

CRIME INQUIRIES AND CORONERS INQUESTS: INDIVIDUAL PROTECTION IN INQUISITORIAL PROCEEDINGS

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"Truth, like all other good things, may be loved unwisely—may be pursued too keenly—may cost too much." (Knight Bruce V.C., in *Pearse v. Pearse* (1846), 1 DeG. and Sm. 12, at 28).

I. INTRODUCTION

Certain features of the coroner's inquest and other provincial inquiries of an inquisitorial nature have long been the focus of concern. Such inquiries are not, and cannot be, criminal investigations, but their findings may result in criminal charges being laid. There is no "accused", so any person may be subpoenaed and compelled to testify or be held in contempt. The witness may seek the protection of the Canada Evidence Act to prevent his testimony from being used in subsequent criminal proceedings, but that may not prevent the inquisitorial proceedings from being used as a process of discovery.

Until recently, most of the concern was directed at the coroner's inquest and various reforms have either been implemented or proposed. However, the Quebec Crime Inquiry has raised in a new and more acute form the individual protection problems inherent in inquisitorial proceedings, in particular, the privilege against self-incrimination and the effects of prejudicial publicity. The Supreme Court of Canada in *Di Iorio v. Montreal Jail Warden*¹ upheld the constitutionality of such a provincial inquiry but, it is submitted, did not satisfactorily deal with the basic problems concerning the rights of individuals. This paper will examine some of these problems which are crucial to the judicial process and the delicate balance to be maintained between the pursuit of truth and the rights of the individual.

II. THE SUPREME COURT OF CANADA AND THE DI IORIO CASE

In 1972 the Quebec Lieutenant Governor in Council ordered the

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¹ *Di Iorio v. Montreal Jail Warden*, 35 C.R.N.S. 57, 8 N.R. 361, 73 D.L.R. (3d) 491 (S.C.C. 1976).

Quebec Police Commission to make an inquiry^{1a} into:

the activities of any organizations or systems, including their ramifications and the persons involved, where such organizations or systems operate in illegal gaming and betting, usurious loan practices (shylocking), extortion, illegal trafficking in drugs and narcotics, counterfeiting, commercial fraud, fraudulent bankruptcies, arson, fraudulent stock manipulation or promotion, fraudulent dealings of corporations, illegal pressure on businessmen or officers or members of associations or corporations to control them or to extort from them money or property, theft of bonds, theft of stamps and precious metals, theft and dismantling of automobiles, sale of stolen goods, prostitution, illegal stills and distribution of adulterated liquor, illegal consumers exploitation, blackmail, intimidation and corruption, and illegal or fraudulent obtention of any permits issued by or decisions made by any public body. . . .²

The Commission was also required to submit a written report of its findings to the Quebec Attorney General on or before December 31, 1975. Di Iorio and Fontaine, two men who were called as witnesses before the Commission, refused to testify. They were found guilty of contempt and were sentenced to one year in jail by the Commission pursuant to the provisions of the Quebec Code of Civil Procedure.³ When these witnesses applied for a writ of *habeas corpus*, their petition was dismissed by the Court of Queen's Bench whose decision was upheld by the Quebec Court of Appeal. On appeal to the Supreme Court of Canada, the judgment of the Quebec Court of Appeal was affirmed by a majority of seven to two.⁴

A. *The Constitutional Issue*

The main constitutional issue raised before the Supreme Court of Canada concerned the legislative power of the province to create the crime inquiry in the way it did. The Court held that this was a matter which fell within the province's jurisdiction to legislate in relation to "The Administration of Justice in the Province." The judgments reveal agreement on two points at least. First, the Court declared that the wisdom or desirability of creating the inquiry was not a matter for the Court to consider.⁵ Secondly,

^{1a} Pursuant to The Police Act, S.Q. 1968 c. 17, s. 19 [*re-enacted* S.Q. 1971 c. 16, s. 4; *as amended* by S.Q. 1972 c. 16, s. 1] which provides that the Police Commission shall make an inquiry, whenever requested to do so by the Lieutenant-Governor in Council, respecting any aspect of crime. The section also makes provision for an inquiry into the activities of an organization or system, its ramifications and the persons involved, to the extent prescribed, whenever there is reason to believe that in the fight against organized crime or terrorism and subversion it is in the public interest to order such an inquiry.

² O.C. 2821/72 dated September 27, 1972, as cited in translation in the judgment of Dickson J., *supra* note 1, at 73-74, 8 N.R. at 382, 73 D.L.R. (3d) at 522-23.

³ S.Q. 1965 c. 80, s. 51.

⁴ Separate judgments were delivered by Pigeon J. (Martland, Judson and Ritchie JJ. concurring), Dickson J. (Martland, Judson, Ritchie and Spence JJ. concurring), Beetz J., and Laskin C.J.C. (dissenting) (de Grandpré J. concurring).

⁵ *Supra* note 1. *E.g.*, Dickson J. at 82, 8 N.R. at 392, 73 D.L.R. (3d) at 529-30; Beetz J. at 98, 8 N.R. at 409, 73 D.L.R. (3d) at 543; Laskin C.J.C. at 99, 8 N.R. at 411, 73 D.L.R. (3d) at 495.

the Court held that if a province had the power to establish a crime inquiry, it could also vest that inquiry with the power to compel testimony and to punish for contempt.⁶

It is evident that the resolution of the constitutional issue in *Di Iorio* was no simple or straightforward task. Most of the authorities did not provide much direct assistance on the basic problem before the Court. The judgments reflect valid and arguable differences of opinion about the scope of the provincial power over the administration of criminal justice, the federal power over "Criminal Law" and "Procedure in Criminal Matters," the nature of the Quebec crime inquiry, and its impact as a coercive investigatory proceeding.

Obviously, there are similarities between the inquiry and other public inquiries, federal or provincial, such as the coroner's inquest, the fire marshall's inquiry, and others,⁷ in terms of their proceedings, powers and impacts upon criminal investigation and prosecution and individual protections. However, slightly differing views were expressed in the various judgments on the relevance and utility of cases on coroners' inquests and other inquisitorial proceedings.

Pigeon J. took the position that the decision of the Supreme Court of Canada in *Faber v. The Queen*⁸ holding that a Quebec coroner's inquest was not a "criminal", but a "civil" proceeding for the purposes of jurisdiction to issue prohibition against a coroner, was "conclusive against the appellants' contention that the matter is 'criminal' because the inquiry was concerned with criminal activities".⁹ If an inquiry directed essentially to finding out who was the author of a crime is not concerned with "criminal matters", which is what was held on the facts in the *Faber* case discussed below, neither, he said, is an inquiry gathering information to identify persons engaged in organized crime and describing their activities. Although the constitutional question was not raised in *Faber*, the decision on forensic jurisdiction must be equally conclusive on the constitutional issue.¹⁰ Pigeon J. felt that:

in s. 91(27) of the B.N.A. Act, the scope of 'Criminal Law' and 'Procedure in Criminal Matters' is narrowed by the allocation to the provinces of jurisdiction over the 'Administration of Justice' in all matters civil and

⁶ *Supra* note 1. *E.g.*, Laskin C.J.C. at 110, 8 N.R. at 423, 73 D.L.R. (3d) at 506; Dickson J. at 76-79 and 91-93, 8 N.R. at 386-89 and 401-404, 73 D.L.R. (3d) at 525-27 and 537-39.

⁷ *See, e.g.*; *Regina v. Quebec Municipal Commission*, note 110 *infra* (Municipal Commissions); *Regina v. Wolfe*, [1965] 1 C.C.C. 343, 48 D.L.R. (2d) 608 (B.C.S.C.) (Immigration inquiry); *Rex v. Mazerall*, [1946] C.R. 511, 86 C.C.C. 137, 4 D.L.R. 336, (Ont. H.C.) and [1946] C.R. 762, 86 C.C.C. 221, 4 D.L.R. 791 (C.A.) (Royal Commission under the Federal Inquiries Act); and Ratushny, *Is There a Privilege Against Self-Crimination in Canada?*, 19 MCGILL L.J. 1 (1973).

⁸ [1976] 2 S.C.R. 9, 32 C.R.N.S. 3, 6 N.R. 1; *fol'd* in *Regina v. Johansen*, [1976] 2 W.W.R. 113, 28 C.C.C. (2d) 524 (*sub nom* *Re Morris-Jones and Regina*), 67 D.L.R. (3d) 466.

⁹ *Supra* note 1, at 69, 8 N.R. at 377, 73 D.L.R. (3d) at 518. (This is a complete reversal from Pigeon's J. own stance in *Faber*.)

¹⁰ *Id.* at 68, 8 N.R. at 377, 73 D.L.R. (3d) at 517.

criminal, which has consistently been held to include the detection of criminal activities.¹¹

He cited, further, in support of these points, *Coote*,¹² an early case on a fire-marshal's inquiry, *Re Clement*,¹³ a decision of the British Columbia Court of Appeal upholding the constitutionality of provincial legislation establishing a special inquiry into the unlawful importation of liquor, and *Batary*¹⁴ and *McDonald*,¹⁵ two "coroner" cases also discussed in detail below.

