S.C.A. No. 02775

IN THE SUPREME COURT OF NOVA SCOTIA

APPEAL DIVISION

Cite as: Nova Scotia (Attorney General) v. Phillips, 1993 NSCA 28

Clarke, C.J.N.S.; Hallett and Matthews, JJ.A.

BETWEEN:

THE HONOURABLE MR. JUSTICE K. PETER RICHARD, in his capacity as a Commissioner under the *Public Inquiries Act* and as a Special Examiner under the *Coal Mines Regulation Act,* appointed pursuant to Order in Council No. 92-504, dated the 15th day of May, 1992	John P. Merrick, Q.C. and Jocelyn M. Campbell for the Appellant
Appellant	
- and -	
THE ATTORNEY GENERAL OF NOVA SCOTIA, representing Her Majesty the Queen in right of the Province of Nova Scotia	Reinhold M. Endres, Q.C. and Louise Y. Walsh Poirier for the Appellant/Intervenor The Attorney General of Nova Scotia
Appellant/Intervenor	
- and -	
UNITED STEELWORKERS OF AMERICA, LOCAL 9332	Raymond F. Larkin and Dianne Pothier for the Appellant/Intervenor United Steelworkers of America, Local 9332
Appellant/Intervenor	
- and -	
WESTRAY FAMILIES GROUP	Brian J. Hebert for the Appellant/Intervenor Westray Families Group
Appellant/Intervenor	
- and -	
THE TOWN OF STELLARTON	Roseanne M. Skoke for the Appellant/Intervenor The Town of Stellarton
Appellant/Intervenor	
- a nd -	
GERALD J. PHILLIPS, ROGER PARRY, GLYN JONES, ARNOLD SMITH, ROBERT PARRY, BRIAN PALMER, and KEVIN ATHERTON	S. Bruce Outhouse, Q.C. and Gordon R. Kelly for the Respondent Gerald J. Phillips
	Robert L. Barnes and Kevin C. MacDonald for the Respondents Glyn Jones, Arnold Smith, Robert Parry, Brian Palmer and Kevin Atherton
	Robert Wm. Wright, Q.C. for the Respondent Roger Parry
Respondents	
	Appeal Heard: December 11, 1992
	Judgment Delivered: January 19, 1993

THE COURT: Appeal allowed per reasons for judgment of Hallett, J.A.; Clarke, C.J.N.S. and Matthews, J.A. concurring

HALLETT, J.A.

This is an appeal by the Attorney General of Nova Scotia and others from a decision of Glube, C.J.T.D. in which she held that the Terms of Reference of an Order in Council appointing Mr. Justice K. Peter Richard a Commissioner under the **Public Inquiries Act**, R.S.N.S. 1989, c. 372 and a Special Examiner under the **Coal Mines Regulation Act**, R.S.N.S. 1989, c. 73 to inquire into

and report on the cause of an explosion at the Westray Mine on May 9th, 1992, are *ultra vires* the powers of the Province of Nova Scotia on the ground that in pith and substance the Terms of Reference encroach on federal criminal law and procedure powers as provided by **s. 91(27)** on the **Constitution Act, 1867**. She also found that **s. 67(e)** of the **Coal Mines Regulation Act** is *ultra vires* the Province.

The Order in Council appointing Justice Richard to inquire into the explosion is dated the 15th day of May, 1992: its terms are as follows:

> " WHEREAS it is deemed appropriate to cause inquiry to be made into and concerning the public matters hereinafter mentioned in relation to which the Legislature of Nova Scotia may make laws;
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> By and with the advice of the Executive Council of Nova Scotia, His Honour the Lieutenant Governor is pleased to appoint the Honourable K. Peter Richard, a Judge of the Supreme Court of Nova Scotia, to be, during pleasure, a Commissioner under the Public Inquiries Act, and a Special Examiner under the Coal Mines Regulation Act, with power to inquire into, report findings, and make recommendations to the Governor in Council and the people of Nova Scotia respecting:
>
> (a) the occurrence, on Saturday, the 9th day of May, A.D., 1992, which resulted in the loss of life in the Westray Mine at Plymouth, in the County of Pictou;
> (b) whether the occurrence was or was not preventable;
> (c) whether any neglect caused or contributed to the occurrence;
> (d) whether there was any defect in or about the Mine or the modes of working the Mine;
> (e) whether the Mine and its operations were in keeping with the known geological structures or formations in the area;
> (f) whether there was compliance with applicable statutes, regulations, orders, rules, or directions; and
> (g) all other matters related to the establishment and operation of the Mine which the Commissioner considers relevant to the occurrence;"

The balance of the Order in Council deals with payment of the Commissioner for expenses, hiring staff, etc.

On September 24th, 1992, the respondents, who were managers and supervisory personnel at the Mine, commenced the proceeding that led to Chief Justice Glube's declaration that the Order in Council and **s. 67(e)** are *ultra vires*. The respondents also sought a declaration that the Order in Council violates their **ss, 7, 8** and **11(d)** rights as guaranteed by the **Charter of Rights & Freedoms**. Having found that the Order in Council is *ultra vires* the Province, Chief Justice Glube did not have to rule on the **Charter** issues.

On October 5th, 1992, after an investigation conducted by the Nova Scotia Department of Labour, charges under the **Occupational Health and Safety Act**, R.S.N.S. 1989, c. 320 were laid against four of the respondents and against Westray Coal, the operator of the mine.

On November 2nd and 3rd, 1992, the constitutional challenge to the Inquiry was heard by Chief Justice Glube and she rendered her decision on November 13th, 1992.

All the appellants who appeared before us raise essentially the same points on appeal. They assert that the learned Chief Justice erred in concluding that the dominant purpose of the Inquiry is to authorize Justice Richard to conduct a criminal investigation. The respondents filed a notice of contention stating that if the appellants succeed on the appeal and this court were to hold that the Terms of Reference are not *ultra vires* the Province that nevertheless the Order in Council violates or, if acted upon by the Commissioner, will violate their rights as guaranteed by **ss. 7, 8** and **11(d)** of the **Charter of Rights and Freedoms**.

I am of the opinion that the learned Chief Justice erred in declaring the Order in Council *ultra vires* the Province. It is clear that she equated the purpose and effects of the Terms of Reference as being similar to the purpose and effect of the terms of reference under consideration in **Starr et al. v. Houlden et al.** (1990), 68 D.L.R. (4th) 641. In the **Starr** case there had been rumours in the media that Ms. Starr had been conferring benefits on elected and unelected public officials in Ontario. The Premier of the province was concerned about the effect these rumours were

having on the public's trust and faith in the integrity of public officials. As a consequence the Governor in Council appointed Mr. Justice Houlden a Commissioner to inquire into the matters pursuant to the **Public Inquiries Act**. The terms of reference provided that he was not to express any conclusion of law regarding the civil or criminal responsibility of any individual or organization. The terms of reference provided that he was to investigate "the nature and extent of the dealings between Ms. Patricia Starr and elected and unelected public officials" and, among other things, "to inquire into and report:

> " 2) . . . . .upon any such circumstances or dealings where, in the opinion of the Commissioner, 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 where, in the opinion of the Commissioner, there is sufficient evidence 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."

The competency of the Province of Ontario to establish the inquiry was challenged. The challenge worked its way to the Supreme Court of Canada; the issues raised were whether the Order in Council establishing the inquiry was *ultra vires* the Province as being within federal jurisdiction pursuant to **s. 91(27)** of the **Constitution Act** and whether the terms of reference by requiring the Commissioner to investigate the conduct of named persons violated the prohibition against the Commissioner expressing conclusions regarding civil and criminal responsibility and whether, if the Order in Council were constitutional, the Commissioner could proceed in the face of continuing police investigation and, if so, what procedures were mandated. The Supreme Court of Canada concluded that a province could not use the public inquiry process to investigate the possible commission of specific criminal offences by named persons. The Court concluded that such a use of the inquiry process by a province has the effect of circumventing criminal procedure as the named individuals can be compelled to testify by the Commissioner. In short, the Court held the inquiry

was *ultra vires* the province as it was in pith and substance a matter relating to criminal law and criminal procedure within the exclusive jurisdiction of Parliament.

The Court did an extensive review of the cases that have come before the Court respecting the constitutionality of provincial commissions of inquiry and reaffirmed the law that provinces have broad powers of investigation and although they may incidentally have an impact upon the federal powers respecting criminal law and procedure they are nevertheless validly constituted.

The Order in Council appointing Justice Richard to inquire into the Westray Mine disaster contains a very different mandate than that given to Mr. Justice Houlden who was directed to inquire into whether Ms. Starr and others, in effect, committed specific criminal offences. The Order in Council empowering Mr. Justice Richard does not direct him to inquire into the conduct of the respondents and whether they were criminally negligent. He is directed to conduct a wide ranging inquiry which includes investigation of the role of, not only the managers and supervisory personnel at the mine, but inspectors of the Department of Labour charged with the responsibility of monitoring the operation of the Mine. He is directed to inquire into the geological structure in the area where the mine is located, and whether neglect caused or contributed to the explosion. By implication he is to inquire into and report on the adequacy of the existing legislation regulating coal mines. He is empowered to inquire into "all other matters relating to the establishment and operation of the mine"; to report and make recommendations.

All these matters are within the scope of the Province's powers as the Province has the constitutional responsibility with respect to the regulation of coal mine operations; that is not a matter within the constitutional powers of the federal government. The **Coal Mines Regulation Act** contains detailed requirements for mine operations to ensure the safety of miners. In my opinion the dominant purpose and effect of the Inquiry is to inquire into and make findings and

recommendations relating to a coal mining disaster; its dominant purpose is not to investigate whether identifiable persons acted or failed to act in a manner that could constitute criminal offences. It is true that the Commissioner is authorized to inquire into and make findings of fact relating to individuals who may have criminal charges, arising out of the Mine disaster, brought against them in the future. An Inquiry into the conduct of personnel at the Mine is a significant part of the Commissioner's task but it is not the dominant purpose or effect of the Inquiry.

Therefore I disagree with Chief Justice Glube that the dominant purpose and effect of the Terms of Reference of the Order in Council is to authorize a criminal investigation. There is not the specifity in the Order in Council appointing Justice Richard that there was in the Order in Council appointing Justice Houlden which was clearly directed at inquiring into a specific type of criminal activity by named persons.

In my opinion the nature and scope of the inquiry to be conducted by Mr. Justice Richard is well within provincial jurisdiction when one considers the Supreme Court of Canada decision in **O'Hara and Kirkbride v. The Queen in Right of British Columbia, et al** (1987), 45 D.L.R. (4th) 527. In that case a commissioner was appointed in British Columbia to inquire into the conduct of the Vancouver City Police. A complaint had been made that a person had been assaulted while in their custody. Earlier inquiries under the Police Act had failed to determine who was responsible. The terms of the Order in Council required the Commissioner to investigate all factors surrounding the detention of the prisoner, the identity of the persons who caused injuries to the person, whether any member of the police force had been responsible for the injuries and whether any evidence had been suppressed during the previous investigations. The constitutional issues that arose out of the terms of reference of that Inquiry were dealt with by the Court. It held that despite Parliament's exclusive jurisdiction over criminal law and criminal procedure a province was authorized under **s. 92(14)** of the **Constitution Act, 1867** to establish an inquiry to investigate wrongdoings committed

by members of a police force under its jurisdiction. The Court held that the province had a legitimate constitutional interest in determining that justice was being properly administered in the province. The fact that the inquiry might later form the basis of a criminal charge did not undermine this basic principle. The Court did point out that there are limits to a province's jurisdiction to establish an inquiry and to equip it with compulsory investigatory authority. A province cannot interfere with the federal interests in providing for a uniform system of criminal justice and that an inquiry enacted solely to determine criminal liability and to by-pass the protection accorded to an accused by the **Criminal Code** would be *ultra vires* the province.

In the **O'Hara** decision the majority judgment concluded with the following statement of the law:

> " A certain degree of overlapping is implicit in the grant to the provinces of legislative authority in respect of the administration of justice and in the grant to Parliament of legislative authority in respect of criminal law and criminal procedure. A matter may well fall within the legitimate concern of a provincial legislature as pertaining to the administration of justice, and may, for another purpose, fall within the scope of federal jurisdiction over criminal law and criminal procedure: *Di Iorio, supra*, at p. 327 C.C.C., p. 529 D.L.R., p. 207 S.C.R. Such is the case in the present appeal. The administration of justice in this country is reflected in and ensured by the provision of police services and other enforcement agencies responsible for the investigation, detection and control of crime within the respective provinces. The control and discipline of police forces is also necessary to the administration of justice. Section 92(14) of the *Constitution Act, 1867* includes the administration of criminal justice: *Di Iorio*. A province has a valid and legitimate constitutional interest in determining the nature, source and reasons for inappropriate and possibly criminal activities engaged in by members of police forces under its jurisdiction. At stake is the management of the means by which justice is administered in the province. That such activity may later form the basis of a criminal charge and thus engage federal interests in criminal law and criminal procedure, does not, in my view, undermine this basic principle. . . ."
>
> "As stated, there are limits to a province's jurisdiction to establish an inquiry and equip it with coercive investigatory authority. Broadly speaking, those limits are twofold in nature. First, a province may not interfere with federal interests in the enactment of and

> provision for a uniform system of criminal justice in the country as embodied in the *Criminal Code*. An inquiry enacted solely to determine criminal liability and to bypass the protection accorded to an accused by the *Criminal Code* would be *ultra vires* a province, being a matter relating to criminal law and criminal procedure. This limitation on provincial jurisdiction is an acknowledgement of the federal nature of our system of self-government. Secondly, neither a province nor Parliament may infringe the rights of Canadian citizens in establishing inquiries of this kind. This limitation is of a different sort. It is an acknowledgement of a respect for individual rights and freedoms and is embodied in the common law, various acts of both levels of governments, including the *Canada Evidence Act*, R.S.C. 1970, c. E-10, and, more recently, the *Canadian Charter of Rights and Freedoms*. Thus, neither level of government may establish and insist upon procedures which infringe fundamental rights and freedoms, such as the right against self-incrimination as it is defined in our law. It will suffice to say that while the appellants framed their arguments in terms strongly reminiscent of a challenge to the constitutionality of the inquiry based on the latter set of concerns, this court was asked only to address its constitutionality in terms of the distribution of powers between the two levels of government. I therefore express no opinion upon the nature and extent of rights guaranteed by the Charter and the law of evidence as they relate to the inquiry's proceedings except to say that those rights, of course, must be respected by the relevant authorities."

