MEDIA COVERAGE OF JUDICIAL INQUIRIES

IMPLICATIONS FOR MEDIA COVERAGE OF COURT CASES

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by

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PUBLIC INQUIRIES

I have been asked to direct my remarks to two distinct, and topical issues concerning public inquiries. The first issue that I will address is the impact of the decision in the Patricia Starr case on the work of future public inquiries. Then, I will narrow the focus a little and discuss the impact of media coverage generally, and television specifically, on "high-profile personalities" such as Susan Nelles and Sinclair Stevens.

I wish to preface my remarks by drawing attention to the fact that they are restricted to public commissions; they concern the high profile, highly publicized commissions struck to investigate specific events. These inquiries tend to be once-off affairs. Private inquiries, for example disciplinary boards of professional organizations, require slightly different treatment, and are not the subject of my remarks. These remarks are based largely on my experience as counsel and are not necessarily reflective of the attitude that I would adopt in any issue before the Court.

THE IMPACT OF THE STARR DECISION

The Starr decision is not the death-knell for public inquiries in Canada, but it will have some profound affects on the conduct of future public inquiries. Some inquiries will be left unscathed by the decision; others may be stopped dead in their tracks. In order to predict which inquiries will be affected and how, the starting point for analysis must be the Starr decision itself.

The decision in that case turned on the fact that the inquiry was impermissible because a criminal investigation is outside the legislative competence of a provincial government. Only the federal government has the constitutional authority to conduct criminal investigations. Provincial inquiries which usurp this federal power are ultra vires the provincial government and invalid. Obviously, this principle will have an impact on all future provincial inquiries. They must not be investigations designed to pursue the criminal wrong-doing of individuals. This constitutional principle, that inquiries must be for a purpose within the authority of the legislature, is important. However, without further guidance, distinguishing the criminal from the non-criminal inquiry would be a difficult task indeed.

In my opinion, concern for the individual is the additional principle which must be called on to determine the acceptability of specific inquiries. And, more generally, this concern is the bedrock principle which must be employed to guide the conduct of all public inquiries. Thus, underlying the decision in the Starr case is a more fundamental principle than the simple division of powers between the federal and provincial governments: when an individual is subjected to investigation and possible punishment by the state, then as a matter of necessity we must ensure that her rights are protected. Only this vigilance can ensure that innocent individuals are not unjustly accused and convicted, and that the guilty receive appropriate sanction.

Public inquires actually come in two separate breeds. The distinction between the two may be apparent from the ambit of the terms of reference, but such clarity is rare. One breed, the truly public inquiry, is both valuable and permissable. These inquiries are established to look into general matters of true public import. The commissions generally hold hearings, weigh policy considerations, and make recommendations for the course of future legislative action. Canada has a long and successful history of inquiries of this nature. The MacDonald Commission into the economy which ultimately proposed the implementation of a free-trade agreement with the United States is but one notable example. As fact finding and policy developing instruments these policy commissions are a valuable complement to the other branches of public government in this country. Of course, it has been observed that inquiries of this ilk are routinely held, and their recommendations almost as routinely ignored by the legislatures, but nevertheless, these public inquiries still serve a valuable, and legitimate role in the collection of instruments of public governance available in a parliamentary democracy.

There is however, another, quite distinct breed of inquiries. They are not true public inquiries. They are criminal investigations masquerading as public inquiries. Some, of which the Starr is but one example, are in effect surrogates for the regular criminal process. Many of this inquiries are unacceptable because insufficient attention is paid to the interest of the target individual.

The normal criminal process involves a police investigation, a preliminary inquiry to test the sufficiency of the Crown's case, and a trial if warranted. This three step process and the full panoply of rules of procedure and evidence which accompany each step, have been developed to balance the societal interests involved in achieving a just result. The procedures ensure the accuracy and fairness of the proceedings. The rationale for such procedural safeguards is that conviction of the innocent is a terrible thing, and a conviction achieved unfairly does society more harm than good.