Dickson J. stated that he found little enlightenment on the constitutional issue in *Di Iorio* in the "coroner cases", since none of them, except perhaps *McDonald*, were directly on point. But he agreed that the cases aided the proposition that "an inquiry which deals to some degree with criminal matters is not a matter of 'criminal law'",¹⁶ and that the reasons for finding that the inquest in *Faber* was not a criminal proceeding were equally applicable to the inquiry into organized crime. Parallels could be drawn between the two types of inquiry in terms of their organization and format, and any part which either might play in the detection of criminals was only "ancillary" to other primary purposes. Dickson J. also cited *Coote*¹⁷ and *Clement*,¹⁸ quoting the following passage from the latter case:

No doubt to concede the power to the province to make investigations into breaches of Dominion laws would appear at first blush to be an anomaly, and it might well be argued that the powers conferred upon the province in respect of the administration of justice ought to be interpreted as conferring merely the duty or obligation to put the machinery of the Courts in motion, and to take the requisite steps to prosecute persons accused of crime. That narrow construction would, I think, preclude what has been generally recognized as one of the functions of government in the administration of justice, namely, the ferreting out of crime and identification of criminals. There is nothing novel in compelling a witness to give evidence which may tend to incriminate him. That is done in the civil Courts and is the practice in one of the oldest criminal Courts of the realm, the coroner's inquest. With the justice or expediency of inquiries into crime by an extrajudicial provincial commission I have not to concern myself. The power to appoint such rests somewhere. It is either with the Dominion or the province, or with each, and hence it is idle to urge as a reason against the validity of the order in council that it is inimical to the rights of the subject.¹⁹

Dickson J. suggested that the existence of the federal power over criminal law and procedure and the provincial power over the administration of justice implied a certain degree of overlapping and that "one should not

¹¹ *Id.* at 69, 8 N.R. at 377, 73 D.L.R. (3d) at 518.

¹² *Regina v. Coote*, L.R. 4 P.C. 599, 9 Moo. P.C. (N.S.) 463; 42 L.J. P.C. 45.

¹³ *Re Public Inquiries Act*; *Re Clement*, [1919] 3 W.W.R. 115, 33 C.C.C. 119, 48 D.L.R. 237 (B.C.C.A.).

¹⁴ See note 85 *infra*.

¹⁵ See note 73 *infra*.

¹⁶ *Supra* note 1, at 90, 8 N.R. at 401, 73 D.L.R. (3d) at 536.

¹⁷ *Supra* note 12.

¹⁸ *Supra* note 13.

¹⁹ *Id.* at 118, 33 C.C.C. at 121-22, 48 D.L.R. at 239-40 (Macdonald C.J.). Quoted by Dickson J. in *Di Iorio*, *supra* note 1, at 88-89, 8 N.R. at 399, 73 D.L.R. (3d) at 535, as bearing "cogently" on the issue.

expect to be able to draw a fine line between the two heads of power nor should one attempt to do so.”²⁰ He rejected both the narrow view of the content of “criminal procedure” confining it to “that which takes place in a courtroom on a prosecution”²¹ and the broad view equating it with “criminal justice”²² and argued that a valid distinction can be made between criminal procedure and an inquiry into criminal acts.²³ Further, he stated that although the inquiry into organized crime was not necessarily aimed, even secondarily, at the investigation of individuals with a view to their subsequent prosecution, the provinces had traditionally exercised control over aspects of the administration of criminal justice within their territory, including the investigation of crime, and there was no reason why they should not do so in this case.

Beetz J., agreeing in substance with Pigeon and Dickson JJ., emphasized that the question in the case was the extent of provincial jurisdiction, and not “the ultimate limits of federal jurisdiction nor . . . the extent to which provincial legislation would remain operative should the Parliament of Canada decide to enter and regulate the field of criminal investigation”.²⁴ Without making any reference to the “coroner cases”, he found that the Quebec legislation which had been challenged did not conflict with any existing federal law²⁵ and could not “be characterized otherwise than as a law relating to the administration of criminal justice” and within provincial competence under section 92(14) of the B.N.A. Act.²⁶

Laskin C.J.C. also indicated that the “coroner cases” were of little direct assistance on the general constitutional issue, but suggested that they did show that “peripheral issues may be decided without touching the larger question”.²⁷ He regarded the passage quoted by Dickson J. from *Clement* as going “much beyond the necessity of the occasion”.²⁸ Noting that the scope of the provincial administration of justice power had not been closely examined in previous cases so as to assist in the present one, he argued that the power to provide for investigation into crimes, on whatever level and however accomplished, was not merely incidental to the criminal law and procedure power (which should be given a flexible and expanding reach), but an essential part of it, and outside the competence of the provinces.²⁹ He stated that:

the suggestion that there is some independent authority in provincial or municipal police forces, independent, that is, of federal legislation, to enforce the criminal law, and that this independent authority is fed by s. 92(14) is simply untenable . . . there is no basis for finding in the

²⁰ *Supra* note 1, at 81, 8 N.R. at 391, 73 D.L.R. (3d) at 529.

²¹ *Id.* at 83, 8 N.R. at 393, 73 D.L.R. (3d) at 531.

²² *Id.*

²³ *Id.*

²⁴ *Id.* at 96, 8 N.R. at 408, 73 D.L.R. (3d) at 542.

²⁵ *Id.* at 98, 8 N.R. at 410, 73 D.L.R. (3d) at 543.

²⁶ *Id.* at 94, 8 N.R. at 405, 73 D.L.R. (3d) at 539.

²⁷ *Id.* at 111, 8 N.R. at 423, 73 D.L.R. (3d) at 506.

²⁸ *Id.* at 110, 8 N.R. at 422, 73 D.L.R. (3d) at 505.

²⁹ *Id.* at 113-15, 8 N.R. at 426-28, 73 D.L.R. (3d) at 508-10.

existence of provincial or municipal police forces any analogical support for the validity of the inquiry.³⁰

Acknowledging that the provinces may legislate for the investigation of any subject within provincial competence under other specific heads of section 92, Laskin C.J.C. emphasized that the inquiry under consideration was concerned solely with crime and criminal law, an exclusively federal area. He suggested that, if a coercive inquiry into crime within a province could be validly established by provincial legislation, provincially constituted coercive inquiries into other federal fields, such as bankruptcy, could also be valid, and might equally be characterized as relating to the administration of justice in the province.³¹ Pointing out that the need for a local inquiry of this nature could be met by federal intervention,³² and the designation of a provincial tribunal to administer it, Laskin C.J.C. concluded that: "I am satisfied on such authorities as there are, as well as on the scheme of the B.N.A. Act, that administration of criminal justice, whatever be the form that it takes, is for Parliament alone to prescribe."³³

The *Di Iorio* decision, it is submitted, has confirmed that the provinces have a role to play in the administration of criminal justice, and that legislative control over this field is not exclusively federal. There is a "grey area" in which the province may act, and the establishment of a crime inquiry, as long as it is not a clear attempt to avoid the operation of established criminal law and procedure processes, is within that area. However, Parliament may still be competent to enter this area and displace existing provincial legislation. The decision of the Supreme Court is clearly limited to the issue before it, which was one of the extent of provincial, not of federal, power, and which involved a challenge to the creation of the inquiry, not an assertion of other objections to testifying at the inquiry.

Indeed, it may be observed that federal steps into this area were taken in Bill C-83³⁴ (now defunct), section 13 of which would have added a new part³⁵ to the Criminal Code to provide for and regulate special crime inquiries.

B. *The Individual Protection Issue*

In the course of the *Di Iorio* appeal, it was argued and submitted that

³⁰ *Id.* at 112, 8 N.R. at 425, 73 D.L.R. (3d) at 507.

³¹ *Id.* at 101-102, 8 N.R. at 413, 73 D.L.R. (3d) at 497.

³² *Id.* at 116, 8 N.R. at 429, 73 D.L.R. (3d) at 511.

³³ *Id.* at 115, 8 N.R. at 428, 73 D.L.R. (3d) at 510.

³⁴ Bill C-83, 30th Parl., 1st Sess. 1974-75-76; given first reading February 24, 1976 but "died" on the Order Paper.