The **Starr** case was subsequent in time to **O'Hara**; the majority in **Starr** quoted the passage cited above as well as the following statement from Chief Justice Dickson's decision in **O'Hara** where he stated at p. 542:

> " The inquiry is mandated to investigate alleged acts of wrongdoing for purposes different than those which underlie criminal law and criminal procedure. The purpose of the inquiry is not to determine criminal responsibility. As such, it is no different than a coroner's inquiry, the constitutionality of which was affirmed by this court in *Faber, supra*.

The Court then stated at p. 665 of **Starr**:

> " In my view, this passage from the judgment of the Chief Justice reconciles to a large extent the cases that have gone before in this area, while adhering to well-established principles of adjudication in the context of division of powers. The comments of the Chief Justice recognize that there may be a "double aspect" to a commission of inquiry. There will be cases, however, where the court is able to identify a predominant feature that outweighs the competing,

incidental aspect. In *Keable* for example, while the commission was empowered to investigate certain alleged criminal acts committed by police forces, its focus was on methods of police investigation, improprieties in relation thereto and recommendations for ensuring that the reprehensible acts were not repeated. Similarly, in *O'Hara* the Chief Justice identified, at p. 541 D.L.R., p. 247 C.C.C., the "management of the means by which justice is administered in the province" as the predominant feature of the inquiry.

Additionally, the Chief Justice in *O'Hara*, while upholding an inquiry into a specific incident, the conclusions of which may have led to criminal charges, explicitly made clear that the inquiry was *intra vires* the province because it did not serve to affix criminal responsibility to a particular individual. Rather, it was more generally concerned with police misconduct. Of some note is the fact that in *O'Hara* a hearing under the *Police Act* in relation to the incident at issue exonerated the police of any wrongdoing. There was no ongoing independent police investigation into possible criminal charges. Finally, and in my view an element of the decision that is of great importance, is the following caveat found at p. 542 D.L.R., p. 248 C.C.C.:

> . . . a province may not interfere with federal interests in the enactment of and provision for a uniform system of criminal justice in the country as embodied in the *Criminal Code*. *An inquiry enacted solely to determine criminal liability and to bypass the protection accorded to an accused by the Criminal Code would be ultra vires a province, being a matter relating to criminal law and criminal procedure.* This limitation on provincial jurisdiction is an acknowledgement of the federal nature of our system of self-government.

(Emphasis added) This limitation is reminiscent of the language used by Dickson J. (as he then was) in *Di Iorio*, and that of Estey J. in his concurring reasons in *Keable*. In sum then, the decision in *O'Hara* speaks as much to the limitations on provincial commissions of inquiry as it does to their breadth. The judgment is a clear affirmation of the view that the pith and substance of a commission must be firmly anchored to a provincial head of power, and that it cannot be used either purposely or through its effect, as a means to investigate and determine the criminal responsibility of specific individuals for specific offences."

In the **Starr** case Lamer J., writing for the majority, made the following statements which are relevant to the issues we have under consideration in this appeal. At p. 669 he stated:

" At the outset, I wish to emphasize that I do not rely on any one fact, viewed independently, to conclude that this particular inquiry is *ultra*

vires the province. The process of characterization in division of powers adjudication is not a formalistic or technical exercise. Rather, the exercise is designed to identify the true nature and character of the law by looking at its overall purpose and effect. Indeed, the characterization of a law demands a holistic rather than a 'check-list' approach. In my view, there are two key facts, whose combined and cumulative effect lead me to the conclusion that this inquiry is, in effect, a substitute criminal investigation and preliminary inquiry. First, the only named parties are two private individuals, one being a corporation, who have been singled out for investigation. Unlike *O'Hara*, where the named individual was the victim of alleged misconduct, the present inquiry names individuals who are the alleged perpetrators of the misconduct. Second, the investigation of these two named individuals is in the context of a mandate that, as recognized by the Court of Appeal for Ontario, bears a "striking resemblance" to s. 121(1)(b) of the *Criminal Code*."

At p. 672 he stated:

" To allow this inquiry to continue as it is formulated, would result in the commissioner assimilating his role to that of judge presiding at a preliminary inquiry. In essence the inquiry is entering into the preliminary stages of the judicial criminal process by taking evidence, determining its sufficiency and ultimately deciding whether a *prima facie* case exists against either or both Starr and Tridel Corporation. There is no doubt that a number of cases have held that inquiries whose predominant role it is to elucidate facts and not conduct a criminal trial are validly constituted even though there may be some overlap between the subject-matter of the inquiry and criminal activity. Indeed, it is clear that the fact that a witness before a commission may subsequently be a defendant in a criminal trial does not render the commission ultra vires the province. But in no case before this court has there ever been a provincial inquiry that combines the virtual replication of an existing *Criminal Code* offence with the naming of private individuals while ongoing police investigations exist in respect of those same individuals. One of the implications for allowing the inquiry to go on in its present form is that the inquiry can compel a "witness" who is really one of the named "suspects" to answer questions under oath even though that person could not have been compelled to provide incriminating evidence against herself in the course of a regular police investigation, during the course of a preliminary inquiry under the *Code* (see s. 541) or during the course of a trial in which she is an accused."

At p. 673 he stated:

" ...the inquiry before this court is *ultra vires* the province because it is

> in pith and substance a substitute investigation and preliminary inquiry of named individuals for a specific criminal offence."

He concluded at p. 674 as follows:

> " It is clear, therefore, that provinces should be given ample room within their constitutional competence to establish public inquiries aimed at investigating, studying and recommending changes for the better government of their citizens. What a province may not do, and what it has done in this case, is enact a public inquiry, with all its coercive powers, as a substitute for an investigation and preliminary inquiry into specific individuals in respect of specific criminal offences. This is an interference with federal interests in the enactment of and provision for a system of criminal justice as embodied in the *Criminal Code*. The net effect of such an inquiry is to bypass the protection accorded to an individual by the *Criminal Code* and is accordingly *ultra vires* the province as being a matter relating to s. 91(27) of the *Constitution Act, 1867*. This limitation on provincial competence has consistently been reiterated in decisions emanating from this court that have upheld the constitutionality of other provincial public inquiries. In substance, the present inquiry offends the principle that a province cannot compel a person to submit to questioning under oath with respect to her involvement in a suspected criminal offence for the purpose of gathering sufficient evidence to lay charges or to gather sufficient evidence to establish a *prima facie* case. In short, the present inquiry circumvents the prescribed criminal procedure for conducting a police investigation and a preliminary inquiry, a matter governed by Part XVIII of the *Criminal Code*. It falls, therefore, clearly outside a province's jurisdiction to establish an inquiry and equip it with coercive investigatory authority. Accordingly, for all the foregoing reasons, I would declare the inquiry to be *ultra vires* the province."

The Order in Council appointing Justice Houlden to inquire into the activities of Ms. Starr exceeded the powers of the province because it authorized Justice Houlden to inquire into the conduct of named individuals in respect of specific criminal offences while there was an ongoing criminal investigation. That is not the purpose and effect of the Order in Council appointing Justice Richard to inquire into the Westray Mine Disaster; his is a very different mandate. It goes without saying that Mr. Justice Richard cannot assign criminal responsibility to any person that was involved in any events leading up to the explosion on May 9th; that would clearly be beyond his power.

Section 2 of the **Public Inquiries Act**, Chapter 372, R.S.N.S. 1989 enable the Governor in Council to cause an inquiry to be made into a "public matter in relation to which the Legislature may make laws".

In my opinion, Chief Justice Glube took too narrow a reading of the Terms of Reference which led her to conclude that the dominant purpose and effect of the Order in Council was to authorize Justice Richard to conduct a criminal investigation; it is different than that as is clear from the Terms of Reference. The pith and substance of the Westray Inquiry is firmly anchored to the Province's power to regulate coal mines within the Province. The dominant purpose and effect of the Order in Council is to authorize Justice Richard to inquire into the explosion with a view to ascertaining the cause of the explosion; whether the explosion was preventable; whether the operation of the Mine complied with the provincial regulatory laws; and by implication, whether amendments need to be made to the provincial laws so as to prevent a disaster of this nature occurring in the future. These are areas in which the Province not only has Legislative power but also responsibility. Therefore the Province has a legitimate interest to inquire into the causes of the explosion and what can be done to prevent such an occurrence again. However, it cannot be disputed that a significant part of the Commissioner's task will be to inquire into the conduct of Westray management personnel in the period leading up to the explosion. Chief Justice Glube's concern that the Inquiry, in this aspect, looks like a criminal investigation and a preliminary inquiry under the **Criminal Code** without any of the criminal laws procedural safeguards, is understandable. However, I am of the opinion, as already expressed, that neither the purpose nor the effect of the Inquiry is to determine criminal responsibility of individuals for specific criminal offences; the Terms of Reference of the Order in Council do not equate those in **Starr**.

The possibility that criminal charges might be laid as a result of the Hearing or the filing of the Commissioner's report is an effect of the Inquiry but that effect is not fatal to the

constitutionality of the Inquiry (**O'Hara**). The Terms of Reference of the Order in Council do not exceed the power conferred on the Governor in Council by **Section 2** of the **Public Inquiries Act** and are not *ultra vires* the Province's constitutional powers. I would allow the appeal on this ground.

Section 67(e) Coal Mines Regulation Act

The learned Chief Justice found that **s. 67(e)** of the **Coal Mines Regulation Act** is unconstitutional. **Section 67** provides:

> " 67 Where any accident occurs in any mine from any cause resulting in the loss of life, the *Fatality Inquiries Act* shall not apply, but the following provisions shall have effect:
>
> (a) the Governor in Council may from time to time appoint one or more competent persons to be called "special examiners", who shall, except as in this Act otherwise provided, have all the powers and privileges of commissioners under the *Public Inquiries Act*, of an inspector under Section 66 and of a medical examiner, and the Minister may from time to time assign to any such special examiner the area within which he shall act, and may from time to time require any such special examiner to act in respect of any particular accident occurring anywhere within the Province whether or not it occurs within an area assigned to any other special examiner;
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> (b) a special examiner shall hold office during pleasure;
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> (c) the Minister may appoint any person or persons possessing a special knowledge to act with the special examiner in holding an inquiry;
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> (d) a special examiner shall make inquiry and report respecting the death of each person separately, or make one report upon the cause of death of all such persons and shall, at the conclusion of the inquiry, report to the Minister whether the accident was or was not preventable, whether any neglect caused or contributed to the explosion or accident and whether there was any defect in or about the mine or the modes of working the mine, or in the observance of this Act or any general or special rules, and shall send to the Minister a copy of his findings in these respects;
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> (e) if, upon such inquiry, the special examiner is of the opinion that death was caused by explosion or accident and resulted from culpable negligence, or that there is reasonable ground for suspecting the same, he shall forthwith file a copy of his report with the clerk of the Crown for the county in which the accident occurred,

and transmit a copy thereof to the Attorney General, together with a notice stating that, in his opinion, it is expedient that a further inquiry shall be held respecting the cause of such accident;

(f) when a special examiner holds an inquiry on the body of any person whose death has been caused by an explosion or accident, of which notice is required by this Act to be given to the Minister and an inspector, he shall immediately notify the deputy inspector for the district of his intention to hold such inquiry and fix a time and place therefor, and where the deputy inspector is unable to attend such inquiry at the time fixed, the special examiner shall adjourn such inquiry whenever practicable to enable the inspector, deputy inspector or some other properly qualified person appointed by the Minister to be present at the inquiry;

(g) the special examiner, at least four days before holding the adjourned inquiry, shall send to the Minister or to the deputy inspector for the district notice in writing of the time and place of holding such adjourned inquiry;

(h) the inspector, deputy inspector or such other person so appointed, or a person appointed by the workers of the mine at which the accident occurred, shall be at liberty at any such inquiry to examine any witnesses, subject nevertheless to the order of the special examiner;

(i) the special examiner shall be paid for every inquiry into the cause of any accident such sum as may be determined by the Governor in Council, to be paid out of the Consolidated Fund of the Province;

(j) except as is otherwise provided, all fees, remuneration and expenses incurred by a special examiner in connection with any inquiry and report shall be paid out of the Consolidated Fund of the Province;

(k) a special examiner, for the purpose of making an inquiry, has the power to summon any witnesses who may be able to give expert testimony respecting the cause of the accident or whether there was any defect in or about the mine in which the accident occurred, and the special examiner may fix a special fee to be paid such expert witnesses."

