily responsible for his or her inquiry. Although the fairness of a future trial is not the paramount consideration, it must be at the forefront in any decision to compel testimony from a person who may later be a criminal defendant. Public inquiries are necessarily public and testimony is often well reported. Statements made during public hearings and conclusions drawn in the final report can subvert a defendant's section 11(d) right to a fair trial by

undermining the ability to empanel an unbiased jury. Though remedy for infringements of this right, except in the clearest of cases, should be sought at the time of trial, the commissioner can and should play a role in minimizing the potential harm.

The commissioner also has a duty to protect, as far as is possible, witnesses from collateral, adverse extra-legal consequences. There is little doubt that, along the continuum of collateral effects, extra-legal consequences do not weigh as heavily as section 7 or 11(d) violations. But *Charter* violations are amenable to judicial remedies. There is no appeal for a destroyed reputation or career, though the results can be just as damaging as a criminal conviction. Just as with derivative evidence, above, the commissioner has a duty to ensure that, as far as possible, reputations are not unfairly destroyed. Of course, it must be remembered that an unenviable reputation can be well-deserved. It is *unfair* damage to reputations that must be guarded against.

Additionally, Canada and the provinces can learn much from the experience overseas. The British doctrine that precludes any criminal prosecutions arising from the same subject as a public inquiry merits serious consideration. Ultimately it is the government that must decide whether to call an inquiry and whether to proceed with criminal charges. An “either/or regime” would firmly place the onus upon the politicians to evaluate the public interests served by both processes and to decide which would be the most compelling. Canadian governments, compared with those of Great Britain, are much less hesitant to call for an inquiry. If criminal charges were automatically precluded with the activation of the inquiry, authorities would likely become less likely to form inquiries. As a consistent aspect of Canadian government, raising the threshold for calling inquiries would undermine the investigatory institution without promising increased returns in individual rights.

The Israeli example, even more so than the British, bears particular scrutiny. The mandatory two-part investigation is compelling. It ensures that commissioners and inquiry staff have a firm foundation in the facts of the case. This precludes many surprises and provides the opportunity to give notice to most of those against whom adverse findings might be made. On the other hand, Canada should not imitate the automatic preclusion against subsequent production of any documents that are compelled before an inquiry. Such a rule would prevent a criminal court from having access to real evidence to which they are entitled,

regardless of the presence of an inquiry. The independent existence and compellability of such documents are unquestioned in Canadian law. The Israeli exclusion is a blanket prohibition that should not be imported.

Public inquiries are a very important part of Canada's administrative state. They are extremely effective tools for ferreting out the truth and for shining a bright light on government operations. Lately, however, inquiries have been the targets of expensive and time-consuming litigation by people who may subsequently be criminally charged for conduct that is also at the root of the inquiry's investigation. The law in this area, despite considerable litigation, remains unsettled. This is particularly so because the majority of the Supreme Court of Canada declined to fully consider the issues that had been raised before it in *Phillips*.¹¹⁰ Nevertheless, future commissioners can see the measures that they might take to minimize adverse side effects, and thus minimize litigation and delays that hamper their investigations. Importantly, politicians can give leadership and guidance to the system of inquiries through their decisions of whether and when to call an inquiry and whether to give the inquiry absolute priority over criminal charges. Canada has a rich history of public inquiries, but there is still much we can learn from the experience of Israel, the United Kingdom, and the United States.

¹¹⁰ *Ibid.*