³⁵ Although providing many useful safeguards with respect to the powers and proceedings of crime inquiries, the proposed Part XXVI, which would have comprised ss. 775-789 of the Code, does not provide any extra protection with regard to self-incrimination than is currently found in s. 5 of the Canada Evidence Act, R.S.C. 1970, c. E-10. Nor does it do anything more than permit exclusion of the public where the Commission thinks this expedient (s. 786(17)) and, as far as protection against publicity is concerned, provide opportunities for persons to be heard before the Commission prior to any report being made against them or if they were mentioned in the hearings.

the inquiry's powers of subpoena and imprisonment for contempt interfered with a citizen's right to protection against self-crimination. In addition it was submitted that the new method of crime investigation instituted by the inquiry not only restricted common law rights such as the right to remain silent in the face of "ordinary" police investigation, but also facilitated the circumvention of many of the basic protections accorded suspects under federal law.³⁶

The majority felt such concern to be exaggerated and any argument respecting protection against self-crimination answered by the point that a witness before the inquiry could obtain the protection of section 5(2) of the Canada Evidence Act,³⁷ if he wished. This would ensure that giving evidence to the inquiry which might tend to be self-incriminating would involve no major detriment, because such answers could not be "used or receivable in evidence against him in any criminal trial, or other criminal proceeding against him thereafter taking place, other than a prosecution for perjury in the giving of such evidence." Dickson J. further pointed out that:

Whether or not one agrees with a result which may force a person to assist in an investigation of his criminal activity, the provisions of s. 5 of the Canada Evidence Act and both federal and provincial Inquiries Acts compel such a result. Quebec's Crime Inquiry introduces no new and insidious form of investigation into our judicial system and there is no evidence before the Court that it is a colourable attempt to evade the procedural provisions of the Criminal Code.³⁸

The following key passages from Laskin C.J.C.'s dissenting judgment illustrate the influence of these factors upon his conclusions in the case:

We are asked to agree that a province could authorize provincial or local police to engage in an inquiry into the criminal law and, for example, in connection therewith to require any citizen under investigation to answer inquiries on pain of liability to incarceration for contempt. Assuming that, whatever be the nature of the inquiry, a citizen may invoke s. 5 of the Canada Evidence Act and thus protect himself in respect of criminalizing questions (assuming also he is a witness within s. 5), nonetheless he would be disentitled to refuse to answer questions incriminating others. The scope of the inquiry can be heedless of rules of evidence that operate under federal law applicable to criminal matters. . . .³⁹

What we have here is an inquisitorial process, more draconian than what Parliament has prescribed in relation to the investigation, detection and prosecution of crime. . . .⁴⁰

In short then, the *Di Iorio* decision tended to dismiss these issues as being the unavoidable but acceptable "spin-off" consequences of conducting an inquiry of this nature. It is submitted, however, that these concerns

³⁶ *Supra* note 1, at 91 and 93, 8 N.R. at 402 and 404, 73 D.L.R. (3d) at 537 and 539 (Dickson J.).

³⁷ *Id.* at 69-71, 8 N.R. at 377-79, 73 D.L.R. (3d) at 518-20 (Pigeon J.); at 91-93, 8 N.R. at 401-404, 73 D.L.R. (3d) at 537-39 (Dickson J.); at 98-99, 8 N.R. at 409-10, 73 D.L.R. (3d) at 543-44 (Beetz J.).

³⁸ *Id.* at 93, 8 N.R. at 404, 73 D.L.R. (3d) at 539.

³⁹ *Id.* at 112, 8 N.R. at 425, 73 D.L.R. (3d) at 507-508.

⁴⁰ 35 C.R.N.S. at 113, 8 N.R. at 426, 73 D.L.R. (3d) at 508.

respecting the protection of individual rights raise valid issues deserving of more careful consideration. In the following pages, therefore, an attempt has been made to analyze some of these problems in a more critical light and to place possible solutions to them in their proper perspective.

III. THE CANADIAN CRIMINAL JUSTICE SYSTEM, INQUISITORIAL PROCEEDINGS AND PROTECTION OF THE INDIVIDUAL

A. *An Historical Perspective*

The Canadian legal framework for the enforcement of criminal law through the detection and prosecution of individual offenders has been constructed around the accusatory and adversary trial processes inherited from the law of England.⁴¹ English law gradually developed a system of evidentiary and procedural rules regulating the administration of criminal justice. During this process the interests of the public in the effective enforcement of the law and in establishing the truth had continually to be balanced against the interests of the individual in being guaranteed fair treatment. The attainment of such a balance was essential to prevent the unequal contest between the State and the individual from becoming an instrument of oppression and tyranny. Ironically, many of the rules of evidence and essential protections which we consider to be fundamental to our adversary system find their origins in the early tyrannical use of this system. Trial by jury, for example, was in its original form more likely to alarm an accused than assure him of a fair and impartial trial based on the merits of his case.⁴² The accused had no right to remain silent, and involuntary confessions were more the rule than the exception. He had not right to counsel,⁴³ no right

⁴¹ It is interesting to note that: (a) in the period following the loss of the old methods of proof such as battle, ordeal and compurgation, the criminal trial in England could well have assumed an inquisitorial form, had it not been for the unwillingness of English judges to part with the old and familiar procedures, consider such things as Roman and Canon law doctrines, and undertake a more active and onerous role as judge than had been the case with the old methods of proof; and (b) "trial by jury" itself owes its origin to the "inquisitio", an inquisitorial administrative device imported from the Continent with the Conquest, one version of which survived in Canada as the grand jury until in 1976 it was finally removed from operation in every part of the country except Nova Scotia.

⁴² In early times, when members of the jury of presentment were also upon the trial jury, and could be penalized for presenting "inconsistent" verdicts, the scales were weighted rather heavily in favour of convictions; see, e.g., Wells, *The Origin of the Petty Jury*, 27 L.Q.R. 347, at 350 (1911). Juries were also both pressured and bribed, and the distinction between punishing jurors for "ministerial irresponsibility" and returning verdicts "perverse" in the eyes of the authorities was not recognized until *Bushel's Case* in 1670, when juries became free to return verdicts without fear of being punished for doing what they felt was right. Political trials were really what led to the jury being regarded as the strong guarantee of civil liberties that it is often stated to be.

⁴³ Not until 1696, by 7 & 8 Will. III, c. 3, was an accused allowed counsel in cases of treason. He was not allowed counsel in cases of felony in general until 1837, by 6 & 7 Will. IV, c. 114.

to see the charge against him⁴⁴ and could not have witnesses sworn on his behalf.⁴⁵ Such preliminary inquiries as there were served to aid the authorities in assembling their case against the accused rather than to ascertain whether there already existed a *prima facie* case sufficient to justify putting the accused on trial.⁴⁶

By the time the accusatory and adversary trial processes were introduced into Canada, however, a variety of laws guaranteeing certain basic rights to those suspected or accused of a crime had been developed. These rights now include: the right to remain silent and leave the accuser to build and present his case without the assistance of the accused; a general right to trial by jury in serious indictable offences; a right to counsel; and a right to know the charges against oneself. Such rights form part of "Criminal Law and Procedure in Criminal Matters" and therefore fall within the constitutional jurisdiction of the federal Parliament.

B. Inquisitorial Proceedings

In addition to the familiar adversary proceedings which historically have been used in conducting criminal prosecutions, other inquisitorial proceedings such as coroners' inquests and public inquiries by fire marshalls have been linked with the investigation, detention, and, indirectly, the prosecution of criminals. These inquisitorial proceedings often examine situations which have involved the commission of a criminal offence and which may eventually result in the laying of a criminal charge. Their hearings and findings may expressly or by implication identify those suspected of a crime.

Because of their potential impact on criminal investigations and prosecutions, such inquisitorial tribunals present several unique problems. Their functioning, for example, may undermine existing protections accorded citizens by the laws of evidence and criminal procedure. Their procedure may, for instance, expose an individual to publicity prejudicial to subsequent criminal proceedings which may be taken against him in a manner which is not otherwise permissible under the federal Criminal Code. A tribunal may compel an individual to incriminate himself by testifying before it, and so assist the Crown in the laying of criminal charges against him, even though he could not have been forced to provide this information in the course of a regular criminal investigation. A further problem raised by certain of these tribunals concerns their constitutional position. Although these bodies

⁴⁴ 7 & 8 Will. III, c. 3, 1696, allowed him a copy of the indictment in cases of treason.

⁴⁵ Not until the 16th and 17th centuries did the regular use of witnesses acquire "respectability", and then, during this period of Tudor and Stuart oppression and political trials, only where useful to the Crown. The accused was, at first, not permitted to call witnesses at all, then, later, to call them, but they could not give sworn testimony. The privilege of calling sworn testimony for the defence was accorded to Englishmen tried in England for certain felonies committed in Scotland by 4 Jac. I, c. 4, 1606. In 1696 it was extended to all treason cases. By 1 Anne, c. 9, 1702, it was finally extended to all those accused of treason or felony.

⁴⁶ See, e.g., J. STEPHEN, I HISTORY OF CRIMINAL LAW 216-33 (1883). The preliminary inquiry was not set in its modern mould until the 19th century.

undoubtedly have some "criminal law" aspects and implications, they are not concerned primarily with criminal law enforcement, but rather with matters which are clearly within provincial jurisdiction. The constitutional division of control over various aspects of their institution and functioning is, therefore, by no means clear. This jurisdictional uncertainty may also directly affect the protections afforded persons suspected of criminal activity.