Under **s. 67,** where an accident in a mine results in death, the Governor in Council may appoint a special examiner to inquire into the cause of death and whether any neglect caused or

contributed to the accident. The Province has the power and responsibility to regulate mines and, in particular, to provide for the safe operation of coal mines. **Section 67(d)** is clearly within the scope of the Province's law-making power.

Chief Justice Glube's finding that **s. 67(e)** is unconstitutional is set forth in her decision as follows:

> " Section 67 of the **Coal Mines Act** provides for the appointment of a person as a "Special Examiner" where there is any loss of life in a mine. The section specifically states that the **Fatal Inquiries Act** R.S.N.S. 1989, c.164 does not apply. The "Special Examiner" has all the powers and privileges of a commissioner under the **Public Inquiries Act**, of an inspector under the **Coal Mines Act**, and of a medical examiner under the **Fatal Inquiries Act**. (The medical examiner looks for culpable negligence as part of his responsibilities.)
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> Section 16 of the **Fatal Inquiries Act**, is an almost identical section to s. 67(e) of the **Coal Mines Act**. Section 16 is as follows:
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> > "16 (1) The judge by whom an inquest is held, after hearing the testimony adduced at the inquest, shall
> >
> > ...
> >
> > (b) if it appears to him that the death resulted, in whole or in part, from the unlawful act or culpable negligence of any other person or persons, state the name or names of such person or persons, if known;"
>
> This clause has been repealed by **An Act to Reform the Courts of the Province**, S.N.S. 1992, c.16, s. 17 (the **Court Reform Act**). This legislation has not been proclaimed to date. The Attorney General acknowledges that the section was repealed because it is unconstitutional.
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> Even if I had not found the whole of the terms of reference unconstitutional, clearly, the responsibilities under s. 67(e) of the **Coal Mines Act** would have to be struck. There is no question that "culpable negligence" can be directly equated to "criminal negligence". (See: Criminal Negligence: An Analysis In Depth by the Honourable Judge P.J.T. OHearn (7 C.L.Q. 27) at p. 28; **R. v. Baker**,

> [1929] 1 C.C.C. 352 at p. 354; and **McCarthy v. The King** (1921) 59 D.L.R. 206.) The section says that the Special Examiner "shall" transmit a copy of his report to the Attorney General with a notice stating that in his opinion it is expedient that there be further inquiry if he is of the opinion or there is reasonable ground for suspecting that the death was caused by explosion or accident and resulted from culpable negligence (s. 67(e)). Although the Special Examiner does not have to name names, again I find that effectively he would be doing so. I do not accept the submissions of the Attorney General on this issue. Section 67(e) is a bare step down from the objectionable contents of the section in the **Fatal Inquiries Act**, which will be repealed once the **Court Reform Act** is proclaimed. In my opinion, s. 67(e) is also unconstitutional."

With respect, I am of a different opinion. When one looks at the provisions of **ss. 67(d)** and **(e)** taken together it is clear that the Legislature recognized that it could authorize a special examiner to inquire into the cause of death in a mine accident and whether any neglect caused or contributed to the accident (**s. 67(d)**). But the Legislature recognized it could not authorize a special examiner to make findings that anyone's criminal negligence caused the deaths. That is why, in my opinion, we have the peculiar provisions of **s. 67(e)**.

I am satisfied that when the Legislature used the words culpable negligence in **s. 67(e)** it meant criminal negligence. The word "culpable" means blameworthy. This word could be interpreted as denoting either civil or criminal responsibility. However, in law the word "culpable" has historically been used to connote criminal responsibility. For example, **s. 222** of the **Criminal Code** states that homicide is culpable or non culpable and that homicide that is not culpable is not an offence. "Culpable homicide is murder or manslaughter or infanticide". (**s. 222(4)**) (See also the references in Chief Justice Glube's decision that culpable negligence can be directly equated with criminal negligence.)

Section 67(d) authorizes the special examiner to inquire into the causes of death and whether neglect caused or contributed to the accident or explosion. While **s. 67(e)** directs a special examiner that if, as a result of his investigation, he comes to the opinion that death resulted from

culpable negligence (as opposed to inadvertent negligence) or he suspected the same, he is to transmit a copy of his report to the Crown and to the Attorney General together with a notice stating that in his opinion it is expedient that a further inquiry shall be held respecting the cause of such accident. In contrast to merely giving an opinion under **subsection (e)**, the special examiner under **subsection (d)** is required to determine the cause of death and whether the accident was or was not preventable and whether any neglect caused or contributed to the explosion. In enacting **s. 67(e)** the Legislature recognized that the special examiner could not be authorized to do anything more than give his opinion, "that death was caused by an explosion or accident and resulted from culpable negligence or that there is a reasonable ground for suspecting the same.? But he could not be authorized to make a finding of criminal negligence. If he comes to such an opinion the special examiner is authorized to recommend that there be a further inquiry. Presumably under such circumstances the Crown could then proceed to carry out a full criminal investigation.

I agree with the submission of the Attorney General that it is not a special examiner's mandate to inquire into and make findings regarding criminal negligence. There are no criminal charges; there is no accused. It is simply an inquiry into an unexplained disaster resulting in death. It is a special type of coroner's inquest.

In **Faber v. The Queen** (1975), 65 D.L.R. (3d) 423 the Supreme Court of Canada held that a coroner's inquest is not a proceeding in a criminal matter. Its function is limited to inquiring into the circumstances of the death and it is not concerned with the prosecution or punishment of an accused. The majority decision held that the purpose of such inquiries is to check the public imagination and enable the community to be aware of the factors which put human life in jeopardy and to reassure the community that the government is acting to ensure that guarantees relating to human life are duly respected. The inquiry of a special examiner under **s. 67** has a similar purpose.

Section 67(e) read in the context of the whole of **s. 67** and , in particular, when read

together with **subsection (d)**, does not encroach, other than incidentally, on the federal power to legislate respecting criminal law and criminal procedure. The purpose and effect of **subsection (e)** is to limit the special examiner's powers if he comes to the opinion that there may have been conduct that attracts criminal responsibility. The special examiner's primary function is outlined in **subsection (d)**. If, while performing this task, evidence is adduced that results in his reaching an opinion that death was caused by explosion or accident and resulted from culpable negligence or there is a reasonable ground for suspecting the same, he shall file his report together with a notice that it would be expedient to hold a further inquiry. Under **s. 67(e)** he is not authorized to make determinative findings of culpable negligence. The Province has a legitimate interest in ascertaining what caused a loss of life in a coal mine explosion or accident; **s. 67(e)** is merely a means by which the Crown can be alerted to the fact that there may have been criminal conduct that warrants a further investigation. The dominant purpose of **s. 67** is not to conduct a criminal investigation nor is that its effect. That is left to the proper authorities following receipt of the special examiner's opinion and report under **s. 67(e).**

There is a presumption that a Legislature does not exceed its constitutional powers to make laws. I am satisfied the manner in which **subsections (d)** and **(e)** are drafted shows the Legislature was clearly conscious of its limitations and that of any special examiner who might be appointed to inquire into a coal mine disaster. The Commissioner of the Westray Inquiry cannot, pursuant to **s. 67(e)** make a finding assigning criminal responsibilities to any person. That would be beyond his powers as conferred on him under the Order in Council and the **Coal Mines Regulation Act**.

I should say a word about **s. 16** of the **Fatality Inquiries Act** since its repeal was considered relevant by Chief Justice Glube in striking down **s. 67(e)**. In my opinion it is considerably different than **s. 67(e)**. **Section 16** of the **Fatality Inquiries Act** requires the judge

presiding over such an inquiry into a death to state the name of any person responsible if he finds death resulted from an unlawful act or culpable negligence. The judge is required to name names and therefore **s. 16** runs afoul of the reasoning in **Re Nelles et al. and Grange et al.** (1984), 9 D.L.R. (4th) 79 and to a lesser extent the reasoning in the **Starr** decision. Under **67(e)** the special examiner is not required to name names; any opinion rendered by him under **s. 67(e)** is merely incidental to his principle function as described in **s. 67(d)**. It is part of a legitimate role to be played by a special examiner. **Section 8** of the **Fatality Inquiries Act**, which is very similar to **s. 67(e)** has not been repealed. It deals with the powers of a medical examiner when conducting an inquiry into death. It reads:

> " 8. If, upon examination, personal inquiry or post-mortem examination, the chief medical examiner is of the opinion that the death was caused by violence, undue means or culpable negligence or that there is reasonable grounds for suspecting that the death may have been so caused, or where death occurs in a jail or prison, he shall forthwith transmit to a judge of the provincial court a copy of his report filed with the clerk of the Crown, together with a notice stating that the report is being transmitted to the judge of the provincial court for consideration as to whether an inquest should be held respecting the cause of death."

That may indicate nothing more than the Attorney General's Department does not consider **s. 8** of the **Fatality Inquiries Act** unconstitutional; I would agree.

In my opinion **s. 67(e)** of the **Coal Mines Regulation Act**, while it overlaps into federal power, the overlap is only incidental; **s. 67(e)** is *intra vires* the provincial power to make laws regulating the operation of coal mines and, in particular, laws that attempt to ensure that mines are operated safely.

CHARTER ISSUES

As Chief Justice Glube found the Order in Council is unconstitutional she did not have to decide if the respondents' assertion that the Order in Council infringes their **s. 7, 8** and **11(d)**

Charter rights has merit. As I am of the opinion the Order in Council is within the scope of the Province's constitutional powers as contained in the **Constitution Act, 1867**, it is necessary to address the issue of **Charter** rights infringement as raised by the respondents in their Originating Notice commencing these proceedings.

The respondents allege that their **ss. 7, 8** and **11(d) Charter** issues are infringed or will be infringed if the Inquiry proceeds before the trials. In my opinion, the important **Charter** issues raised in the challenge to the Inquiry's right to proceed are the respondents' "right to silence" and right to a fair trial on the charges under the **Occupational Health and Safety Act** and with respect to criminal charges that may result from the R.C.M.P.'s ongoing criminal investigation of the explosion.

Section 7 of the Charter

Section 7 provides:

> " Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."

There are two factual matters which make the case we have under consideration different from any of the cases upon which the appellants and the intervenors rely. First, there are charges pending under the **Occupational Health and Safety Act**; and secondly, no damage has as yet been done to the respondents' fair trial interest.

Not only have charges been laid under that **Act** but there is an ongoing criminal investigation by the R.C.M.P. into the conduct of the mine owner and management personnel in the operation of the mine in the period leading up to the explosion that killed 26 miners. A search warrant issued on December 1st, 1992, recites, based on the affidavit of an R.C.M.P. Officer, that there are reasonable and probable grounds for believing that records and documents at the Westray Inquiry office, (the documents having originated at Westray Coals offices and the offices of various

Government Departments)

> " will afford evidence that between the 30th day of April 1991 and the 15th day of May 1992, Curragh Resources Inc. also operating under the company name of Westray Coal, also known as Westray Coal Mine, did by criminal negligence in the operation of its coal mine show wanton or reckless disregard for the lives or safety of its mine employees, and did thereby cause the deaths of 26 miners contrary to Section 220 of the Criminal Code."

On December 10th, 1992 the Crown prosecutor stayed certain of the charges under the **Occupational Health and Safety Act**. A review of the charges indicates that the most serious charges against the four respondents were stayed, fuelling speculation that criminal negligence charges will be laid. On the same date the four respondents pleaded not guilty to the remaining charges. The trial was set down to commence April 19th, 1993; it is expected to last two months.

It is of major significance to the **Charter** issues we have under consideration to recognize that if found guilty the four respondents who are charged with offences under the **Occupational Health and Safety Act** face the possibility of a fine or up to one year imprisonment or both; their liberty interest is now at risk and different considerations must apply.

In none of the cases which the Supreme Court of Canada reviewed in **Starr** were charges pending against any of the persons who were involved in the events subject to investigation by the public inquiry. In **Thomson Newspapers Ltd. v. Director of Investigation and Research, Combines Investigation Act et al.** (1990), 106 N.R. 161 a majority of the Supreme Court of Canada held that the power under the **Combines Investigation Act** to compel the attendance of witnesses and the production of documents in the investigatory stage did not offend the **ss. 7** or **8 Charter**. None of the persons named in the Orders to testify had been charged with an offence. Statements in the decisions of Justices La Forest, L'Heureux-Dubé and Lamer in **Thomson** must be read bearing this fact in mind. Justices Wilson and Sopinka wrote strong dissents; in 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 to 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.

The second point of difference between the situation we have under consideration and those cases relied on by the Attorney General is the timing of the application. In **R v. Vermette**, [1988] 1 S.C.R. 985 and **R. v. Kenny** (1991), 287 A.P.R. 318 the event that gave rise to the question as to whether or not the fair trial interest of the accused was infringed had already taken place by the time the application for a stay of proceedings was heard. In the case we have under consideration no damage has yet been done to the fair trial interests of the respondents as the Inquiry, having been stayed pending resolution of the **Charter** issues, has not commenced public hearings.

