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STARR TREK: THE UNFINISHED MISSION

Dale Gibson

In the celebrated Patty Starr case[1], the Supreme Court of Canada was asked to determine two important constitutional matters; (a) the extent of provincial competence to authorize investigation of allegedly criminal conduct by a commission of inquiry; and (b) the extent to which such investigations are constrained by the Canadian Charter of Rights and Freedoms. The majority of the Court completed the first part of the assignment, but declined to deal with the second, and probably more important, issue.

Patricia Starr was alleged to have diverted charitable funds to political parties and to have sought in return political favours on behalf of a corporation with which she was associated. Investigation of these allegations by the police and others was under way when the resignation of a high-ranking aide to the Premier of Ontario, in face of media claims that he was involved in the Starr affair, caused the Premier to appoint a Commission of Inquiry. Mr. Justice L. W. Houlden of the Supreme Court of Ontario was commissioned to investigate and report, on among other things, whether:

> there is sufficient evidence that a benefit, advantage or reward of any kind was conferred upon an elected or unelected public official or upon any member of the family of any elected or unelected public official, or ... that there was [an] agreement or attempt to confer a benefit, advantage or reward of any kind upon an elected or unelected public official or upon any member of the family of an elected or unelected public official. (Order in Council, 6 July 1989)

The Commissioner was prohibited from making any findings of guilt against anyone, but was empowered by the Public Inquiries Act of Ontario[2] to order any person to give evidence.

Ms. Starr objected that this potential obligation to testify conflicted with her right to stand silent in any criminal proceedings that subsequently might be commenced against her, and she sought a ruling from the courts that creation of the Commission of Inquiry violated the Constitution. After losing before both the Divisional Court and the Court of Appeal of Ontario, she was successful in the Supreme Court of Canada.

Starr's victory in the Supreme Court was based on a finding that the Commissioner's terms of reference extended beyond the province's constitutional jurisdiction over administration of justice in the province into the exclusively federal domain of criminal law and procedure.

In so ruling, Lamer J., who wrote for the majority, clarified previous rulings concerning the power of provincial legislatures to authorize public inquiries into matters touching upon criminal justice. He acknowledged that the provinces' responsibility for administration of justice in the province

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empowers them to legislate for the establishment of public inquiries concerning: the conduct of institutions and officers of justice[3]; the general state of crime and criminal investigation in the province[4]; particular crimes or alleged crimes (provided that particular persons are not accused)[5]; and the causes of unexplained deaths[6]. However, he explained, "the inquiry process cannot be used by a province to investigate the alleged commission of specific criminal offences by named persons". This is not to say that provinces may never authorize the investigation of specific crimes alleged to have been committed by particular individuals, but only that in those circumstances federally-established criminal procedures must be followed rather than the provincial inquiry process.

In the view of Lamer J. and his colleagues, the Starr inquiry attempted to intrude more deeply into the area of criminal investigation than these guidelines permit. After noting that the Commissioner's terms of reference expressed the allegations of wrongdoing in language that closely approximated Section 121 of the Criminal Code of Canada, and that it named specific persons, Patricia Starr and Tridel Corporation Inc., as being allegedly involved, Lamer J. continued:

> ...[T]he combined and cumulative effect of the names together with the incorporation of the Criminal Code offence... renders this inquiry ultra vires the province. The terms of reference name private individuals and do so in reference to language that is virtually indistinguishable from the parallel Criminal Code provision. Those same terms of reference require the Commissioner to investigate and make findings of fact that would in effect establish a prima facie case against the named individuals sufficient to commit those individuals to trial for the offence in Section 121 of the Code. The net effect of the inquiry, although perhaps not intended by the province, is that it acts as a substitute for a proper police investigation, and for a preliminary inquiry governed by Part XVIII of the Code, into allegations of specific criminal acts by Starr and Tridel.

He later observed that the inquiry had been established while a police investigation into the allegations was ongoing. Madame Justice L'Heureux-Dubé, who dissented, treated this third factor as being integral to the majority ruling, but this does not appear to have been the case. A few paragraphs after referring to the police investigation, Lamer J. reiterated that his conclusions were based on the "two key facts" that two accused persons were named, and that the allegations bore a "striking resemblance" to the wording of the Criminal Code.

L'Heureux-Dubé J. was of the view that the inquiry did not trench upon federal jurisdiction over criminal law. She pointed out in her dissenting opinion that the Criminal Code and the provincial order-in-council had "completely different objectives". While this observation is true it fails to take account of the fact that the effect of legislation is as important to its constitutionality as its objectives. She also accused Lamer J. of engaging in "semantic gymnastics" in order to distinguish the Starr inquiry from investigations that had been previously held to be within provincial jurisdiction. This was unfair. The case law was, for the most part, compatible with the majority's conclusion that provincial inquiries may investigate specific crimes so long as specific suspects are not identified; and that they may focus on particular suspects if the allegations concern matters under provincial jurisdiction rather than Criminal Code offences.