C. *Protection of the Individual*

1. *Protection Against Self-Crimination*

Under present Canadian law, a person suspected or accused of committing a crime is protected by several specific rules based on the policy that a person should not be compelled to contribute to the case against him by his own words.⁴⁷ Generally he may remain silent in the face of questions put to him by the police. If he is charged, the Criminal Code provides that he must not be examined, cross-examined, or subjected to inquiry as to the offence with which he is charged in the course of any judicial interim release hearings.⁴⁸ He has the right to remain silent at any preliminary inquiry into the charges against him and must be cautioned in accordance with a set formula that he has this right.⁴⁹ In a federal prosecution, although he is competent he is not compellable as a witness at his own trial and no comment can be made upon his failure to testify.⁵⁰

It must be noted, however, that these rules do not confer on an accused either a general right to remain silent or a general privilege against self-crimination. In fact, there are so many rules which would have to be

⁴⁷ This idea, inherited from the English system of law, may be found behind specific rules of many common law legal systems, which give it varying degrees of application. Thus in England it results in the general rules, subject to statutory exceptions (see e.g., J. Heydon, *Statutory Restrictions on the Privilege Against Self-Incrimination*, 87 L.Q.R. 214 (1971)), that a person suspected of crime may remain silent in the face of investigation and cannot be compelled to answer questions which may tend to incriminate him, or be compelled to testify for the prosecution in his own trial for crime. In the United States the general privilege against self-incrimination has been incorporated as a constitutional right in the Fifth Amendment, described by Justice Goldberg in *Murphy v. Waterfront Commission*, 378 U.S. 52, 84 S.C. 1594, 12 L.E. 678 (1964), in the following way:

It reflects many of our fundamental values and most noble aspirations; our unwillingness to subject those accused of crime to the cruel trilemma of self-accusation, perjury or contempt; our preference for an accusatorial rather than an inquisitorial system of criminal justice; our fear that self-incriminating statements will be elicited by inhumane treatment and abuses, our sense of fair play which dictates 'a fair state-individual balance by requiring the government to leave the individual alone until good cause is shown for disturbing him and by requiring the government in its contest with the individual to shoulder the entire load' . . . our respect for the inviolability of the human personality and of the right of each individual 'to a private enclave where he may lead a private life'.

⁴⁸ CRIMINAL CODE, R.S.C. 1970, c. C-34; as amended, ss. 457.3(1)(b), 457.5(a), 457.6(10), 457.7(3), 457.8(9) and 459(8).

⁴⁹ *Id.*, s. 469.

⁵⁰ Canada Evidence Act, R.S.C. 1970, c. E-10, s. 4(5). This should only apply in jury trials, and probably not to a comment made in the absence of the jury.

regarded as exceptions to such a right that it cannot be said to exist in terms of effective general application.⁵¹ The limits of the right to refuse to testify illustrate this. At common law, witnesses had the right to protect themselves by refusing to answer questions which might tend to incriminate them. This right, however, was removed by the Canada Evidence Act⁵² which provides that such questions must be answered, but that a witness can claim the protection afforded him under that Act. This protection prevents his answers from being used against him in subsequent criminal proceedings.⁵³ Thus a person may be compelled to testify even when his testimony will assist those who are investigating his criminal activity. Similarly, although a person accused of a crime cannot be compelled to testify at his own trial, he can be compelled to testify at the trial of a co-accused if it is held separately from his own.⁵⁴

2. Protection Against Prejudicial Publicity

Another group of rules seeks to protect a person from prejudice which may result from publicity and the publication of information concerning proceedings against him. For example, a trial must be as fair and unprejudiced as is practically possible. If a person is to be tried by a jury, that jury must not include persons who have already been influenced in their thinking, but rather be composed of those who will try the case on the evidence presented at trial and nothing else.

Several rules exist to further these objectives including those permitting change of venue⁵⁵ and those providing for challenges to the jury.⁵⁶ Rules controlling the publicity of pre-trial proceedings are designed to foreclose these problems even before they arise. In addition, some rules serve to protect the accused not only from prejudice in terms of obtaining a fair trial, but also from other consequences of publicity, including damage to the accused's reputation, community reaction to his family, and even physical danger from his "colleagues".⁵⁷

⁵¹ See further, Ratushny, *supra* note 7.

⁵² R.S.C. 1970, c. E-10.

⁵³ R.S.C. 1970, c. E-10, s. 5(2). It is up to the witness to claim the protection of the Act. If he fails to do so, for whatever reason, it does not apply, and his answers can be used against him. There is no duty in general to bring the protection afforded to his attention or to warn him of the incriminating nature of a question.

⁵⁴ See, e.g., *Re Regan*, 13 M.P.R. 584, 71 C.C.C. 221, [1939] 2 D.L.R. 135 (N.S.C.A.), discussed in connection with *Batary, infra*.

⁵⁵ CRIMINAL CODE, R.S.C. 1970, c. C-34, s. 527.

⁵⁶ R.S.C. 1970, c. C-34, ss. 558-571.

⁵⁷ Examples of the latter may be found in such provisions as ss. 457.2, 467 and 470 of the CRIMINAL CODE. These sections require non-publication orders to be made if requested by the accused in connection with the proceedings at judicial interim release hearings (s. 457.2) and preliminary inquiries (s. 467). They prohibit the publication of a report that any admission or confession by the accused was tendered in evidence at a preliminary inquiry, or of the nature of any such admission or confession (s. 470), until the accused is either discharged after preliminary inquiry or, if committed for trial, his trial is completed. The CODE even requires the justice

IV. PROTECTIONS AGAINST SELF-CRIMINATION AND PREJUDICIAL PUBLICITY IN CORONERS INQUESTS

A. *The Nature of the Coroner's Inquest*

A clear understanding of the problem of procedural guarantee in the coroner's inquest requires some appreciation of the general history of the coroner's inquest both in England,⁵⁸ where it originated, and in Canada, where it was transplanted as a common law institution.⁵⁹

The medieval coroner, who had many responsibilities in the area of criminal law enforcement, was one of the most important local officers of the Crown. In addition to his other duties, the coroner was responsible for inquiring into the circumstances of any unnatural deaths which occurred in his area, a responsibility he fulfilled by holding an "inquest over the corpse". After a local jury which had been summoned by the coroner had given answers to the coroner's questions, a document termed an "inquisition" was drawn up. This document was in effect a record of the answers or verdict given by the inquest to the questions which had been raised which would include whether the deceased had come to his death naturally, by misadventure, or feloniously; if the latter, whether by homicide or suicide, and, if by homicide, who the slayer was.⁶⁰ The inquisition operated as a presentment or indictment of anyone accused therein of homicide in the same way as a presentment by a grand jury. Thus, in a period when there was not organized system of crime detection agencies, the coroner's inquest, which was later classified as a criminal court of record,⁶¹ played a significant role in the detection and accusation of criminals.

holding a preliminary inquiry to inform any accused not represented by counsel of his right to apply for and receive a non-publication order (s. 469). Although the general rule is that criminal proceedings should be open and public and that good cause is required for departing therefrom, the Code does provide for the exclusion of the public from proceedings in certain instances, such as: s. 441 (trial of juveniles), s. 442 (where exclusion is deemed by the presiding officer to be "in the interest of public morals, the maintenance of order or the proper administration of justice") and s. 465 (j) dealing with preliminary inquiries.

⁵⁸ See generally, HUNNISETT, *THE MEDIEVAL CORONER*, (1961), and REPORT OF THE COMMITTEE ON DEATH CERTIFICATION AND CORONERS, (Cmd. 4810 1971).

⁵⁹ See generally, ONTARIO LAW REFORM COMMISSION, REPORT ON THE CORONER SYSTEM IN ONTARIO 11 (1971), and the judgment of Wells J. in *Wolfe v. Robinson*, [1961] O.R. 250, at 253ff., 27 D.L.R. (2d) 98, at 101ff. (H.C.).

⁶⁰ The jury might find itself answering many other questions than these. For instance, it would have to establish whether the deceased was English or not, which would influence whether a possible *murdam* fine was payable, and whether the body had been moved from the place where death occurred, and, if so, by whom (again, relevant to fines). The instrument of death might have to be identified and might be subject to forfeiture as a *deodand*. The Crown's financial interests were very much at the heart of the coroner's inquest, and these were not the most popular proceedings.

⁶¹ See, e.g., JERVIS ON CORONERS 23 (9th ed. 1957), and BOYS ON CORONERS 2 (5th ed. 1940).