The decision of the Supreme Court of Canada in **R. v. Hebert** (1990), 110 N.R. 1 is of great importance in relation to the issues that arise in this case. In **Hebert** Justice McLachlin, writing for the majority of the Court did an exhaustive review of the law underlining the **Charter** rights embodied in **s. 7** of the **Charter**. She concluded that an individual has the right to silence; that is the right to speak or not to speak when detained as a suspect. Justice McLachlin stated at paragraph 20:

> " The right to silence conferred by s. 7 of the **Charter** is rooted in two common law concepts. The first is the confessions rule, which makes a confession which the authorities improperly obtain from a detained person inadmissible in evidence. The second is the privilege against self-incrimination which precludes a person from being required to testify against himself at trial. While the exact scope of the confessions rule has been the subject of debate over the past century, a common theme can be said to unite these two quite separate rules -- the idea that a person in the power of the state in the course of the criminal process has the right to choose whether to speak to the police or remain silent."

Justice McLachlin then moved to a consideration of the exact nature and definition of the confession rule. She reviewed the decision of the Supreme Court in **R. v. Wray**, [1971] S.C.R. 272 and **R. v. Rothman**, [1981] 1 S.C.R. 640 and concluded that the essence of the confession rule is the suspect's freedom to choose whether to give a statement or not. Madam Justice McLachlin stated at paragraph 37:

> " The reasons of Estey, J., and Lamer, J., disclose an array of distinguished Canadian jurists who recognized the importance of the suspect's freedom to choose whether to give a statement to the police or not, and emphasized the fairness and repute of the administration of justice as an underlying rationale for the confessions rule, both before and after **Wray**. Among them is Chief Justice Freedman, **Admissions and Confessions**, reproduced in R.E. Salhany and R.J. Carter, eds., **Studies in Canadian Criminal Evidence** (1972), at p. 99, who emphasized the centrality to the confessions rule of individual freedom and the integrity of the judicial system:
>
> > 'It is justice then that we seek, and within its broad framework we may find the true reasons for the rule excluding induced confessions. Undoubtedly ... the main reason for excluding them is the danger that they may be untrue. But there are other reasons, stoutly disclaimed by some judges, openly professed by others, and silently acknowledged by still others -- the last perhaps being an instance of an 'inarticulate major premise' playing its role in decision-making. These reasons, all of them, are rooted in history. They are touched with memories of torture and the rack, they are bound up with the cause of individual freedom, and they reflect a deep concern for the integrity of the judicial process.' "

She made reference to Mr. Justice Beetz' statement in **R. v. Horvath**, [1979] 2 S.C.R. 376; 25 N.R. 537 as to the basis of the confession rule. Justice Beetz had stated:

> " . . .But the basic reason is the accused's absolute right to remain silent either completely or partially and not to incriminate himself unless he wants to. This is why it is important that the accused understand what is at stake in the procedure. (Emphasis added)"

Justice McLachlin concluded her analysis with respect to the confession rule with the following

statement at paragraph 41:

> " I return to the question of what the confessions rule suggests as to the scope of the right to pretrial silence under s. 7 of the **Charter**. The foregoing review suggests that one of the themes running through the jurisprudence on confessions is the idea that a person in the power of the state's criminal process has the right to freely choose whether or not to make a statement to the police. This idea is accompanied by a correlative concern with the repute and integrity of the judicial process. This theme has not always been ascendant. Yet, its importance cannot be denied. It persists, both in Canadian jurisprudence and in the rules governing the rights of suspects in other countries. The question is whether, as Kaufman, J.A., suggests, it should prevail in the post-**Charter** era.." (Emphasis are mine)

Madam Justice McLachlin then reviewed the jurisprudence with respect to the privilege against self-incrimination; she stated at paragraph 42:

> " The second rule which is closely concerned with the right to silence of a person in jeopardy in the criminal process is the privilege against self-incrimination. It is distinct from the confessions rule, applying at trial rather than at the investigatorial phase of the criminal process: see **R. v. Marcoux**, [1976] 1 S.C.R. 763; 4 N.R. 64, at pp. 768-769 S.C.R. Yet it is related to the confessions rule, both philosophically and practically."

I do note that Justice McLachlin stated it to be distinct from the confession rule as it applies at trial rather than at the investigatorial phase of the criminal process. However, she went on to conclude at paragraph 46 that despite the differences between the two rules the common theme is the right of an individual to choose whether to make a statement to the authorities or to remain silent. She stated as follows:

> " Despite their differences, the common law confessions rule and the privilege against self-incrimination share a common theme -- the right of the individual to choose whether to make a statement to the authorities or to remain silent, coupled with concern with the repute and integrity of the judicial process. If the measure of a fundamental principle of justice under s. 7 is to be found, at least in part, in the underlying themes common to the various rules related to it, then the measure of the right to silence may be postulated to reside in the notion that a person whose liberty is placed in jeopardy by the

> criminal process cannot be required to give evidence against himself or herself, but rather has the right to choose whether to speak or to remain silent. This suggests that the scope of the right of a detained person to silence prior to trial under s. 7 of the **Charter** must extend beyond the narrow view of the confessions rule which formed the basis of the decision of the majority of this Court in **Rothman**."

In short, where a person's liberty is in jeopardy that person cannot be required to give evidence against himself or herself but rather has the right to choose whether or not to speak. Justice McLachlin then considered whether her hypothesis was confirmed by consideration of the right to silence in the context of other **Charter** provisions. She made the following statement at paragraph 48 which is particularly relevant to the problems arising in this case:

> " The rights of a person involved in the criminal process are governed by ss. 7 to 14 of the **Charter**. They are inter-related: **Re B.C. Motor Vehicle Act**, supra. It must be assumed that the framers of the **Charter** intended that they should be interpreted in such a manner that they form a cohesive and internally consistent framework for a fair and effective criminal process. For this reason, the scope of a fundamental principle of justice under s. 7 cannot be defined without reference to the other rights enunciated in this portion of the **Charter** as well as the more general philosophical thrusts of the **Charter**."

It is, of course, to be recognized that the comments Justice McLachlin made were in the context of an individual detained as a suspect. In my opinion, her statements equally apply to an individual who has been charged with an offence that puts his liberty interest at risk; that is the position four of the respondents find themselves in having been charged with offences that carry the possibility of penal consequences. In the opinion of Justice McLachlin the drafters of the **Charter** viewed the ambit of the right to silence embodied in **s. 7** of the **Charter** as extending beyond the confession rule and including the right of an individual suspected or charged to make a free choice as to whether to remain silent or speak to the authorities. (Paragraph 53).

Of equal importance to the problem we have under consideration is Justice McLachlin's statement in paragraph 55 where she stated:

> " The second **Charter** right relevant to the ambit of the right to silence conferred by s. 7 is the privilege against self-incrimination. This right has been enshrined in s. 11(c) of the **Charter**, which provides that no one can be required to give evidence against himself, and echoed in s. 13 of the **Charter**, which prevents evidence given by a witness being used against the witness in a subsequent proceeding. I have earlier suggested that these rights may be diminished to the extent that a person may be compelled to make statements at the pretrial stage. It follows that if the **Charter** guarantees against self-incrimination at trial are to be given their full effect, an effective right of choice as to whether to make a statement must exist at the pretrial stage." (Emphasis are mine)

Justice McLachlin stated at paragraph 58 that the **Charter** "has made the rights of the individual and the fairness and integrity of the judicial system paramount". She pointed out the importance of obtaining a fair balance between the interests of the individual and the state and the role of **s. 7** of the **Charter** to impose limits on the power of the state over detained persons. As I have noted, it is my opinion, that **s. 7** comes into play, not only when suspects are detained but when persons have been subject to the coercive power of the state by having been charged with offences that carry penal consequences.

Justice McLachlin at paragraph 63 outlined the scope and fundamental function of **Section 7** of the **Charter**:

> " The **Charter** through s. 7 seeks to impose limits on the power of the state over the detained person. It thus seeks to effect a balance between the interests of the detained individual and those of the state. On the one hand s. 7 seeks to provide to a person involved in the judicial process protection against the unfair use by the state of its superior resources. On the other, it maintains to the state the power to deprive a person of life, liberty or security of person provided that it respects fundamental principles of justice. The balance is critical. Too much emphasis on either of these purposes may bring the administration of justice into disrepute -- in the first case because the state has improperly used its superior power against the individual, in the second because the state's legitimate interest in law enforcement has been frustrated without proper justification."

To arrive at the appropriate balance between the interests of the state and the respondents

in the matters we have under consideration is critical.

In paragraph 66 Justice McLachlin summarized the implications to be drawn from **Charter** provisions related to the right to silence as guaranteed by **Section 7**. She stated:

> " **Charter** provisions related to the right to silence of a detained person under s. 7 suggest that the right must be interpreted in a manner which secures to the detained person the right to make a free and meaningful choice as to whether to speak to the authorities or to remain silent. A lesser protection would be inconsistent not only with the implications of the right to counsel and the right against self-incrimination affirmed by the **Charter**, but with the underlying philosophy and purpose of the procedural guarantees the **Charter** enshrines." (Emphasis are mine)

The analysis by Madam Justice McLachlin of the **s. 7 Charter** right to silence was, of course, made in the context of a suspect in detention having been tricked into making a statement by an undercover police officer after he had advised the police he did not wish to make a statement.

Justice McLachlin commented that the right to silence was subject to several limitations one of which is that it applies only after detention; that statement has been relied upon by counsel for the Attorney General to support his position that the respondents do not have a right to silence as they are not detained. Justice McLachlin's comments must be looked at in the factual context in which the comments were made; at paragraph 73 she stated:

> " It applies only after detention. Undercover operations prior to detention do not raise the same considerations. The jurisprudence relating to the right to silence has never extended protection against police tricks to the pre-detention period. Nor does the **Charter** extend the right to counsel to pre-detention investigations. The two circumstances are quite different. In an undercover operation prior to detention, the individual from whom information is sought is not in the control of the state. There is no need to protect him from the greater power of the state. After detention, the situation is quite different; the state takes control and assumes the responsibility of ensuring that the detainee's rights are respected." [Emphasis mine]

It is clear that Justice McLachlin made the distinction between persons in the control of

the state and those who were not. With respect to the Westray Inquiry the four respondents who have been charged with offences and to which they have pleaded not guilty are in need of protection from the greater power of the state because under the **Public Inquiries Act**, they can be compelled to testify. Therefore, they are, in that sense, under the control of the state at a time when their liberty interest is at risk.

In **Hebert** the Supreme Court of Canada found that there was a violation of **s.7**. The Court then considered whether **s. 1** of the **Charter** had any application and concluded that since the conduct in question was not a limit prescribed by law **s. 1** did not apply. What was at issue was the police conduct. The court then applied the Collins test (**R. v. Collins**, [1987] 1 S.C.R. 265) and concluded that the conduct of the police was wilful and intended to undermine the appellant's right to silence and that the evidence should be excluded under **s. 24(2)** of the **Charter** even though it would result in an acquittal.

I am of the opinion that the right to silence of the respondents as granted by **s. 7** of the **Charter** will be infringed if the Commissioner by reason of the powers conferred on him under the **Public Inquiries Act**, compels the respondents charged with offences to testify before him. Those respondents charged with offences under the **Occupational Health and Safety Act** facing the possibility, if convicted, of being imprisoned, have a **Charter** right not to be compelled to speak. The right to remain silent is a principle of fundamental justice. (**Hebert v. The Queen**) The respondents charged with offences have the right to choose whether to speak or not. The combined effect of the Order in Council and the **Public Inquiries Act** purportedly empowers the Commissioner to take that right from them. In my opinion, the Commissioner cannot deprive the four respondents of their **Charter** right to silence. The respondents cannot be compelled to testify before Justice Richard respecting their involvement in the operation of the Mine in the period leading up to the explosion so long as the charges against them under the **Occupational Health and Safety**

Act are alive and the criminal investigation is ongoing.

I reject the argument that if the respondents are called as witnesses and compelled to testify before the Inquiry their **Charter** rights to silence and a fair trial are adequately protected by **ss. 11(c)** and **13** of the **Charter**. Relief at trial will be too late; there is a better remedy. I will deal with this issue in depth when dealing the respondents' right to a fair trial and the remedies available under the **Charter**. I am also of the opinion that the **Charter** challenge is not premature at this stage of the Inquiry although there is a serious question surrounding that issue which I will address later in this decision.

Section 8 of the Charter

Section 8 of the **Charter** states:

> " Everyone has the right to be secure against unreasonable search or seizure."

In view of other conclusions I have reached it is not necessary to deal in any depth with the **s. 8** issues. However, I am not persuaded that the seizure of the documents by the Commissioner from the Westray office was an unreasonable seizure that infringed the respondents **s. 8 Charter** right. There is a very low expectation of privacy with respect to Westray's corporate documents as many of the documents seized are in the nature of reports and records required to be kept under the **Coal Mines Regulation Act**. In a sense those are public documents rather than documents personal to the respondents. The documents were seized by Westray pursuant to a validly constituted public inquiry. The documents have subsequently been seized by the R.C.M.P. from the Commissioner's office under the authority of search warrants. The evidence does not support a finding that the respondents **s. 8 Charter** right has been infringed.