The single most consistent trend in the development in our criminal law and procedure has been the continuous development of safeguards which protect the rights of the accused. The right to silence, the right to counsel, the right to be presumed innocent, and the right to a fair trial: these are among the most fundamental rights of an individual confronted by the full power of the state in a criminal proceeding. These rights are not important because they attach to criminal proceedings; on the contrary, criminal proceedings are legitimate because the accused is safeguarded by these vital rights.

If there were no distinction between the procedures of a criminal trial and public inquiries, if they differed in name only, then I would have no quarrel with them. However, this is most patently not the case. The rules of procedure and the rules of evidence are frequently relaxed beyond the acceptable for these inquiries. Ostensibly, this relaxation is justified because the inquiry is in the public interest. Are not criminal trials also in the public interest? One of the most frequent relaxations is that the terms of reference of the commission are very vague; no specific act of misfeasance is named, and no charges are brought. The 'target' individual does not even know the case against her. How can she possibly make full answer and defence?

Therefore, in my view the breed of public inquires which I consider to be repugnant are those which aim directly at the alleged wrong doing of specific

individuals, yet operate without the traditional safeguards developed over the centuries to protect the individual and which we profess to cherish as a hallmark of our democratic system. Public inquiries that are little more than criminal investigations yet do not accord these fundamental protections are invalid. They amount to trials without safeguards. Such inquiries do not conform to our accepted notions of fairness, do not produce just results, and hence cannot be tolerated in a society such as ours.

I find the argument that the rights of the individual ought to be reduced because of alleged public interest quite alarming. Frankly, it makes no sense to me whatsoever to develop a criminal justice system painstakingly, to take care at every stride to strike the correct balance between the individual and society, and then to toss the whole system to the winds every time a politically volatile impropriety pops up. It is precisely at such times that the criminal system with all its checks and balances is required most urgently. Granted the person scrutinized in an inquiry does not face the same penal consequences as an accused in a trial. However, the consequences can be equally devastating. For instance the damage to personal reputation and the loss of privacy that may result from any inquiry, even if that inquiry absolves the individual of blame, is immense. Personal reputation is for many as cherished a commodity as any; for it to be shattered by a flurry of unsubstantiated accusations is a senseless and cruel waste.

Furthermore, it is conceivable that criminal charges may follow upon the disclosures obtained in the course of a public inquiry. Were it not for the relaxed rules of evidence that are the norm, this would be fine. If however, the individual is compelled to testify at the inquiry, a compulsion that is not acceptable in the criminal process, then it is completely inappropriate to base criminal charges on the evidence forced from the individual's mouth.

I have described the two different categories of inquiries in very contrasting terms. As is always the case in law though, the distinction is not nearly so sharp as I have made out. Frequently it will be very difficult to determine whether an inquiry ought to be characterized as criminal or purely public. I would suggest that when in doubt it is best to err on the side of caution in favour of the rights of the individual. In the long run this approach will serve the public interest best.

Acceptance of the fact that public inquiries must not become covert criminal investigations has clear implications for both politicians and commissioners. The terms of reference establishing inquiries will not only have to be crafted in general terms, but in substance as well as form, they must not focus on "naming names". If what is required is a forum for policy development, then that aim should be articulated. Inquiries should be investigatory, not prosecutorial in nature. Simultaneously, we should witness the demise of inquiries aimed directly at the criminal impropriety of named individuals. In order to achieve this, when allegations of impropriety are made against select individuals, the government of the day will have to withstand the political heat while the criminal process is allowed run its course unhurried. Public criminal inquiries must not be used simply as a safety valve to release public steam and to save politicians from public scalding, when the rights of individuals are trampled in the process.

Equally importantly, commissioners on inquiries must restrain their enthusiasm to find scapegoats. Inquiries established legitimately to look into the causes of a public concern, and to report on prospects for improvement must not be allowed to slide into the realm of criminal indictment. However, the terms of reference are frequently vague and ambiguous. Sometimes this is deliberate to allow commissioners the opportunity to steer the inquiry as they see fit. Given this, commissioners must recognize that the correct role of a public inquiry is investigation and formulation of suggestions for improvement. Inquiries with relaxed individual safeguards are not the correct fora for the assignment of criminal responsibility.