With the development of more efficient general agencies and procedures for the investigation of crime and initiation of criminal prosecutions, as well as increased state interest in the recording of accurate information on births and deaths, the nature and purposes of both coroners and their inquests changed significantly. The coroner's primary role became the accurate identification of medical causes of death and, where necessary, the holding of public inquiries in situations involving unusual or unnatural deaths. These inquiries were not conducted primarily with a view to identifying criminal activity and criminals, but rather to satisfy public concern and promote public welfare. The inquest did, however, retain the power to indict suspects for unlawful homicide, a power which today is rarely exercised and has been the subject of severe criticism.⁶²

The coroner's inquest⁶³ was introduced into Canada before these conceptual changes had occurred. The first Criminal Code, however, stripped the coroner's inquest of its presentment power⁶⁴ and prescribed the procedure to be followed when the verdict of an inquest alleged that a named person had committed unlawful homicide and that person had not already been charged.⁶⁵ By this procedure, the coroner was to issue a warrant for the conveyance of such person before a magistrate or justice, or cause this person to enter a recognisance to appear before such an official. These provisions, which have been carried through in substance to the present day, together with a few other Criminal Code provisions requiring that an inquest be held after executions⁶⁶ and specifying certain offences which might be committed by a coroner in the exercise of certain anachronistic functions not connected with inquests,⁶⁷ represent virtually all of the federal law which exists in this area today. Most of the law governing the coroner and his inquest, as well as other officers and procedures introduced by some provinces to perform similar functions, is to be found in provincial legislation and the old common law. Although different provinces have different

⁶² See, e.g., REPORT OF THE COMMITTEE ON DEATH CERTIFICATION AND CORONERS, *supra* note 58, which concluded that:

There is still a tendency to regard the coroner's role as being primarily directed to the investigation of suspicious deaths and, in particular, possible homicides. This belief . . . is now completely outmoded . . . We cannot too strongly emphasize our own conclusion that the coroner's primary function, at present, is to help to establish the cause of death in a wide range of situations, few of which have any criminal or even suspicious overtones. (at xiii, para. 13)

The REPORT recommended, at 352, amongst other things, that:

47. The duty of a coroner's jury to name the person responsible for causing a death and the coroner's obligation to commit a named person for trial should be abolished. (See also 181-86, para. 16.18ff.).

⁶³ These included the power and duty of the coroner to commit for trial, and to bind over material witnesses by recognizance, e.g., An Act Respecting the Duties of Justices of the Peace, S.C. 1869 c. 30, ss. 60, 61, 63 and 64.

⁶⁴ CRIMINAL CODE, S.C. 1892 c. 29, s. 642; now R.S.C. 1970, c. C-34, s. 506(3).

⁶⁵ S.C. 1892 c. 29, s. 568; now R.S.C. 1970, c. C-34, s. 462.

⁶⁶ CRIMINAL CODE, R.S.C. 1970, c. C-34, ss. 676 and 677.

⁶⁷ R.S.C. 1970, c. C-34, s. 117.

coroner and fatality inquiries legislation,⁶⁸ certain common approaches and principles may be discerned.

In recent years, there has been an increasing awareness in Canada of other social purposes which may be served by public inquiries into deaths, in addition to the detection of criminal activity and the commencement of prosecutions. As a result, recent case law, provincial studies and provincial legislation tend to support a general move to separate inquests, or other public inquiries into individual deaths, from the criminal law process proper. This approach leaves the investigation of crime and the initiation of prosecutions to authorities specifically charged with these functions and subject to uniform controls. A brief examination of relevant case law clearly demonstrates this general change in attitude.

In Canada, early cases on coroner's inquests, including *Regina v. Hammond*,⁶⁹ *Rex v. Barnes*,⁷⁰ and *Regina v. Hendershott*,⁷¹ accepted without question the old English classification of the coroner's 'court' as a criminal court of record with the resulting constitutional implications. As recently as 1962, a member of the Ontario Court of Appeal in *Wolfe v. Robinson* bluntly asserted:

It is too late in the day to contend . . . that the Coroner's Court is not a criminal Court of record . . . The Coroner's Court being a criminal Court of record, only the Parliament of Canada has authority to enact legislation as to the Rules of Practice and Procedure to be followed in that forum in accordance with the provisions of s. 91(27) of the B.N.A. Act.⁷²

The British Columbia Court of Appeal, however, rejected this approach in *Regina v. McDonald*,⁷³ wherein Bull J.A. stated:

. . . The very nature of the inquiry held by the Coroner in Canada, which is not a trial and at which there is no party or person accused and the function of which is to investigate many other matters than to find that murder or manslaughter has been committed, is such that this Court cannot fairly be said to be a 'Court of Criminal Jurisdiction' whose procedures *before* such a verdict, if any, are with respect to 'Criminal Matters' or 'criminal law' in order to come under the exclusive authority of Parliament.⁷⁴

⁶⁸ Manitoba and Nova Scotia have Fatality Inquiries Acts, which employ a 'medical examiner' system, in which any public inquiry into death is performed by a judicial officer, while medical officers are concerned with initial investigation and the establishment of the medical circumstances of death. British Columbia and Alberta have proposed variants of the medical examiner system, but have not as yet implemented them. Newfoundland never had a coroner system, but seems to operate a kind of medical examiner system today. The other provinces not currently using a medical examiner system operate coroner systems, and have Coroners Acts. Some still use juries in inquests, others do not.

⁶⁹ 29 O.R. 211, 1 C.C.C. 373 (H.C. 1898).

⁷⁰ 49 O.L.R. 374, 36 C.C.C. 40 (C.A. 1921).

⁷¹ 26 O.R. 678 (H.C. 1895).

⁷² [1962] O.R. 132 at 137, 132 C.C.C. 78 at 83 (Schroeder J.A.).

⁷³ [1969] 3 C.C.C. 4, 2 D.L.R. (3d) 298 (B.C.C.A.).

⁷⁴ *Id.* at 12, 2 D.L.R. (3d) at 305. Bull J.A. went on to express the view that all pre-verdict procedure in the inquest is within the control of the Provinces under s. 92(14) of the B.N.A. Act.

This decision was narrowly approved by the Supreme Court of Canada in *Faber v. The Queen*⁷⁵ where the majority judgment was rendered by de Grandpré J., Martland, Judson, Ritchie and Dickson JJ. concurring. After reviewing the older cases and examining the nature of the inquest in light of its history and the relevant federal and Quebec legislation, de Grandpré J. stated that he was "unable to accept the conclusions stated in decisions holding that the coroner is a court, or a court of record, with criminal jurisdiction, especially as in many such cases the observation was made *obiter*" ⁷⁶ Rather, he found that:

the coroner is not now a part of the structure of criminal justice . . . the traditional role of the coroner, as it existed in England, disappeared, and was replaced by . . . one which was not primarily of a criminal nature, but came to have a social context . . . the investigation of crime . . . is not the determining aspect of the coroner's functions, with the result that the criminal aspect is not predominant. Furthermore, the proceeding itself is not as such concerned with the investigation of crime. . . . ⁷⁷

Pigeon J. in delivering the dissenting judgment, Laskin C.J.C., Spence, and Beetz JJ. concurring, acknowledged that the 1892 Criminal Code had made "an important change" in abolishing the direct presentment power. However, he concluded:

I cannot agree that as a result . . . it can properly be said that a coroner no longer has any criminal jurisdiction . . . At the date of Confederation, the proceedings at an inquest . . . undoubtedly came within the ambit of Procedure in Criminal Matters just as much as proceedings before a grand jury. Parliament gave them a different effect when enacting the *Criminal Code*, 1892. There is nothing in that enactment indicating an intention to alter the legal character of those proceedings. ⁷⁸

Pigeon J. noted that the fact that an inquest was not a "court of criminal jurisdiction" in the sense of a court of trial or in the more limited meaning of that phrase as it is employed in the Criminal Code, did not mean that the inquest may not involve proceedings in a criminal matter. This, according to Pigeon J. was true especially when the inquest was expected to reach a verdict as to who should be charged with causing the death in question. Observing quite correctly that the case did not directly raise any constitutional issues for decision, Pigeon J. did indicate that, in his opinion, while certain aspects of the coroner system undoubtedly fell within provincial legislative competence in relation to the administration of justice in the province, other aspects were clearly within Parliament's

⁷⁵ *Supra* note 8.

⁷⁶ *Id.* at 31, 32 C.R.N.S. at 17, 6 N.R. at 17.

⁷⁷ *Id.* at 30-31, 32 C.R.N.S. at 17, 6 N.R. at 16.

⁷⁸ *Id.* at 13-14, 32 C.R.N.S. at 23, 6 N.R. at 23.

exclusive authority to legislate in relation to "the Criminal Law, including the Procedure in Criminal Matters".⁷⁹

Further evidence of this trend to take the coroner's inquest out of its old "criminal law" context is contained in the 1971 Report of the Ontario Law Reform Commission on the Coroner System in Ontario.⁸⁰ The Commission noted that:

[T]he former utility of the coroner as a protector of Crown revenue or as an agency for bringing suspects to trial is not a material consideration today . . . other portions of the machinery of the state exist to perform those specific tasks.⁸¹

It also stated that the proper purposes of a modern coroner system were to enable a check to be kept on the factual and medical circumstances of death and to provide for public inquiries where necessary for the purpose of:

formally focusing community attention on and initiate community responses to preventable deaths . . . and . . . satisfying the community that the circumstances surrounding the death of no one of its members will be overlooked, concealed or ignored.⁸²

The Commission therefore recommended a new legislative scheme for the Ontario coroner system, designed to eliminate to as great an extent as possible the "criminal" aspects of the inquest and so avoid the problems produced by the old common law system.⁸³ One of the measures proposed in this regard was to prohibit a coroner's jury from making "any finding of legal responsibility" or expressing "any conclusion of law" as to when, where, how, or by what means the deceased came to his death. The new Ontario Coroners Act contains such a prohibition⁸⁴ which, insofar as it may be valid legislation, should effectively foreclose any possibility of a coroner's inquest in Ontario being *directly* employed to initiate criminal prosecutions. It does

⁷⁹ Pigeon J., of course, later found the decision of the majority in *Faber* "an insuperable obstacle" to reaching any other conclusion in *Di Iorio* but that the Quebec Inquiry into organized crime was validly established under the provincial power over the administration of justice and was not within the exclusive federal power as dealing with criminal law or procedure in criminal matters.