Section 11(d) of the Charter

Section 11(d) provides:

" 11. Any person charged with an offence has the right

(d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;"

In my opinion the fair trial interest of the respondents charged with offences under the **Occupational Health and Safety Act** as guaranteed by **s. 11(d)** of the **Charter** will be impinged upon if the Inquiry proceeds to hear any evidence that could implicate any of them as being in any way responsible for the explosion. It is widely recognized that public inquiries attract a great deal of media attention and that persons subsequently charged may have difficulty in getting a fair trial. This was clearly recognized by Justice Barry in **R v. Kenny** (1991), 287 A.P.R. 318. In that case by the time the **Charter** application was made, prior to the start of the trial of sexual assault charges laid against the accused, the testimony of victims before a public inquiry had already been given and was broadcast on public television channels in Newfoundland. In the circumstances Justice Barry found there was an infringement of Brother Kenny's right to a fair trial based on the dramatic pre-trial televised testimony but he was not prepared to stay the criminal charges. He reasoned that the challenge for cause procedures in the **Criminal Code** would enable an impartial jury to be selected and that the jury would decide on the guilt or innocence of Brother Kenny based on the evidence heard at the trial. Apparently his ruling is under appeal. In the case we have under consideration there is not yet any damage to the respondents facing charges under the **Occupational Health and Safety Act** and the possibility of charges under the **Criminal Code** because the Inquiry has not yet proceeded to public hearings pending the resolution of the constitutional issues which are the subject of these proceedings. Under the circumstances, this court is not limited as was Justice Barry to two possible courses of action; either allow the trial to proceed or stay proceedings entirely.

Even though I am of the opinion that the respondents charged with offences cannot be compelled to testify before the Commissioner that is not to say the Commission counsel could not

proceed to call as witnesses other persons who may testify to events that could tend to show that one or more of the respondents was guilty of certain acts or omissions. That testimony could point to the guilt of a respondent respecting either provincial offences for which he has already been charged or criminal negligence charges which are anticipated in view of the Crown prosecutor's decision to withdraw what appear to be the most serious of the charges under the **Occupational Health and Safety Act**. It is

a reasonable assumption that if Westray Coal is charged with criminal negligence the senior personnel in charge of the mine operations, the respondents or some of them, are likely also to be charged.

Section 24(1) of the Charter

There has not yet been a breach of the respondents' **Charter** rights. However, that does not prevent the court, if it is just and appropriate to do so, from granting a remedy under **s. 24(1)** of the **Charter**. In **Operation Dismantle v. The Queen**, [1985] 1 S.C.R. 441 the Supreme Court of Canada held that **s. 24(1)** of the **Charter** enables a court of competent jurisdiction to grant a remedy not only in situations where there has been an actual interference with individuals rights as guaranteed by the **Charter** but also when there is an apprehension of an interference with **Charter** rights.

In **Operation Dismantle** the appellants alleged that a decision made by the Government of Canada to allow the United States to test cruise missiles in Canada violated s. 7 of the *Charter*. The development of the cruise missile, it was argued, heightened the risk of nuclear war and the increased American military presence and interest in Canada as a result of the testing allegedly made Canada more likely to be a target for nuclear attack. Declaratory relief, an injunction and damages were sought.

The Court, per reasons of Dickson C.J., dismissed the appeal. The Court concluded that the appellants' statement of claim should be struck out and their cause of action dismissed; that should not surprise anyone. The statement of claim did not disclose facts which, if taken as true,

would prove that the Canadian government's decision to permit the testing of the cruise missile in Canada could cause a violation or a threat of violation

of the appellants' rights under s. 7 of the *Charter*.

Chief Justice Dickson addressed the issue of granting relief where the harm alleged is prospective; he stated at p. 456:

> " The principles governing remedial action by the courts on the basis of allegations of future harm are illustrative of the more general principle that there is no legal duty to refrain from actions which do not prejudice the legal rights of others. A person, whether the government or a private individual, cannot be held liable under the law for an action unless that action causes the deprivation, or threat of deprivation, of legal rights. . . .
>
> According to Eager, *The Declaratory Judgment Action* (1971), at p. 5:
>
> 3. The remedy [of declaratory relief] is not generally available where the controversy is not presently existing but merely possible or remote; the action is not maintainable to settle disputes which are contingent upon the happening of some future event which may never take place.
>
> 4. Conjectural or speculative issues, or feigned disputes or one-sided contentions are not the proper subjects for declaratory relief.
>
> Similarly, Sarna has said, "The court does not deal with unripe claims, nor does it entertain proceedings with the sole purpose of remedying only possible conflicts": (*The Law of Declaratory Judgments* (1978), at p. 179).
>
> None of this is to deny the preventative role of the declaratory judgment. As Madame Justice Wilson points out in her judgment, Borchard, *Declaratory Judgments* (2nd ed. 1941), at p. 27, states that,
>
> . . . no "injury" or "wrong" need have been actually committed or threatened in order to enable the plaintiff to invoke the judicial process; he need merely show that some legal interest or right of his has been placed in jeopardy or grave uncertainty ....
>
> Nonetheless, the preventative function of the declaratory judgment must be based on more than mere hypothetical consequences; there must be a cognizable threat to a legal interest before the courts will entertain the use of its process as a preventative measure. As this Court stated in *Solosky v. The Queen*, [1980] 1 S.C.R. 821, a declaration could issue to affect future rights, but not where the dispute in issue was merely speculative." [My underlining)

Chief Justice Dickson, after stating that declaratory relief is available for prospective harm if proven, dealt with the question of granting injunctive relief for prospective harm. He stated at p. 457:

> " A similar concern with the problems inherent in basing relief on the prediction of future events is found in the principles relating to injunctive relief. Professor Sharpe, *Injunctions and Specific Performance* (1983), clearly articulates the difficulties in issuing an injunction where the alleged harm is prospective at pp. 30-31:
>
> > All injunctions are future looking in the sense that they are intended to prevent or avoid harm rather than compensate for an injury already suffered . . . .
> >
> > Where the harm to the plaintiff has yet to occur the problems of prediction are encountered. Here, the plaintiff sues *quia timet* - because he fears - and the judgment as to the propriety of injunctive relief must be made without the advantage of actual evidence as to the nature of harm inflicted on the plaintiff. The court is asked to predict that harm will occur in the future and that the harm is of a type that ought to be prevented by injunction.
>
> The general principle with respect to such injunctions appears to be that "there must be a high degree of probability that the harm will in fact occur": Sharpe, *supra*, at p. 31. In *Redland Bricks Ltd. v. Morris*, [1970] A.C. 652, at p. 665, *per* Lord UpJohn, the House of Lords laid down four general propositions concerning the circumstances in which mandatory injunctive relief could be granted on the basis of prospective harm. The first of these stated [at p. 665]:
>
> > 1. A mandatory injunction can only be granted where the plaintiff shows a very strong probability upon the facts that grave damage will accrue to him in the future .... It is a jurisdiction to be exercised sparingly and with caution but in the proper cause unhesitatingly.
>
> It is clearly illustrated by the rules governing declaratory and injunctive relief that the courts will not take remedial action where the occurrence of future harm is not probable. This unwillingness to act in the absence of probable future harm demonstrates the courts' reluctance to grant relief where it cannot be shown that the impugned action will cause a violation of rights."

In **Operation Dismantle** the Court concluded that:

> " the speculative nature of the allegation that the decision to test the cruise missile will lead to an increased threat of nuclear war makes it manifest that no duty is imposed on the Canadian government to refrain from permitting the testing. The government's action simply could not be proven to cause the alleged violation of s. 7 of the *Charter* and, thus, no duty can arise."

With respect to the Westray Inquiry, the likelihood of witnesses being called who will implicate one or more of the four respondents charged with offences as bearing some responsibility for the disaster is very real; miners have given interviews to the media which have been widely reported in which they have stated that the mine was being operated without sufficient regard for the safety of the miners. The Inquiry counsel proposes to inquire fully into the cause of the explosion. That is part of the mandate of the Inquiry; that the Inquiry counsel will do this is not a matter of speculation. Nor is it a matter of speculation that such evidence will impact on the respondents' fair trial interests and their right to silence.

Chief Justice Dickson at p. 457 of the **Operation Dismantle** decision approved the statement in **Borchard, Declaratory Judgments** (2nd ed. 1941) that in order to invoke the judicial process and obtain declaratory relief a party need show only that a legal right has been placed in "jeopardy or grave uncertainty". With respect to injunctive relief he approved the statement that there must be "a high degree of probability that the harm will in fact occur" before a court should grant such relief.

These tests will be relevant in consideration of the remedy that might be granted to the respondents. The important aspect of the **Operation Dismantle** decision is that there does not have to be a present infringement to grant relief under **s. 24(1)** of the **Charter**.
However, the courts must be cautious in granting relief where there is not a present infringement but merely a prospective one.

The issue as to whether or not **Charter** relief could be granted in the event of an apprehended infringement at a future trial was raised in **R. v. Vermette**, supra. The Supreme Court of Canada reaffirmed its view as expressed in **Operation Dismantle** that **Charter** relief can be granted notwithstanding there is not an actual interference with a **Charter** right at the time of the

application. The court stated at paragraph 18:

> " The Crown appeals as of right from the decision of the Court of Appeal. The questions of law that he raises are based on the dissenting judgments of Crête, C.J., and Beauregard, J. The first of these questions relates to the jurisdiction of Greenberg, J., in this case, given that the respondent only apprehended a contravention of his rights when a trial took place. However, since the filing of the notice of appeal, this Court has decided in the case of **Operation Dismantle Inc. et al. v. Canada et al.**, [1985] 1 S.C.R. 441; 59 N.R. 1, that s. 24(1) applies not only in the case of an actual interference with the guaranteed rights, but also when an apprehension of such an interference at a future trial can be established by an applicant. The appellant, therefore, abandoned this ground of appeal. He, however, submits that the respondent has neither established that his right to a fair and public hearing by an impartial tribunal (see s.11(d) of the **Charter**) was infringed or denied, or that such an interference may be apprehended."

It seems to me that if the Westray Inquiry proceeds to hear evidence prior to disposition of the charges laid against the four respondents there is a high degree of probability that these respondents' **s. 11(d)** fair trial interests on those charges will be infringed. In addition to the risks posed because of pre-trial publicity the right to silence of the respondents charged entitles them, for the reasons previously stated, to refuse to testify before the Inquiry. This will mean that incriminating testimony will likely be given that may go unanswered. The fact that the respondents' testimony, if they did testify before the Inquiry, could not be used against them in the prosecution of the provincial offences or criminal charges, if laid, does not really solve the problem created by the publicly conducted hearings. It is probable, given the nature and number of charges originally laid under the **Occupational Health and Safety Act** that the Crown has substantial evidence that emanates from miners who worked at Westray and from inspectors of the Department of Labour that will implicate the four respondents in wrongdoing. The evidence will be given at a public hearing. Judging from the past experience of the Grange Inquiry and the Marshall Inquiry there will be extensive media coverage of the hearings; to think otherwise would be unrealistic. If any of the respondents are

charged with criminal negligence the pre-trial publicity will probably limit the chances of obtaining an impartial jury should they elect trial by judge and jury.

The four respondents' right to silence will have been compromised even if they agree to testify, which they may be forced to do, as they may not want to leave unanswered allegations that are made at the public inquiry. They are in the coercive power of the state; the Crown will be able to gather evidence without the usual safeguards provided by the criminal law.

Justice Richard in taking evidence as Commissioner is not bound by the rules of evidence as it relates to criminal and quasi-criminal offences. Professor Ratushny in an article entitled "The Role of the Accused in the Criminal Process" published in **The Canadian Charter of Rights & Freedoms**: Commentary Edited by Walter S. Tarnopolsky and Gerald A. Beaudoin (1982) Carswell Company at pp. 364-365 referred to the risks run by a witness who testifies before a public inquiry who may be faced with criminal charges in the future. He recognized that the testimony could not be introduced at a subsequent criminal trial but pointed out that damage may be done "in other ways". He went on to elaborate as follows:

> " 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. <u>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 whose detailed protections may so easily be ignored. Nor are these merely theoretical problems.</u>" [Emphasis are Mine]

In the **Thomson Newspaper** case LaForest J. expressed concerns respecting the validity of the investigatory scheme provided under the **Combines Investigation Act** if it were in the context

of a criminal investigation. LaForest J. stated at p. 220:

> " The situation is, of course, quite different when the state seeks information, not in the course of regulating a lawful social or business activity, but in the course of investigating a criminal offence. For reasons that go to the very core of our legal tradition, it is generally accepted that the citizen has a very high expectation of privacy in respect of such investigations. The suspicion cast on persons who are made the subject of a criminal investigation can seriously, and perhaps permanently, lower their standing in the community. This alone would entitle the citizen to expect that his or her privacy would be invaded only when the state has shown that it has serious grounds to suspect guilt. This expectation is strengthened by virtue of the central position of the presumption of innocence in our criminal law. "

Counsel for the respondents in his factum made several insightful comments about the **Thomson Newspapers** decision insofar as it applies to the issues we have under consideration:

> " 130. Notwithstanding the fact that the Court in **Thomson Newspapers**, effectively split in its ruling on the validity of the Combines provisions there under review, it can be clearly seen from a careful reading of that case that the Westray Inquiry does not survive any of the tests enunciated in the judgments of Wilson, J., LaForest, J., L'Heureux-Dubé, J., and Sopinka, J. The attempted characterization by the Attorney General at para. 131 of his Factum of the various judgments in the **Thomson Newspapers** case, as favoring his argument is simply wrong. Wilson, J. and Sopinka, J. both held that the investigative scheme under review offended **s. 7** of the **Charter**, albeit for somewhat different reasons. Although L'Heureux-Dubé, J. was prepared to uphold the process it is obvious from several of her remarks that she would have reached a different conclusion had any of the compelled witnesses been actually charged. It is thus incorrect for the Steelworkers to say, at para. 166, of their Factum that L'Heureux-Dubé, J. had no problem with "compellability outside a trial context." Even the decision of LaForest, J. was premised upon the unique and inherent difficulties which confront Combines investigators seeking evidence to establish the apparent commission of that type of economic offence. There is nothing in his decision to suggest that he would support such intrusive investigative techniques in other contexts where evidence is more readily available through the use of traditional investigative procedures. It can only be concluded from all of the above that if this Inquiry convenes before the Labour Department prosecutions are concluded, it will subvert the normal limitations imposed on state investigatory powers and will

> thereby constitute a violation of the principles of fundamental justice guaranteed by **s. 7** of the **Charter**."