But what do the majority's distinctions accomplish in the long run? Do they materially advance the development of Canadian constitutional law? One way of attempting to answer this question would be to consider whether a provincial government faced with a future situation identical to the Starr imbroglio could carry out a provincial inquiry into the matter in spite of the ruling in the Starr case. I believe it could.

There are at least two ways in which a controversy like the Starr affair could be provincially investigated under terms of

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reference only slightly altered from those that were struck down in the Starr case.

The first of these expedients would be to avoid the language of criminal law when framing the accusations to be investigated, and focus instead on a subject clearly within provincial jurisdiction, such as the "ethical obligations" of provincial politicians and civil servants. The other would be to generalize the accusations of wrongdoing. Rather than being asked to look into specific crimes by specific people the inquiry could be directed to investigate such general matters as: "the extent to which politicians or civil servants have been subjected to attempts to influence the exercise of their responsibilities", or "the extent to which charitable organizations or their resources have been involved in attempts to influence the behaviour of politicians or civil servants." In short, the obstacles raised by the Starr decision to the use of provincial commissions of inquiry to investigate allegations of wrongdoing are capable, in large measure, of being surmounted by careful legal drafting.

Why then did the country's highest and hardest working court take such pains to re-articulate the parameters of the provincial investigatory power? Probably because it was concerned with the unfairness of subjecting identifiable suspects to public scrutiny without the safeguards, such as the right to stand silent, embedded in the normal procedures of criminal law. There are several hints in Lamer's reasons for judgment that the majority judges were motivated by such concerns.

If so, the majority's refusal to consider the impact of the Charter was most unfortunate. While it is true that a more diffuse public inquiry, with less emphasis on the language of criminal law and on the wrongdoing of specific persons, would be less likely than the Starr inquiry to undermine accuseds' rights, it is difficult to conceive of any meaningful public inquiry into allegedly criminal conduct that would not indirectly place those rights in considerable jeopardy. The Royal Commission of Inquiry into infant deaths at Toronto's Hospital for Sick Children in 1980-81, which led to the Ontario Court of Appeal decision in Re: Nelles and Grange[7], for example, resulted in so much public attention being focused on nurse Susan Nelles that the Court of Appeal's ruling preventing the Commissioner from "naming names" offered Ms. Nelles little real protection. Given the general public's inability to distinguish between the technical phraseology of criminal law and other accusatory language, the wording of the charges is not very significant. And, since even broadly-mandated investigations (such as the McCarthy-era witch hunts in the United States) can spotlight particular individuals, the requirement to generalize the questions under investigation offers only scant protection for the rights of potential accused persons. In view of their apparent concern for the fair treatment of such persons, the majority ought to have dealt with the issue frontally, by ruling upon Starr's arguments that the inquiry would violate her rights under

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DONALD V. SMILEY (1921-1990)

Donald Smiley, one of Canada's pre-eminent social scientists, died recently in Toronto. A member of the Centre for Constitutional Studies' Advisory Board, Smiley was at the time of his death a Distinguished Research Professor at York University in Toronto. He held faculty positions at the University of British Columbia (1959-1970) and the University of Toronto (1970-1976) before joining the Department of Political Science at York. A Fellow of the Royal Society of Canada, Smiley edited the well respected journal, Canadian Public Administration, from 1974 to 1979.

Smiley had close ties with the University of Alberta. He received three Alberta degrees including a Master of Arts in 1951 in what was then called Political Economy. He was proud of his affiliations with the university and was always interested in developments and happenings here. Smiley was particularly encouraged by the establishment of the Centre for Constitutional Studies which he saw as an important new part of the Canadian scholarly scene.

Don Smiley contributed enormously to our understanding of Canadian federalism. Throughout his scholarly career he was intrigued by the interplay between federalism, cabinet government and the resolution of complex public policy issues. He saw Canadian politics as being governed by three perennial dynamics–between Canada and the United States, between Québec and the rest of the country, and between the heavily populated industrialized centre and the outlying provinces. Smiley was also one of the first Canadian scholars to think deeply and creatively about the capacity of national political institutions to accommodate and to reflect regional political identities and aspirations. He was deeply concerned about the impact of "executive federalism" on the quality of democracy and governmental accountability. The frequent citation of his bountiful scholarship in the debate about the Meech Lake Accord attests to the breadth and the depth of his insights.

Like most outstanding scholars, Smiley was intellectually curious. He read broadly and remained interested in economics, law, and sociology as well as purely political matters. He was keenly interested in political developments abroad particularly, but by no means exclusively, in the other established federations, notably the United States and Australia. As a result, his scholarship ranged broadly to embrace such diverse topics as the role of the state in economic development, the politics of national political leadership conventions, nationalism, and democratic theory. Smiley also had an abiding interest in civil liberties and the changing constitutional, legal, and political relationships between individuals and governments in the face of the active state. Even with the advent in 1982 of an entrenched Charter of Rights and Freedoms, his classic 1969 essay entitled "The Case Against the Canadian Charter of Human Rights" deserves to be read carefully by thoughtful Canadians.