⁸⁰ This Report led to the enactment of a new Coroners Act in Ontario; see S.O. 1972 c. 98; as amended by S.O. 1974 c. 103.

⁸¹ ONTARIO LAW REFORM COMMISSION, REPORT ON THE CORONER SYSTEM IN ONTARIO 25 (1971).

⁸² *Id.* at 29.

⁸³ The Commission proposed the extinction of the "criminal court of record" concept by repeal of the common law on coroners in Ontario and its replacement with purely statutorily controlled and originated systems. The Coroners Act, S.O. 1972 c. 98, followed this proposal, and s. 2 thereof provides as follows:

(1) In so far as it is within the jurisdiction of the Legislature, the common law as it relates to the functions, powers and duties of coroners within Ontario is repealed.
(2) The powers conferred on a coroner to conduct an inquest shall not be construed as creating a criminal court of record.

One wonders about the validity of this technique of 'pulling oneself up by one's own bootstraps'. If the common law in question is "criminal law", surely the province cannot avoid it by "repealing" it? If it is not, was there a problem in the first place?

⁸⁴ Coroners Act, S.O. 1972 c. 98, ss. 25(2), (4) and (5).

not, however, prevent the inquest from being used to further a criminal investigation in an indirect manner.

B. *Protection Against Self-Crimination and The Coroners Inquest*

Neither this problem nor the issue of protection against self-crimination has been left untouched by Canadian jurisprudence. As soon as an attempt is made to resolve either of these issues, however, it immediately becomes apparent that many other factors are involved. These include the nature of the proceedings, the constitutional questions raised thereby, and the uncoordinated nature of the problem-solving process. A brief examination of the relevant cases and statutes readily demonstrates these complexities.

1. *Compellability to Testify at an Inquest—Cases Concerning the "Charged" Witness*

Although the issue of compellability to testify at an inquest has arisen in several cases, it has never, it is submitted, been resolved in a satisfactory or consistent manner.

In a Supreme Court of Canada decision, *Batary v. Attorney General Saskatchewan*,⁸⁵ it was held that a person who had been charged with unlawful homicide, but whose preliminary hearing had been adjourned pending completion of the inquest into the death of his alleged victim, could not be compelled to testify at that inquest under provisions contained in the Saskatchewan Coroners Act.⁸⁶ This Act provided that:

[N]o person giving evidence at the inquest shall be excused from answering a question upon the ground that the answer thereto may find to criminate him or may find to establish his liability to a civil proceeding at the instance of the Crown or of any person or to a prosecution under any Act of the legislature, but if he objects to answering the question upon any such ground he shall be entitled to the protection afforded by Section 5 of the *Canada Evidence Act* and of Section 33 of the *Saskatchewan Evidence Act*.⁸⁷

The majority of the Supreme Court found these provisions to be *ultra vires* as attempting to change criminal law. Cartwright J., speaking for the majority,⁸⁸ held that the law in force in Saskatchewan was the law of England as it existed on July 15, 1870, except as altered by statutes validly enacted thereafter. Under that law, a person accused of crime was neither competent nor compellable to testify at his own trial. Furthermore, a person accused of murder did not seem to have been compellable to testify at an inquest

⁸⁵ [1965] S.C.R. 465, 51 W.W.R. 449, 52 D.L.R. (2d) 125.

⁸⁶ Coroners Act, R.S.S. 1953, c. 106, s. 15 (as it then was). The Saskatchewan Act has since been amended to comply with the *Batary* case: see Coroners Act, R.S.S. 1965, c. 113; as amended by S.S. 1966 c. 94, s. 4, which introduced a new section (16a) for this purpose. See also, Coroners Act, S.O. 1972 c. 98, s. 22(1) and N.W.T. Coroners Ordinance, R.O.N.W.T. 1974, c. C-16, s. 22(3).

⁸⁷ Coroners Act, R.S.S. 1953 c. 106; as amended by S.S. 1966 c. 94.

⁸⁸ Taschereau, Martland, Judson, Ritchie and Spence JJ. concurring.

into the death of his alleged victim. The Canada Evidence Act,⁸⁰ according to Cartwright J., had merely made an accused *competent* to take the stand at his own trial, and provided a specific protection against testimony given by him in proceedings other than his trial being used against him at trial. Noting that Batary could not be compelled to testify at his preliminary inquiry, Cartwright J. stated:

It would be a strange inconsistency if the law which carefully protects an accused from being compelled to make a statement at a preliminary inquiry should permit that inquiry to be adjourned in order that the prosecution be permitted to take the accused before a coroner and submit him against his will to examination and cross-examination as to his supposed guilt.⁹⁰

He concluded that the Saskatchewan legislation intended to change the law in this regard, derogating from the maxim *nemo tenetur seipsum accusare*, a principle of criminal law in both England and Canada, and thus invaded the federal criminal law field.

Fauteux J. in his dissent took a completely different approach. Citing *Rex v. Barnes*,⁹¹ a decision of the Ontario Court of Appeal which the majority of the Supreme Court in *Batary* felt was wrong, and *Re Regan*,⁹² he stated that whether a person was compellable depended on the nature of the proceedings in question and his status in those proceedings. He distinguished the Canadian inquest from its English counterpart on the basis that the former was not a "criminal proceeding". Even if it were, Fauteux J. asserted, the person called to testify did not stand "accused" before it, and therefore the rule that an accused could not be compelled to testify at his own trial or in other proceedings had no application. He also noted that there was no general right against self-crimination, but rather only specific rules, many of which were statutory, which were of limited application and which did not cover the situation at hand. Fauteux J. was not impressed with the argument, which the majority had found influential, that an accused might suffer hardship as a result of being compelled to testify. Finally, he declared himself totally unable to reconcile the majority approach with *Re Regan*, a case which had been mentioned but not overruled by Cartwright J. This case had supported the rule that, although an accused was not compellable to testify at his own trial, he was compellable to testify at the separate trial of a co-accused.⁹³

The true complexity of the issues involved becomes readily apparent when the *Batary* decision is analyzed in light of other relevant cases. *Re Barnes*, an earlier case, which on its facts was very similar to *Batary*, had upheld the classification of a coroner's inquest as a criminal court of record. It also decided that a person charged with unlawful homicide was compellable to testify at an inquest over the death of his alleged victim. As

⁸⁹ R.S.C. 1970, c. E-10.

⁹⁰ *Supra* note 85, at 476, 51 W.W.R. at 458, 52 D.L.R. (2d) at 134.

⁹¹ 49 O.L.R. 374, 36 C.C.C. 40 (1921).

⁹² *Supra* note 54.

⁹³ *Supra* note 69; see accompanying text.

no one was "accused" at the inquest, the court held that there was no common law or statutory rule protecting a witness at an inquest simply because he was accused in a separate proceeding. The risk that this approach might allow an inquest to be used as a tool of investigation with the accused being forced to contribute to the case against himself was recognized in *Barnes*, but it was dismissed as being either a necessary evil or resolved by not examining the witness on the charge against him at the inquest.⁹⁴ Riddell J.A. stated:

[I]t is to be hoped that we have not arrived at the point that one accused of crime has so many and so high rights that the people have none. The administration of our law is not a game in which the clever and more astute is to win, but a serious proceeding by a people in earnest to discover the actual facts for the sake of public safety and the interest of the public generally.⁹⁵

Thus, in two similar fact situations, the courts were able to reach two very different conclusions. In both *Batary* and *Barnes*, it should be noted, the courts were concerned with the compellability of a person already accused of unlawful homicide. What would be their decision in a case where the person called to testify at an inquest had not yet been charged with the unlawful homicide of the deceased in question?

2. The "Uncharged" Witness

This very situation arose in *Regina v. McDonald*⁹⁶ where the British Columbia Court of Appeal held that the ruling in *Batary* did *not* extend to a person who, though likely to be charged, had not yet been charged at the time of the inquest. Such a person, the court held, was compellable to testify at the inquest into the death of his possible victim.

Although some statements made in the course of the *McDonald* case concerning the nature of the coroner's inquest received the approval of the Supreme Court of Canada in *Faber*, Pigeon J. in his dissent in *Faber* stated that in his opinion *McDonald* was wrong on the issue of compellability. The principle in *Batary*, he felt, should be equally applicable to the case of a person who was likely to be charged. The judgment of Orde J. in *Barnes* at first instance also suggests that no distinction should be drawn between the two situations.