Although the dominant purpose of the Terms of Reference of the Order in Council appointing Justice Richard as the Commissioner to inquire into the Westray Mine Disaster is not to inquire into whether specific crimes were committed by named or identifiable individuals, it must be recognized that a significant aspect of the Inquiry's function is to determine the cause of the disaster. If the Commissioner finds there was culpable negligence he has a duty in his role as Special Examiner under the **Coal Mines Regulation Act** to file a copy of his report with the Attorney General. In effect, the state has empowered the Commissioner to conduct an inquiry under the **Public Inquiries Act** and the **Coal Mines Regulation Act** without being subject to the limitations imposed on the police when investigating a crime. He has the power to compel the attendance of witnesses and demand the production of documents. There are none of the safeguards present that an accused has the benefit of when the police are conducting an investigation with respect to the possibility that an offence carrying penal consequences has been committed. The integrity of the criminal process is in jeopardy in these circumstances.

The Attorney General relies on the **Thomson Newspaper** case as authority to allow the inquiry to proceed. In that case no one had been charged at the time when the orders to testify were issued; it was merely an investigation. That is a major factual difference between the situation in that case and the situation we have under consideration; the respondents have been charged with offences carrying penal consequences.

The Inquiry cannot be looked at in isolation as if the Province had not laid charges against four of the respondents. Justice Richard, as Commissioner empowered to inquire into the Westray Mine Disaster, although independent of government is, in effect, an agent of government (**A.G. Quebec & Keable v. A.G. Canada** 90 D.L.R. (3d) at p. 181). He has coercive powers to gather

evidence in a manner that neither the Department of Labour nor the prosecutor's office could do. That evidence, including the *viva voce* evidence, could be used in the prosecution of the offences under the **Occupational Health and Safety Act** subject to being excluded by the trial judge under **s. 24(2)** of the **Charter**. There is also the safeguard provided by **s. 13** of the **Charter**. Should we rely on those safeguards in these circumstances?

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. The **Salmon Royal Commission**, 1966, considered the conflict between the rights of the individual and the public interest in having matters of public concern properly investigated by a public inquiry. It recognized the problems created by the publicity generally accorded to inquiries. The Commission concluded:

> " The publicity ...which such hearings usually attract is so wide and so overwhelming that it would be virtually impossible for any person against whom an adverse finding was made to obtain a fair trial afterwards. So far no such person has ever been prosecuted. This again may be justified in the public interest because Parliament having decided to set up an inquiry under the Act has clearly considered whether or not civil or criminal proceedings would resolve the matter and has decided that they would not."

In England they have recognized the great difficulty a person has in obtaining a fair trial if adverse findings are made following a prior public inquiry. The English practice has not been followed in Canada; in fact, much the opposite. The Supreme Court of Canada has agreed that charges could be laid following findings made by a commissioner after a public inquiry (**O'Hara**).

In Ontario, following the Grange Inquiry into the deaths at the Hospital for Sick Children in Toronto, in which the Commissioner was prohibited by the Ontario Court of Appeal from assigning responsibility to any persons, and following the aborted Inquiry into activities of Ms. Patty

Starr, which was held by the Supreme Court of Canada to be a criminal investigation in the guise of a public inquiry, the Ontario Law Reform Commission initiated a study into the role of public inquiries in Ontario. The exhaustive study resulted in a thorough report entitled **Report on Public Inquiries, 1992**. In the introduction, after referring to the important role public inquiries have played in Canada, the Law Reform Commission stated at p. 1:

> " Despite their importance and their unique place in our system of government, scepticism, even cynicism, about the utility of public inquiries has always been present. In recent years the concern about whether the benefits of public inquiries outweigh their costs has increased. The utility of the public inquiry as a policy option should be viewed in relation to its alternatives. These vary with the diverse policy objectives of inquiries, from police investigations and prosecutions at one end of the spectrum, to legislative committees, task forces, and a wide variety of agencies and advisory bodies, at the other.
>
> If public inquiries are to continue to be an important policy instrument, it is clear that they will have to continue to evolve. As in other aspects of government, public inquiries must adjust to demands from the public for an increased voice in their deliberations, and for public inquiries to represent affected interests more effectively. Similarly, as with other aspects of government, the courts are playing an increasing role in supervising the conduct of public inquiries. The procedures adopted by public inquiries, especially those with a mandate to investigate suspected wrongdoing, have become increasingly judicialized, thereby raising concerns about the time, expense and, most importantly, the fairness, of such inquiries. On the other hand, there are public inquiries in which no issue of wrongdoing arises at all, and for these policy-making inquiries a totally different perspective may be appropriate."

These comments bear careful consideration.

The Report deals with the history and policy of public inquiries, the present law, the relationship between public inquiries and the Constitution including the division of powers and **Charter of Rights and Freedoms** issues, the case for reform of the law respecting public inquiries, the law in other jurisdictions and finally, the proposals for reform.

The Report reviews all the case law relevant to the constitutional division of powers and

Charter issues in the context of the creation and function of public inquiries. The Commissioners conclude there is a need for reform. Most significantly, after studying the same problems that face us in this case, the Commissioners made the following relevant recommendations:

> " 4. No person should be summoned by an inquiry to testify or produce evidence about any subject matter in relation to which an information has been laid against that person and has not been finally disposed of.
>
> 5. (1) Everyone summoned to testify before a public inquiry should have a statutory right to refuse to testify on the grounds that such testimony might incriminate him or her.
>
> (2) The right to refuse to testify in paragraph (1) should not be available to anyone being asked to testify about the execution of official governmental duties or to any person who has received from the proper prosecutorial authorities a grant of immunity from prosecution about the subject matter of the testimony."

The Commissioners explained the rationale for their recommendations at pp. 196-197:

> " It should be noted that, under our recommendations, it would be possible to compel a person to testify at a public inquiry if the person is granted immunity from a subsequent prosecution under the *Criminal Code*, R.S.C. 1985, C-46 or some other regulatory or disciplinary offence. A person who is compelled to testify might be sued civilly for any matter revealed in the subject matter of the testimony. In our view, however, subsequent criminal or quasi-criminal prosecutions impose the most unfairness on individuals, and not civil proceedings. We have concluded, therefore, that no immunity from subsequent civil proceedings should be granted.
>
> Granting a statutory right to refuse to testify would move public inquiries closer to the position in the United States. As discussed earlier in this report, the Fifth Amendment of the American Bill of Rights, Being Amendments I to X, XIII to XV, XXIV and XXVI to the Constitution has been interpreted to allow individuals to

> refuse to testify on the grounds that their testimony might incriminate them. Following the American example, our proposal would allow the right to refuse to testify to be displaced by a grant of immunity from prosecution. In our view, immunity from prosecution is a better solution than trying to ensure that the testimony is not used, directly or indirectly, in subsequent prosecutions. As discussed above, an attempt to regulate permissible derivative evidence would create formidable problems. Not only would there be a difficulty in defining derivative evidence, but there would be jurisdictional difficulties created by Ontario's inability to legislate in relation to the admissibility of evidence in criminal proceedings.
>
> We recognize that a right to refuse to testify would introduce a new element of uncertainty in the operation of public inquiries, and may frustrate their work when the two proposed exceptions are not met. Nevertheless, we believe that this is the most effective means of protecting individuals from self-incrimination. As a policy matter, it makes clear that, in light of the Charter and decisions such as *Starr v. Houlden*, governments will in some cases have to choose between conducting a public inquiry and pursuing subsequent prosecutions. Our proposals allows this choice to be made." [Emphasis mine]

I would also emphasize that the foregoing quotation indicates the commissioners view a grant of immunity as a better solution than trying to ensure testimony is not used in subsequent criminal proceedings. In other words, **s. 13** of the **Charter** may not be the best safeguard for persons in the position of the four respondents.

A substantial component of Justice Richard's mandate involves an inquiry into the causes of the explosion and, by implication, who may have been responsible. While this is within his mandate and within the scope of Provincial powers it is my opinion that the Inquiry should not proceed to public hearings before the charges against the four respondents have been tried or while the criminal investigation is ongoing and, if criminal charges are laid, until those trials are completed. The coercive power of the Province has been brought to bear on the respondents by the public inquiry process. Simultaneously the four respondents have been charged by the Province with offences possibly punishable by imprisonment if found guilty. And at the same time there is an ongoing criminal investigation with the very real possibility that some of the respondents will be

charged with criminal offences. These respondents have been put in the position that they will likely have to defend themselves, so to speak, in three proceedings. The cumulative effect of the unrestricted investigatory powers that the Commissioner has been clothed with by the **Public Inquiries Act** and his mandate as set forth in the Order in Council, combined with the likelihood of extensive publicity of the public hearings, will likely lead to an infringement of the four respondents' **Charter** rights to silence and a fair trial if the Inquiry proceeds to public hearings before these other matters are resolved. To proceed with the public inquiry puts the respondents' liberty interest at risk and therefore will infringe their **s. 7** right not to be deprived of their liberty except in accordance with the principles of fundamental justice. Procedural fairness dictates that they should not have to deal with the simultaneous exercise by the State of its coercive powers both under the **Public Inquiries Act** and by laying charges under the **Occupational Health and Safety Act** let alone being subject to a criminal investigation. There is a great deal of merit in a regime which requires a government to either lay charges or conduct a public inquiry but not to do both except with the safeguards proposed by the Ontario Law Reform Commission.

I do not agree with the position of the Attorney General's counsel that the application for **Charter** relief is premature. He relies on the decision of the Supreme Court of Canada in **Vermette**, supra. The facts and disposition by the Courts in the **Vermette** case are succinctly set out in the headnote ((1988), 84 N.R. 296):

> " **Summary:**
>
> An R.C.M.P. officer was charged with break and enter and theft of a list of Parti québécois members. A defence witness at the accused's jury trial made accusatory statements respecting the Parti québécois and some of its members. The Premier, in the National Assembly, publicly attacked the witness, defence lawyers, the federal government and the R.C.M.P. The extensive media coverage forced the trial judge to discontinue the trial. After a new trial was ordered the accused applied to quash the information and sought a stay of proceedings under s. 24(1) of the Charter of Rights and Freedoms.

> The Quebec Superior Court, in a judgment reported [1982] C.S. 1006; 1 C.C.C. (3d) 477; 30 C.R. (3d) 129; 3 C.R.R. 12, held that the exceptional publicity denied the accused's right to a full and complete defence and a fair trial under ss. 7 and 11(d) of the Charter. The court granted a stay of proceedings. The Crown appealed.
>
> The Quebec Court of Appeal, Crête, C.J.Q., and Beauregard, J., dissenting, in a judgment reported [1984] C.A. 466; 15 D.L.R. (4th) 218; 16 C.C.C. (3d) 532; 45 C.R. (3d) 341, dismissed the appeal. The Crown appealed.
>
> The Supreme Court of Canada, Lamer, J., dissenting, allowed the appeal, set aside the stay of proceedings and ordered a new trial. The court held that the stay of proceedings was premature; the accused's right to a fair hearing before an impartial jury could only be determined when the jury was selected."

Justice LaForest writing for the majority stated:

> " [20] As regards the motion based on the provisions of the **Charter**, I am completely in agreement with the reasons given by the dissenting judges. In my view, a stay of proceedings was, in this case, premature. It is only at the stage when the jury is to be selected that it will be possible to determine whether the respondent can be tried by an impartial jury. This does not therefore involve substituting our opinion for that of the judge. As Beauregard, J., notes, there is no evidence indicating that it will be impossible to select an impartial jury in a reasonable time. This is rather a matter of speculation."

While the finding in that case seems on its face to apply to the situation we have under consideration, the case is distinguishable on its facts. In **Vermette**, as in the **Kenny** case, the damage had already been done before the application for **Charter** relief was made; in **Vermette** the Premier's tirade in the House and in **Kenny** the vivid televised testimony of a victim of sexual assault. The only options open to the trial judges were either to stay the proceedings and thus prevent the trials from proceeding or refuse to do so and deal with the **Charter** issues raised at the time of the jury selection.