Donald Smiley's publications exerted an obvious and great impact on the perspectives, ideas and research agendas of a generation of Canadian scholars. But to assess his contribution exclusively by this criterion would be misleading. For Smiley made his presence felt in innumerable, less visible ways. He was a dedicated teacher, an effective graduate supervisor, and an enlightened contributor to the increasingly complex debates of professional associations. Honest, straightforward and often outspoken, he stimulated and invigorated those in contact with him, particularly junior scholars whose careers were bolstered by his enthusiasm and support. He will be missed.

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(Starr continued)
Sections 7, 8, 11, and 13 of the Canadian Charter of Rights and Freedoms.

Because she was of the view that the inquiry did not invade federal jurisdiction over criminal law, Madame Justice L'Heureux-Dubé was forced to consider the Charter challenge in her dissenting opinion. She rejected that challenge.

So far as the corporate claimant was concerned, she was content to hold that corporations are not capable of exercising the Charter rights in question. She appears to have overlooked section 11 (d) of the Charter (the right to a "fair trial"), which was asserted in argument and which would seem as appropriate a protection for corporations as for human persons. So far as Ms. Starr was concerned, L'Heureux-Dubé J. acknowledged that the Charter was applicable, but found that no Charter rights would be violated by the inquiry. She rejected the argument that Starr's "liberty" under Section 7 of the Charter would be infringed because:

> if one were to accept this line of argument then all inquiries that may eventually be connected to some subsequent criminal proceedings would be constitutionally infirm.

The obvious flaw here is that since Section 7 is not absolute, and permits deprivations of liberty which do not offend "principles of fundamental justice", it would be only those inquiries which failed to observe fundamental justice that could be invalidated by Section 7. Justice L'Heureux-Dubé's failure to consider the question of "fundamental justice" at all deprives her conclusion about Section 7 of much weight.

The strongest Charter argument advanced on behalf of Ms. Starr was based on her right under Section 11 (d) of the Charter to "be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal." Although that right applies only to a "person charged with an offence" (in contrast to the guarantee of "fundamental justice" in Section 7 which is not restricted to criminal proceedings), the right would be a mockery if it could not be applied to prevent governmental actions taken prior to the laying of formal charges which had the effect of preventing a fair hearing once charges were laid. Compelling a potential accused person to testify before news media to which potential judges and jurors have uncontrolled access is surely inconsistent with the guarantee contained in Section 11 (d). At any rate, it is a question that deserves the earnest attention of the Supreme Court of Canada. The consideration that L'Heureux-Dubé J. gave to the question was almost as perfunctory as that which she gave to Starr's Section 7 argument:

> Concern was expressed as to whether Ms. Starr could ever hope to undergo a fair trial should criminal charges ever be brought, particularly as a result of her media exposure. Yet Ms. Starr was being discussed, if not accused, by the media well before the legislature contemplated setting up an inquiry or pursuing any investigation whatsoever. If anything, the flexibility of the inquiry would enable her to clear any alleged blemishes to her reputation as a result of media exposure. The Commission will have to hear her. The media owe her no such duty.

Even if one disregards the confirmatory and aggravating effect a public inquiry can have on media accusations (the McCarthy hearings again come to mind), this analysis is crucially deficient in overlooking the power of commissions of inquiry, which news media do not possess, to compel persons under investigation to testify.

The constitutionality of compelling potential accused persons to testify publicly about allegedly criminal behaviour before the laying of criminal charges was the most important legal issue raised by the Starr case, and the issue was fully argued before the Court. It is acutely disappointing, therefore, that only the dissenting judge faced the question squarely, and that she did so in a very casual fashion. The commission of inquiry in this case was sometimes described jokingly in the media as a "Starr Chamber". While the ruling of the Supreme Court put an end to the particular inquiry, it did little to protect against the dangers of future provincial Star Chambers. To shift puns, Starr-light sheds insufficient illumination on the rights of witnesses before provincial inquiry commissions. The Charter issues that were given such short shrift in the Starr case will have to be re-considered by the Supreme Court of Canada before those rights can be fully understood.

It is interesting to note that the majority and dissenting judgments in this case were authored by the two judges who, at the moment of writing, are the leading candidates to replace Brian Dickson as the Chief Justice of Canada. The reasons of Mr. Justice Lamer exhibit a libertarian impulse, but a rather short-sighted approach to constitutional decision making. Those of Madame Justice L'Heureux-Dubé indicate a disturbing insensitivity to the rights of individuals caught up in the inquiry process. The broadly expository and cautiously rights-conscious style that characterized the best constitutional decisions of the "Dickson Court" is not evident in either approach.

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1. Starr, et al v. Houlden [1990] S.C.J., No. 30, April 5, 1990.
2. R.S.O. 1980, c. 411, s.7(1)
3. Keable v. Attorney General of Canada, [1979] 1 S.C.R. 218; O'Hara v. British Columbia, [1987] 2 S.C.R. 591.
4. Di Orio v. Warden of Montréal Jail, [1978] 1 S.C.R. 152.
5. Re: Nelles and Grange (1984), 46 O.R. 210 (Ont. C.A.).
6. Re: Nelles and Grange, ibid.; Faber v. The Queen ,[1976] 2 S.C.R. 9.
7. Supra, fn.5.