THE IMPACT OF MEDIA COVERAGE

The second issue that I have been asked to address is the impact of media coverage of public inquiries on "high profile" personalities. The two people who come to mind instantly are of course Susan Nelles and Sinclair Stevens, both of whom I represented as counsel. There is a strong link between my feelings on this issue, and the views that I have just expressed on the previous one. I intend, therefore, to focus my comments on the mutual interaction between the two issues.

First, by way of background, I wish to make very clear to you the intensity of media coverage of these infamous inquiries. The glare of attention should not be underestimated. The coverage was probing, and it was incessant. The scrutiny is of a level that I have never experienced elsewhere. I am not completely certain why we as a society have this fixation for inquiries, but in general terms it appears that all the right elements are in place for a public spectacle. First, the issue is normally one of interest, and controversy. Second, the inquiry, which gives the impression of being a trial becomes the focus of considerable drama. Finally, once underway the proceedings begin to develop there own momentum so that any hint of salacious detail immediately becomes front page news.

Were this attention focused on the public policy type of public inquiry, then I would have few concerns with it. Ironically though, the inquiries which attract the most notice tend to be of the variety that I have described as surrogate trials centered on alleged misdeeds of an individual or group. The Grange Inquiry illustrates this point clearly. Susan Nelles was in no way shape or form a celebrity of national renown prior to the inquiry, but she certainly was by the time the proceedings finally drew to a close. Nor can it be argued that the aim of the Grange Inquiry was to investigate the death of babies in order to develop new policy or administrative procedures for hospitals; the clear aim was to find the party responsible for a select group of infant deaths. It is doubtful that such inquiries should be permitted in the first place. If some are to continue, I am adamant that television not be permitted in the hearings. Let me develop this point.

Obviously, the presence of journalists, and the dissemination of information about the proceedings serves a valuable public interest. In fact, for policy inquiries the widespread interest and discussion that the inquiry sparks is a vital component of the overall success of the process. It is the rare commissioner who can resist these arguments of public interest as well as the lure of the T.V lights. However, resist they must. The public interest can be served without television

coverage of the proceedings. The interests of the individuals involved dictate that this be so.

I have already alluded to the intensity of the media coverage. This impacts on all participants in the inquiry- witnesses, counsel, and commissioners. Appearing before any sort of court or panel can be unnerving for anyone- appearing under a public microscope can be profoundly unsettling to say the least. Counsel and commissioners however, rarely suffer long term ill effects from the notoriety. What disturbs me is the impact that this coverage can have on an individual who is the focus of an inquiries attention.

You will recall that what concerned me about many inquiries is the relaxed rules of procedure. This unfairness is magnified by the media coverage because of the distortion that may result from the edited testimony of one witness. Evidence is frequently untested and hearsay is rampant. And yet, testimony of dubious merit is repeated like gospel on the evening news. In effect the individual is subjected to trial without procedural safeguards by a jury of anchormen.

For this reason, I am particularly opposed to the presence of television in the hearing rooms of public inquiries. The damage that may be done by airing a film-clip of the testimony of a witness whose credibility is subsequently destroyed in cross-examination is immense; the value of the footage to give viewers a feeling for the tenor of the proceedings is negligible. All that the public sees is the inflammatory testimony; rarely is any more placid rebuttal shown. In my opinion, print journalism is less prone to these weaknesses, and is more likely to present a balanced account of the proceedings. Therefore, I feel that we must resist with all vigour the temptation to make the latest public inquiry the daily soap opera; TV viewers should not get their fix of drama at the expense of the reputations and well-being of a few victims. The task of resistance must fall to the chairmen of commissions, most of who have the authority to deny television access to the hearings if they feel that it is warranted. Commissioners must not succumb to their desires to become T.V. stars, and counsel for witnesses must steel their resolve.

Public inquiries may be very valuable, and serve a legitimate role in our system of governance. However, to the extent that they serve as an alternative to the criminal process, they are of dubious merit. We disregard the regular trial practices and rules of evidence at our peril; when we treat an individual unfairly, our society as a whole is demeaned. We do ourselves little favour and much harm; justice is ill-served by unfair procedures.