In the course of its reasons in the **Vermette** case, the Supreme Court of Canada reaffirmed its view as stated in **R. v. Corbett**, (1988) 85 N.R. 81 that a jury has an ability to disabuse

itself of information it is not entitled to consider in determining if the Crown has proven the case against an accused beyond a reasonable doubt. Mr. Justice LaForest , writing for the Court, in dealing with the question of when a **Charter** application asserting an accused cannot obtain an impartial jury should be made, stated at p. 303:

> " [21] In deciding the question, one must not, in my view, rely on speculation. As the Court of Appeal of Ontario observed in **R. v. Hubbert** (1975), 29 C.C.C. (2d) 279, at p. 289 (affirmed by this Court: [1977] 2 S.C.R. 267; 15 N.R. 139), "There is an initial presumption that a juror ... will perform his duties in accordance with his oath", and the fact that he may have read about the case through the media is by and large unimportant; see **R. v. Makow** (1974), 20 C.C.C. (2d) 513, at pp. 518-519 (B.C.C.A.); **R. v. Kray** (1969), 53 Cr. App. R. 412, at p. 414, both cited with approval in **Hubbert**. In an extreme case (and the present certainly qualifies), such publicity should lead to challenge for cause at trial, but I am far from thinking that it must necessarily be assumed that a person subjected to such publicity will necessarily be biased."

These oft repeated statements as to the ability of a jury to disabuse itself of all information other than the evidence tendered at trial are, of course, based somewhat on speculation; we do not know what goes on in the mind of a juror. The law merely presumes a juror will abide by his or her oath to decide the case on the evidence tendered at trial and in accordance with the trial judge's instructions on the law and by implication on nothing else. It is, however, widely recognized that triers of fact bring to their task of adjudication their unconscious biases.

There is a temptation to apply **Vermette** and simply say any **Charter** infringement issues can be dealt with at the trial on the charges under the **Occupation Health and Safety Act** . While such a course of action might be satisfactory to deal with the effect of pre-trial publicity on the respondents right to a fair trial, it would not take into account the unfairness that is created by the Commissioner's ability to conduct an investigation into the respondents' involvement, if any, leading to the explosion without the respondents having the protection of normal criminal law procedures

relating to investigations of offences carrying the possibility of penal consequences. What is in issue if the Inquiry proceeds before the trials is not only the effect of pre-trial publicity but also the infringement of the respondents' right to silence and the state's potential use of the Inquiry as an investigative tool that is not limited by the standard procedural safeguards imposed on the state when investigating the possibility of criminal offences having been committed. We cannot overlook the fact that there is an ongoing criminal investigation and that the four respondents charged already have their liberty interest at risk..

There is another effect that ought to be considered. If the Inquiry is allowed to proceed, and depending how events unfold at the Inquiry hearings, the proceedings against the four respondents under the **Occupational Health and Safety Act** and any criminal charges that might be laid could be derailed by reason of **Charter** infringement.

In **Canadian Broadcasting Corporation v. Dagenais, et al**, O.C.A. No. C13873 dated December 18, 1992 (unreported) the Ontario Court of Appeal granted an injunction to prevent the showing on television in Ontario and part of Quebec of a film "The Boys of St. Vincent" on the ground that televising it as proposed could put at risk the fair trial interest of several Christian Brothers charged with sexual offences against young males in their care. The Court rejected the notion that, on the facts of the case, the availability at trial of the challenge for cause provision of the **Criminal Code** and a careful instruction on the law by the trial judge would be sufficient to overcome the effect on jurors of the very dramatic and damaging film. The Court stated at pp. 13-14:

> " The learned motions court judge concluded that such procedures would not be effective. There had already been widespread publicity of similar conduct alleged against other Christian Brothers in Newfoundland and elsewhere, and the matter had received such widespread attention that, in the view of the learned motions court judge, it would make it difficult for the four respondents to be tried by jurors who had not been tainted by such publicity. As I read her reasons, she concluded that by showing the

> film now, before the trials of the four respondents had been concluded, there was a real and substantial risk that it would be impossible to empanel an impartial jury. If the film had been shown when proposed, and the judge presiding over the trials of the four respondents were of like mind, the charges would be stayed and the respondents discharged without a trial. It is in the public interest, and in the interest of victims of crime, that those charged with criminal offences should be tried according to law and, if found not guilty, discharged, and if found guilty, sentenced.
>
> The risk of denying the respondents a fair trial far outweighs any inconvenience which the appellant, Canadian Broadcasting Corporation, may suffer by not airing the film when it proposed to do so. No pressing need was shown why the film had to be aired before the conclusion of the four trials. The film will still be timely when it is shown at a later date and the interests of justice dictate postponing its airing rather than running the risk attendant upon showing it at the time proposed.
>
> In order to assure the four respondents a fair trial, the learned motions court judge had a broad discretion and I cannot say that she erred in the exercise of her discretion in directing that the airing of the film be postponed."

I mention this recent decision as it re-enforces my view that it is not only in the interest of persons accused of offences but also in the public interest not to jeopardize criminal or quasi-criminal trials if it can be avoided. Secondly, the challenge for cause provisions of the **Code** are not necessarily the best answer for the problem of pre-trial publicity when other options are available.

The Westray Inquiry is investigating the same events as will be the focus of the trial on the **Occupational Health and Safety Act** offences and which are the subject of the R.C.M.P. investigation. In short, a substantial component of the Inquiry's mandate is to ascertain if the explosion was caused by carelessness or incompetence of Westray personnel which would clearly include the respondents, one of whom is the mine manager, another the underground manager and others performing lesser supervisory roles. The Commissioner is, of course, also investigating the role of mines' inspectors and the many other areas as authorized by the Order in Council. Considering the fact that the Inquiry will be investigating matters which are already the subject of

charges under the **Occupational Health and Safety Act** and of investigation by the R.C.M.P. with respect to the possibility of criminal charges being laid there is a very real risk that the investigation by the Commissioner if it proceeds forthwith to public hearings will result in the infringement of the four respondents' **s. 7 Charter** right to liberty and right to silence as well as their right to a fair trial as guaranteed by **s. 11(d)**.

We are not faced with the limited options available to the trial judge in the **Vermette** case; we can stay the Inquiry until the criminal investigation is concluded, until the trials of the four respondents for the provincial offences are concluded and if criminal charges are laid against any of the respondents until those trials are concluded. This would ensure that the respondents get fair trials; I can see no valid reason to run a risk in this respect.

Scope of Appeal Court's Jurisdiction

Although the issue was not raised by any of the parties to the appeal, I feel it is prudent to state why I am of the opinion the Court has jurisdiction to grant a temporary stay of proceedings. The Attorney General in his Factum suggested this was an appropriate remedy rather than striking down the Order in Council if the Court found it was not *ultra vires* and if it were found there was a **Charter** infringement. I have decided that the Order in Council should not be struck down; it is a valid exercise of provincial powers.

The **Charter** issues are before us because, following the filing of a Notice of Appeal, the respondents filed a Notice of Contention:

> " that the judgment appealed from should be affirmed on grounds in addition to those given by The Honourable Chief Justice C.R. Glube and that they are entitled to additional or different relief or disposition than that given by the judgment appealed from.
>
> AND TAKE NOTICE that the grounds of contention are:
>
> 1. THAT Order in Council No. 92-504 violates the rights of the Respondents guaranteed by ss. 7, 8 and 11(d) of the Canadian Charter of Rights and

Freedoms ("the Charter");

2. THAT Order in Council No. 92-504 violates the rights of those Respondents facing provincial prosecution or subject to Criminal Code investigation to remain silent as guaranteed by s. 7 of the Charter;

3. THAT Order in Council No. 92-504 violates the rights of those Respondents facing provincial prosecution or subject to Criminal Code investigation to be secure against unreasonable seizures as guaranteed by s. 8 of the Charter;

4. THAT Order in Council No. 92-504 violates the rights of those Respondents facing provincial prosecution or subject to Criminal Code investigation to be presumed innocent as guaranteed by ss. 7 and 11(d) of the Charter by mandating the Commissioner to make findings of, *inter alia*, causation, neglect, culpable negligence, and whether there was compliance with applicable statutes or regulations, and, further, by authorizing the making of such findings in the absence of appropriate rules of evidence and procedure and without regard to the possible prejudicial effect of such findings in the context of later prosecution;

5. THAT Order in Council 92-504 violates the rights of those Respondents at risk for Criminal Code prosecution to be presumed innocent as guaranteed by s. 7 of the Charter, and is *ultra vires* the Province of Nova Scotia, by failing to prohibit or curtail the publication of evidence which would tend to incriminate those persons and by otherwise interfering with the evidentiary and procedural protections guaranteed to an accused pursuant to the Criminal Code of Canada;

6. THAT Order in Council 92-504 violates the rights of the Respondents facing provincial prosecution or subject to Criminal Code investigation to a fair trial as guaranteed by s. 11(d) of the Charter by failing to subordinate the Inquiry to all pending or potential prosecutions in circumstances where the scope of the public inquiry substantially overlaps with matters which are the subject of prosecution and an ongoing police investigation;

7. THAT, in the alternative, the learned Chambers Judge

> erred by failing to exercise her discretion to prevent the apprehended breach of the Respondents' Charter rights through the issuance of an injunction or stay preventing the commencement of hearings pursuant to Order in Council No. 92-504 until the conclusion of all quasi-criminal or criminal prosecutions of the Respondents or any of them.
>
> AND that the Respondents will ask that the decision appealed from be upheld or, in the alternative, that this Honourable Court should issue an injunction or stay to prevent the commencement of the Westray Public Inquiry until the conclusion of all quasi-criminal or criminal prosecutions against the Respondents or any of them."

Civil Procedure Rule 62.09(1) provides for the right of a respondent who does not want to cross-appeal to file a notice of contention:

> " 62.09 (1) A respondent who has not cross-appealed and who intends to contend on the appeal that
>
> (a) the judgment appealed from should be varied in any event, or
>
> (b) the judgment appealed from should be affirmed on grounds other than those given by the court appealed from, or
>
> (c) he is entitled to other or different relief or disposition than that given by the judgment appealed from,
>
> shall, within fifteen days from service of the notice of appeal on him, file with the Registrar and serve on the appellant and any other party affected by the contention, a notice of contention specifying the grounds thereof."

As can be seen the Notice of Contention filed by the respondents tracks the language of this rule. The respondents are within Clause 1(c).

In the Originating Notice which commenced this proceeding the respondents in addition to seeking declarations respecting the Order in Council and breaches of their **Charter** rights sought an injunction to prevent the Commissioner from performing any of the functions authorized by the Order in Council. Therefore, the request for injunctive relief was raised by the pleadings.

In her decision the learned Chief Justice stated at p. 54:

> " Although the **Charter** arguments are very appealing, and counsel for the applicants were quite persuasive, having found the Order in Council unconstitutional, it is inappropriate to rule on the **Charter** issues as they are moot. The **Charter** arguments made under s. 7, 8 and 11(d) are dismissed."

For this Court to have jurisdiction it is necessary to consider whether Chief Justice Glube had jurisdiction to deal with the application for **Charter** infringement rather than the provincial court judge who will preside over the trials of the **Occupational Health and Safety Act** charges. In **Mills v. The Queen** (1986), 26 C.C.C. (3d) 481, 29 D.L.R. (4th) 161, 52 C.R. (3d) 1, [1986] 1 S.C.R. 863 the Supreme Court of Canada unanimously held that the trial court is a court of competent jurisdiction where it has jurisdiction conferred by statute over the offence, the person and powers to make the order sought. In this case insofar as I am of the opinion that the proceedings before the Commissioner should be stayed temporarily one must ask the question whether it is appropriate for the Trial Division or the Appeal Division of this Court to consider granting relief when the jurisdiction might properly be in the provincial court judge presiding over the trial of the provincial offences. I have concluded that Chief Justice Glube did have jurisdiction. The decision of the Supreme Court of Canada in **Rahey v. The Queen** (1987), 33 C.C.C. (3d) 289, 39 D.L.R. (4th) 481, [1987] 1 S.C.R. 588, 57 C.R. (3d) 289 held that while the trial court is, as a general rule a court of competent jurisdiction, the superior court should also have constant, complete and concurrent jurisdiction for an application under **s. 11(d)** of the **Charter**. I am satisfied that Chief Justice Glube had jurisdiction to consider the **Charter** application, particularly in view of the fact that the charges had not been laid against four of the respondents at the time the application was initiated (**Rahey v. The Queen**, supra per LaForest J.).

Being satisfied that Chief Justice Glube had jurisdiction it follows that this court has jurisdiction to grant any remedy that was available to her. The powers of the appeal court are very broad; **Civil Procedure Rule 62.23** provides:

" 62.23 (1) Without restricting the generality of the jurisdiction, powers and authority conferred on the Court by the Judicature Act or any other enactment the Court may:

(a) amend, set aside or discharge any judgment appealed from except one made in the exercise of such discretion as belongs to a Judge;

(b) draw inferences of fact and give any judgment, allow any amendment, or make any order which might have been made by the court appealed from or which the appeal may require;

(c) make such order as to the costs of the trial or appeal as it deems fit;

(d) direct a new trial by jury or otherwise, and for that purpose order that the judgment appealed from be set aside;

(e) make any order or give any judgment which the appeal may require.