⁹⁴ Orde J., at first instance, had pointed out that this possibility existed in many other proceedings; *supra* note 91, at 378-79, 36 C.C.C. at 44-45. Meredith J.A. suggested the problem was best solved by proper exercise of discretion rather than rules of law and that, *e.g.*, civil proceedings arising out of a situation should be postponed until criminal proceedings from the same situation had been completed; further, that a witness should not be examined on a charge pending against him once on the stand.

⁹⁵ *Supra* note 91, at 390, 36 C.C.C. at 56.

⁹⁶ *Supra* note 73. See also, *Re Wyshinski*, 53 W.W.R. 422 (*sub nom* Wyshinski v. Schwartz), [1966] 2 C.C.C. 199 (Sask. Q.B.), and *Regina v. Johansen*, *supra* note 8, which reached the same result as *McDonald*, distinguishing *Batary*.

As both situations may involve the same risks of prejudice to the people involved, it is submitted that the same rule should be applied. Admittedly, in the one case the witness at the inquest has already been placed at risk in criminal proceedings and is an "accused" in the technical sense, whereas in the other he is not *as yet*. But this is merely a question of timing. To permit the question of timing to support a difference of rules is to encourage the withholding of the formal step of laying charges until after an inquest in order to avoid the rule in *Batary* for the benefits of the rule in *McDonald*. Attractive as this position may seem, it too, presents problems. The person who has been accused is easily identifiable. The person who has not been accused but may be is not necessarily so readily identifiable before the fact. Are we to say that anyone who *could just possibly* be charged is to be exempt from testifying? Will the fulfillment of the other social purposes of an inquest be impaired by such exemptions? If this is, in fact, the result, perhaps all such persons *should* be compellable witnesses.

In any case, following the *Batary* decision, we are left with the rule that a person accused of crime cannot be compelled by provincial legislation to testify at the inquest into the death of his alleged victim, at least while his preliminary inquiry is still pending. Such a person is thus, by a decision resting largely upon common law, protected from self-crimination at inquest proceedings. However, a person who, for whatever reason, has not been formally charged does not have this protection. What protections, if any, are afforded him?

3. Provincial Legislation and the "Uncharged Witness"

An examination of relevant provincial statutes reveals an attempt on the part of some provinces to provide certain protections for the "uncharged" witness. Many provincial Coroners Acts, for example, not only provide that where a person has been charged with unlawful homicide, an inquest into the death of the alleged victim will only be held upon the direction of the Attorney General or Solicitor General,⁹⁷ but also that where a person is charged *during* the inquest, the inquest must be discontinued, subject to a

⁹⁷ E.g., New Brunswick Coroners Act, R.S.N.B. 1973, c. C-23, s. 8(1); Ontario Coroners Act, S.O. 1972 c. 98, s. 22(1); Quebec Coroners Act, S.Q. 1966-67 c. 19, s. 15; Saskatchewan Coroners Act, S.S. 1966 c. 94, s. 9(1); Nova Scotia Fatality Inquiries Act, R.S.N.S. 1967, c. 101, s. 15; and Manitoba Fatality Inquiries Act, S.M. 1975 c. 9, s. 21. Some such legislation reverses this and provides that a designated officer may direct that the inquest not be held or continued: e.g., Alberta Coroners Act, R.S.A. 1970, c. 69, s. 31; British Columbia Coroners Act, R.S.B.C. 1960, c. 78, s. 8, as amended by S.B.C. 1974 c. 21, s. 2; N.W.T. Coroners Ordinance, R.O.N.W.T. 1974, c. C-16, s. 33; and Yukon Territory Coroners Ordinance, R.O.Y.T. 1971, c. C-18, s. 33(1).

direction from the Attorney General that it be reopened.⁹⁸ Some provincial acts also contain provisions similar to section 5(2) of the Canada Evidence Act,⁹⁹ and are designed to confer much the same protection on witnesses.¹⁰⁰ The new Ontario Coroners Act goes even further than others in this regard. It provides that witnesses at an inquest are "deemed" to have objected to answering incriminating questions, and that "no answer given by a witness at an inquest shall be used or be receivable in evidence against him" in any trial or other subsequent proceedings, other than a prosecution for perjury in giving such evidence.¹⁰¹ In addition, some provincial statutes containing these types of provisions attempt to ensure that witnesses are made aware of these rights either by requiring that the coroner read the relevant protection provision to each witness before his evidence is given,¹⁰² or by making the coroner and Crown attorney responsible for ensuring that a witness is informed of his rights against self-crimination when it appears that he is about to give evidence which would tend to incriminate him.¹⁰³ In provinces where such provisions have not been enacted,¹⁰⁴ witnesses appearing before inquests or death inquiries are still entitled to the protection¹⁰⁵ of the Canada Evidence Act.¹⁰⁶ Indeed, provisions in provincial statutes which purport to regulate the privilege against self-incrimination in such proceedings may well be *ultra vires*. But it is submitted that provisions requiring witnesses to be informed of their rights under the Canada Evidence Act¹⁰⁷ should not be objectionable on constitutional grounds.

In addition, several provincial Coroners Acts specifically accord witnesses the right to counsel and permit the granting of "standing", with its accompanying rights in terms of legal representation and active participation in

⁹⁸ *E.g.*, New Brunswick Coroners Act, R.S.N.B. 1973, c. C-23, s. 8(2); Ontario Coroners Act, S.O. 1972 c. 98, s. 22(2); Quebec Coroners Act, S.Q. 1966-67 c. 19, s. 15; Saskatchewan Coroners Act, S.S. 1966 c. 94, s. 9(2); Nova Scotia Fatality Inquiries Act, R.S.N.S. 1967, c. 101, s. 15; and Manitoba Fatality Inquiries Act, S.M. 1975, c. 9, s. 21. Again, some statutes reverse this and provide that a designated officer may direct the closing of the inquest: *e.g.*, see note 97 *supra*.

⁹⁹ R.S.C. 1970, c. E-10.

¹⁰⁰ *E.g.*, Alberta Coroners Act, R.S.A. 1970, c. 69, s. 24(2); Quebec Coroners Act, S.Q. 1966-67 c. 19, s. 23; and Saskatchewan Coroners Act, S.S. 1966 c. 94, s. 16(2).

¹⁰¹ Ontario Coroners Act, S.O. 1972 c. 98, s. 34(1).

¹⁰² This is the approach taken by the Saskatchewan Coroners Act, S.S. 1966 c. 94, s. 16(3).

¹⁰³ Ontario Coroners Act, S.O. 1972 c. 98, s. 34(2), *as amended by* S.O. 1974 c. 103, s. 13.

¹⁰⁴ *E.g.*, British Columbia, New Brunswick, Nova Scotia.

¹⁰⁵ See: *Marshall v. The Queen*, [1961] S.C.R. 123, 129 C.C.C. 232; and B. Affleck, *The Role of the Crown at the Inquest*, in *THE ROLE OF THE INQUEST IN TODAY'S LITIGATION* 19 (L.S.U.C. 1975) and R. Carter, *The Role of Counsel*, in *THE ROLE OF THE INQUEST IN TODAY'S LITIGATION* 35-36 (L.S.U.C. 1975), where discussion of this topic from the practical point of view can be found.

¹⁰⁶ R.S.C. 1970, c. E-10.

¹⁰⁷ *Id.*

the proceedings, to parties with an interest to be protected at an inquest.¹⁰⁸

Although these measures are undoubtedly highly desirable, they do not substantially alter the position of the "uncharged" witness. He is still compellable and must answer all questions, even those tending to incriminate him, on pain of contempt. And, even though his answers cannot be used against him in subsequent criminal proceedings, the very fact that he must give them may prove to be highly detrimental. His problem has not yet been satisfactorily solved by federal or provincial legislation or by case law. All that has been done is, basically, to reiterate sternly the warning expressed by the Ontario Law Reform Commission: "The inquest is not to be used as a forum for discovery for subsequent civil litigation nor as an investigatory tool in criminal proceedings."¹⁰⁹ In short, we are relying solely upon the responsible and conscientious exercise of discretion by the agencies involved in the investigation of crime and prosecution of offenders, and not upon principles or rules of law, to protect the individual against possible abuses of one legal process in order to avoid constraints on and protections conferred by another.

4. *Compellability to Testify at Other Inquiries*

Before examining the relationship between a second major right of an accused, protection against prejudicial publicity, and the coroner's inquest, one final issue must be raised: the applicability of the *Batary* case to other inquiries. Logically, if a person charged cannot be compelled to testify before a coroner's inquest, he should not be a compellable witness before any other inquiry or proceeding which would subject him to similar prejudices. This should be the case regardless of whether the inquiry is federally

¹⁰⁸ *E.g.*, Ontario Coroners Act, s. 33 and British Columbia Coroners Act, s. 23; Quebec Coroners Act, s. 24; Nova Scotia Fatality Inquiries Act, s. 11(2); and Manitoba Fatality Inquiries Act, s. 16, dealing with persons with standing. *See also*, on the rights of witnesses to counsel, Ontario Coroners Act, s. 35(1), which merely entitles him to play an advisory role, unless the coroner gives him leave to play additional or more active roles, and Alberta Coroners Act, s. 24(3) and Saskatchewan Coroners Act, s. 16(4), which permit witnesses' counsel to examine and cross-examine other witnesses.