(2) The powers of the Court may be exercised in respect of all or any part of the judgment or proceedings appealed from, notwithstanding that the notice of appeal states that part only of the judgment is complained of, and may be exercised in favour of all or any of the parties or other persons interested in the appeal, although they have not complained of the judgment appealed from.

(3) On or after hearing an application for leave to appeal the Court, if it decides to grant leave to appeal and if the merits of the appeal have been fully argued, may decide the appeal without further argument."

In **Rahey**, the Supreme Court of Canada, with respect to offences to be tried in a provincial court, stated that the superior court, notwithstanding it has jurisdiction under **s. 24** of the **Charter**, should decline to exercise this discretionary jurisdiction unless, in the court's opinion, given the nature of the violation and other circumstances, the superior court is more suited than the provincial trial court to assess and grant a remedy that is just and appropriate. In **Re Krakowski and The Queen** (1983), 4 C.C.C. (3d) 188; 41 O.R. (2d) 321 the Ontario Court of Appeal, with respect to a case to be tried in the Provincial Court, stated that a superior court should only exercise

its discretion to grant **Charter** relief if there are special circumstances in the case that warrant the same. The **Charter** infringement alleged in that case related to the right to be tried within a reasonable time as guaranteed by **s. 11(b)** of the **Charter**. The preference of the courts is that the trial court deal with **Charter** applications at the time of trial.

The four respondents pleaded not guilty to the **Occupational Health and Safety Act** charges the day before the hearing of this appeal. Would it be better to leave the **Charter** issues to the provincial court judge who presides over the trial? I think not. If we decline to grant relief the Inquiry could proceed before the trials commence; that would likely impinge on the four respondents fair trial interests for the reasons already indicated. Therefore, it is appropriate that we consider exercising our jurisdiction rather than defer to the trial judge to deal with the issues when the trial begins on April 19, 1993.

Other than to argue that the granting of **Charter** relief by this court would be premature, based on the decision of the Supreme Court of Canada in **Vermette**, none of the parties to the appeal suggested that this Court does not have jurisdiction or that it should decline to exercise its jurisdiction if we are of the opinion there is a present or apprehended **Charter** breach.

I am mindful of the admonition in the **Rahey** and **Krakowski** cases to which I have referred but the circumstances are such that the issue of a stay should be addressed by this court now. In my opinion there are special circumstances that dictate that we should exercise our jurisdiction to postpone the Inquiry for if we did not do so the Inquiry could proceed immediately to conduct public hearings into events that will be in issue at the trials of the **Occupational Health and Safety Act** offences and which are the subject of the ongoing criminal investigation; relief at trial would be too late. I am also of the opinion that it would be inappropriate to refer the matter of relief to the Trial Division. It is not in the public interest or in the fair trial interests of the respondents to defer making a decision.

Charter Relief

It is necessary to address the issue whether the relief I propose to grant to the respondents is available under **s. 24(1)** of the **Charter. Section 24(1)** states:

> " 24. (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances."

Section 24(1) of the **Charter** gives the court a broad discretionary power to fashion relief for infringement of a **Charter** right. The Supreme Court of Canada in **Operation Dismantle**, supra, has stated that relief can be granted for apprehended breaches.

In **Quebec Association of Protestant School Boards et al. v. Attorney General of Quebec et al. (No. 2) (1982)**, 140 D.L.R. (3d) 33, (Que. S.C.), affd 1 D.L.R. (4th) 573 (Que. C.A.), affd 10 D.L.R. (4th) 321, [1984] 2 S.C.R. 66, 9 C.R.R. 133 the Supreme Court of Canada by implication, affirmed the ruling of the Quebec Court that a declaration may be sought by those who apprehend future violation of their rights as well as by victims of infringements that have already occurred at the time of the **Charter** application.

For the reasons I have given there is a high degree of probability of an infringement of the four respondents fair trial interests as guaranteed by the **Charter** if the Inquiry proceeds to public hearings before the trials are completed and while there is an ongoing criminal investigation.

In **Canadian Broadcasting Corporation v. Dagenais, et al.**, supra, the Ontario Court of Appeal granted injunctive relief for an apprehended breach.

The superior courts have a supervisory role with respect to the administration of justice in the Province. The superior courts have a responsibility to ensure that tribunals created by the Legislature or Commissioners empowered by Order in Council act in accordance with the law. The essence of the four respondents' **Charter** rights is that they be dealt with fairly as they appear to be

the subject of an ongoing criminal investigation and are facing charges under the **Occupational Health and Safety Act** for which they could, if found guilty, be sentenced to a term of imprisonment of up to one year; the coercive power of the state has clearly been brought to bear on them and none of the statutory safeguards are in place to limit the power of the Commissioner. In my opinion their **Charter** rights of silence and right to a fair trial will be infringed if the Inquiry proceeds forthwith to public hearings. Fairness dictates that the four respondents charged are entitled to have these charges dealt with before the Inquiry commences public hearings. As Justice McLachlin stated in **Hebert**, supra, the **Charter** "has made the rights of the individual and the fairness and integrity of the judicial system paramount." These paramount objectives can be achieved by granting a temporary stay.

The Federal Court of Appeal granted somewhat equivalent relief in **Tyler v. Minister of National Revenue**, [1991] 1 C.T.C. 13, 91 D.T.C. 5022, 120 N.R. 140. That case dealt with issues similar to those confronting us. The court held that requiring compliance with a request of the minister under **s. 231.2(1)(a)** of the **Income Tax Act**, S.C. 1970,71,72, Chapter 63 to provide the minister with signed statements of income assets, liabilities and living expenses may result in a deprivation of liberty and security by reason of the provisions of the subsection. The court concluded that compliance with the minister's request in a tax context alone would not amount to a breach of fundamental justice since there was no suspect nor an accused. However, the court held that providing those financial statements to the police when the taxpayer was already facing charges under the **Narcotic Control Act** and the **Criminal Code** for possession of property derived from trafficking in narcotics would amount to conscripting the individual to give evidence against himself in a criminal proceeding contrary to the principles of fundamental justice. The court concluded that the taxpayer would thereby be indirectly deprived of his right as an accused to remain silent. The court concluded that in the circumstances the appropriate remedy was to order the minister to refrain

from communicating to the police any of the contents of the information requested under the subsection so long as the charges remained outstanding.

In the case we have under consideration once public hearings are convened by the Commissioner the testimonial evidence will be public knowledge and available to both the Department of Labour and the R.C.M.P.

In reaching my opinion that a temporary stay of the public hearings should be granted I have attempted to balance the interests of the state in determining what caused the explosion and how similar tragedies might be avoided in the future against the four respondents' **Charter** rights to silence and to fair trials. As the respondents' liberty is at risk the interests of those individuals must prevail over those of the state. This can be accommodated by the postponement of the Inquiry. While that is not entirely desirable the interest of the state in obtaining the report and recommendations of the Commissioner must give way to the **Charter** rights of the four respondents charged with offences.

I considered whether it would be fair and reasonable to allow the Inquiry to proceed and direct the Inquiry not to delve into matters relating to the events out of which the charges against the four respondents arise. I have concluded that would be impractical and could involve the constant supervision of the Supreme Court as recognized by Chief Justice Glube in that part of her decision in which she held **s. 67(e)** to be unconstitutional where she stated:

> " To allow the Westray Inquiry to continue under the present terms of reference would be to run a parallel inquiry with the police investigations relating to the possible criminal charges and it would also provide information to the police and to the Department of Labour relating to the charges already laid against the applicants under the **Health and Safety Act**. Proceeding with the Westray Inquiry could produce derivative evidence which would be obtained by its coercive power of compelling persons to testify, with sanctions if the person refuses. Without the Westray Inquiry, neither the criminal investigators nor the Department of Labour could coerce any of the applicants to give statements. To do so, would breach their basic constitutional rights which have been codified in the **Charter**.

> Short of the court being involved on a daily or even an hourly basis, there is no way to adequately control the process of the evidence to avoid this concern under the existing terms of reference. The court cannot take on the task of monitoring the Westray Inquiry. In a large measure, proceeding under the present terms of reference would result in a trial without the procedural and evidentiary protection which would be available to the applicants in a court of law."

While I do not agree that the Order in Council or **s. 67(e)** of the **Coal Mines Regulation Act** are *ultra vires* the Province I am in full agreement with Chief Justice Glube's comments that there could not be adequate control of the evidence given at public hearings. A significant component of the Inquiry's mandate involves inquiring into the cause of the explosion which of necessity will investigate the role played by the management and supervisory personnel, including the respondents. It is possible that the Inquiry could delve into the role of the mine inspectors but that would inevitably touch on the conduct of the respondents who have been charged. An inquiry into the role of the inspectors would necessitate the respondents having counsel at the Inquiry hearings to cross-examine inspectors and miners if they implicated the respondents as being responsible in whole or in part for the explosion. The coercive power of the State under these circumstances is oppressive. The respondents are defending themselves on the charges under the **Occupational Health and Safety Act** and should not have to engage, at the same time, counsel to protect their interests before the Inquiry.

I have considered other alternatives. Could Justice Richard in the meantime inquire generally into the adequacy of the present Legislation respecting the regulation of mines? I have concluded that to do so would not be cost effective; the Commissioner not having heard the evidence of what took place leading up to the explosion would be acting in a vacuum without any factual background against which to make a proper assessment as to the adequacy of the present law. I have considered whether in camera sessions or publication bans or a combination of the two would be

sufficient safeguards to allow the Inquiry to proceed. That solution does not respond to the anticipated breaches of the respondents' right to silence if the hearings proceed. I also agree with Chief Justice Glube that public inquiries should be public.

Delaying the filing of the Commissioner's report until after the trials does not answer the problem as the public hearings would have gone ahead in the meantime with the consequent infringement of the respondents' **Charter** rights. Most importantly the Commissioner's mandate cannot be fulfilled until he delves into the cause of the explosion and that can only be done after the respondents' trials. The evidence tendered at the trials of the respondents may answer some of the questions which could reduce the scope of the Inquiry. However, the trials will not provide all the answers. If criminal charges are laid these trials will no doubt generate extensive evidence relating to the disaster.

Considering the apprehended risk of the respondents' fundamental **Charter** rights if the Inquiry proceeds to public hearings before the completion of the trials and the criminal investigation and contrasting those rights to the public interest in proceeding forthwith it is my opinion the Inquiry should be temporarily stayed. The Province's interest with respect to the regulation of coal mines can be adequately addressed at a later date.

In conclusion, procedural fairness to persons who appear to be subject to criminal investigations and are charged with offences that puts their liberty at risk falls within the scope of the rights guaranteed by the **Charter**. If the Westray Inquiry were to proceed with public hearings while the criminal investigation is continuing and prior to the disposition at trial of the charges under the **Occupational Health and Safety Act** it would infringe those respondents' **Charter** right to silence and to a fair trial as guaranteed by the **Charter.** It is recognized that a superior court has jurisdiction under **s. 24(1)** of the **Charter** to grant a stay of proceedings. That being the case there can be no doubt that a temporary suspension of the Inquiry in the special circumstances of this cases

is a remedy available under **s. 24(1)**. I would therefore grant a stay of the Inquiry pending completion of the trials of the offences under the **Occupational Health and Safety Act** and the criminal investigation. And, if criminal charges are laid, until the completion of those trials. I am assuming a decision will be made within the next month or two whether or not to lay such charges.

Summary

I would allow the appeal and quash the judgment and order of Chief Justice Glube which declared the terms of Order in Council No. 92-504 establishing the Westray Inquiry and **s. 67(e)** of the **Coal Mines Regulation Act** *ultra vires* the Province of Nova Scotia. In my opinion the Order in Council and **s. 67(e)** are *intra vires* the Province. In my opinion a stay should issue requiring the Commissioner of the Westray Inquiry to postpone public hearings until:

(a) the charges against four of the respondents under the **Occupational Health and Safety Act** are disposed of by a trial court or stayed; and

(b) criminal charges (if any are laid against any of the respondents arising out of the explosion of May 9, 1992) are disposed of by a trial court or a decision is made not to lay any criminal charges against any of the respondents.

J.A.

Concurred in:

Clarke, C.J.N.S.

Matthews, J.A.

S.C.A. No. 02775

IN THE SUPREME COURT OF NOVA SCOTIA

APPEAL DIVISION

BETWEEN:

THE HONOURABLE MR. JUSTICE K. PETER RICHARD, in his capacity as a Commissioner under the *Public Inquiries Act* and as a Special Examiner under the *Coal Mines Regulation Act*, appointed pursuant to Order in Council No. 92-504, dated the 15th day of May, 1992

Appellant

- and -

THE ATTORNEY GENERAL OF NOVA SCOTIA, representing Her Majesty the Queen in right of the Province of Nova Scotia

Appellant/Intervenor

- and -

UNITED STEELWORKERS OF AMERICA, LOCAL 9332

Appellant/Intervenor

- and -

WESTRAY FAMILIES GROUP

Appellant/Intervenor

- and -

THE TOWN OF STELLARTON

Appellant/Intervenor

- and -

GERALD J. PHILLIPS, ROGER PARRY, GLYN JONES, ARNOLD SMITH, ROBERT PARRY, BRIAN PALMER, and KEVIN ATHERTON

Respondents

REASONS FOR JUDGMENT BY:

HALLETT, J.A.