This is a substantial improvement over the common law position, which, because the inquest is inquisitory, with no 'parties' and no 'lis', gave no right to counsel to anyone involved, strictly speaking, and set no store by rules of natural justice; *see, e.g.*, *Wolfe v. Robinson*, *supra* note 72, at 136, 132 C.C.C. at 82 (Schroeder J.A.).

¹⁰⁹ ONTARIO LAW REFORM COMMISSION, REPORT ON THE CORONER SYSTEM IN ONTARIO 100 (1971). *See also*, Affleck, *supra* note 105, at 21:

"As far as criminal charges arising out of an inquest are concerned, it is my submission that an inquest proceeding should not be used as a forerunner to criminal charges. In cases where criminal conduct is involved, the police should be urged to continue their investigations to a point where criminal charges are laid or they are satisfied that it would be useless to proceed further The inquest proceeding should not be used as a forum to air the investigation."

It should be noted that Mr. Affleck is making this submission from a prosecutorial point of view, and goes on to demonstrate how the procedure he condemns resulted in a failure to prosecute, because of lack of admissible evidence caused by the suspect taking Canada Evidence Act protection at an inquest, and the resulting embarrassment to the police and Crown Attorney.

or provincially established. Case law, however, does not appear to support this position.

In *Regina v. Quebec Municipal Commission ex p. Longpré*,¹¹⁰ a Quebec Court of Appeal decision, the *Batary* case was held *not* to apply to a public inquiry other than a coroner's inquest. The court held the accused to be a compellable witness before the Quebec Municipal Commission to testify to facts relating to the charges against him. The court distinguished the *Batary* case on two grounds: first, the proceedings in *Batary* were those of a coroner's inquest, not an administrative tribunal; secondly, in *Batary* the preliminary hearing had been adjourned pending completion of the inquest, whereas in *Longpré* the preliminary hearing had already been held. In the court's view the accused therefore would incur no further detriment in being compelled to testify before the inquiry. Neither of these reasons, it is submitted, presents a valid ground for drawing this distinction.

C. Protection Against Prejudicial Publicity and the Coroner's Inquest

It seems quite clear that persons involved in coroners' inquests who either have been charged or who may subsequently be charged with a crime as a result of the inquiry are not entitled to the same degree of legal protection against prejudicial publicity as would be accorded them in criminal proceedings against them. While the Criminal Code *requires* the making of non-publication orders if requested by the accused at his preliminary inquiry or judicial interim release hearing and prohibits the publication of confessions or admissions made before trial, no such rules govern coroners' inquests. Furthermore, although some provincial legislation specifically permits the coroner to hold inquest proceedings *in camera*,¹¹¹

¹¹⁰ [1970] 4 C.C.C. 133, 11 D.L.R. (3d) 491 (Que C.A.).

¹¹¹ E.g., New Brunswick Coroners Act, s. 21; Nova Scotia Fatality Inquiries Act, s. 10; Ontario Coroners Act, s. 26; Prince Edward Island Coroners Act, s. 10A (added by S.P.E.I. 1970 c. 13), and Quebec Coroners Act, s. 19. The Ontario legislation specifically limits *in camera* inquest to two situations, i.e., where the coroner is of the opinion that national security might be endangered or where a person is charged with an indictable offence under the CRIMINAL CODE, in which cases the coroner *may* (not *must*) hold the hearing *in camera*. Clearly, the emphasis in all these provisions is upon public hearings, subject to a limited area of exception, in the discretion of the coroner.

Mr. Carter, in his paper in THE ROLE OF THE INQUEST IN TODAY'S LITIGATION, *supra* note 105, at 35, suggests that:

In view of the provisions of section 457(2) of the *Criminal Code*, providing for an order prohibiting the publication of any evidence taken at a show cause hearing and the provisions of section 467(1), providing for an order prohibiting the publication of any evidence taken at a preliminary hearing, and in view of the wide scope of admissibility permitted by section 36 (of the Ontario Coroners Act), it would seem that if an accused had been charged with an indictable offence the inquest directed by the Solicitor General (under S. 22(2) of the Coroners Act, which permits that officer to direct the re-opening of an inquest which has been closed because someone is charged during the inquest with a criminal offence arising out of the death) should be held *in camera*.

However, this would appear, on the clear wording of the Act, to be entirely in the discretion of the coroner, and, therefore, we are again talking about a protection which is not conferred by a rule of law, but depends upon discretion.

(and although he probably possesses such a discretion at common law) extremely good reasons will be required to overcome the marked preference for holding inquiries openly and in public to fulfill their primary purposes.

The holding of an inquest may therefore be prejudicial to a person subsequently subjected to criminal proceedings by making certain Criminal Code provisions designed to preclude prejudicial publicity ineffective. After referring to these Criminal Code protections and the attempt to guarantee a fair hearing to the accused person, the authors of the recent *Rapport du Comité d'étude du Barreau du Québec sur les commissions d'enquête*, observed that:

Cette garantie est illusoire, si l'enquête du coroner ou du commissaire aux incendies fait l'objet d'une publicité tapageuse qui cause à l'accusé éventuel un préjudice important qui empêche la tenue d'un procès juste et équitable.¹¹²

D. Summary

It seems clear that, in the modern context, the primary purposes of the coroner's inquest do not include the investigation of crime and the identification and prosecution of criminals. It is equally clear that the inquest should not be regarded as a proper tool for the detection of crime and criminals. Unfortunately, although the relevant legislation of some provinces recognizes and encourages these conceptual changes, that of others does not. In fact, the opposite position is sometimes promoted.¹¹³ In dealing with the situation which *may* arise when proceedings in an inquest involve a verdict or finding alleging that a named person has committed a crime, the Criminal Code lays down the proper procedure to be followed by a coroner. This does not in itself make the proceedings in coroners' inquests "criminal" in nature, nor does it require or support classifying the inquest as a criminal court of record. At most, it recognizes that the proceedings *may* produce a formal accusation of crime which will be incorporated in the formal 'judgment' or record of these proceedings. It is submitted that, even though this does not render these proceedings "criminal" *per se*, the possibility of such findings including such an accusation should be specifically prevented.¹¹⁴ Any formal links that now exist between the inquest and the investigation and prosecution of offenders requiring or permitting the inquest to function as a formal investigative and accusatory agency should be formally severed.

Even if this is done, it is evident that under present law inquest proceedings, like many others, may be linked in a practical way with

¹¹² See 36 R. de B. 545, at 561 (1976).

¹¹³ E.g., Quebec Coroners Act, S.Q. 1966-67 c. 19, s. 30:

[T]he coroner shall also state in his verdict if he is of the opinion that a crime has been committed and, should the case so admit, mention fully the facts constituting such crime and if possible the name of the criminal.

¹¹⁴ This was also recommended in the *RAPPORT DU COMITE D'ETUDE DU BARREAU DU QUEBEC SUR LES COMMISSIONS D'ENQUETE*, *supra* note 112, at 561.

subsequent criminal proceedings. An accused may thus be deprived of the full benefit of protections enjoyed by other persons facing similar charges in situations where inquest proceedings have not been held. Such an accused may forcefully assert that he has been deprived of equal protection under the law. How can this argument be answered?

One possible solution is to say that nothing need be done; that on balance the problems raised are neither numerous nor significant. From a policy perspective it may well be argued that the need to establish publicly the truth through inquest proceedings should outweigh any unfortunate (or perhaps not so unfortunate) side-effects that may result. Evidently, one's approach will be influenced by one's basic philosophy concerning the balance that should exist between individual rights and effective enforcement of criminal law, and between individual rights and the effective public investigation of the circumstances of unusual and unnatural deaths. Or, bearing in mind the conflicting needs of effective public inquiry and individual protection, it may be argued that little more *can* be done to improve the individual's position. The equal protection argument can be met by asserting that the "inequality" lies not so much in the law or treatment under the law, as in the fact that in some cases inquests will be held, while in others, they will not. Everyone is subject to the same risks under the law. They just happen to materialize for some, but not for others.

It is submitted, however, that, if we really believe in the validity of existing protections accorded an accused or suspected person under our law and in the policies supporting these protections, we should make every practicable effort to preclude inquest proceedings, or any other proceedings, from directly or indirectly diminishing the effectiveness of these protections. The rules concerning notice, standing, right to counsel and closing and postponing inquests when charges are laid and so forth enacted in the Ontario Coroners Act ¹¹⁵ as a result of the work of the Ontario Law Reform Commission are generally desirable and workable. It is felt, however, that these alone are not sufficient.

As was discussed in the section on self-crimination and the coroner's inquest, the kind of "use immunity" available under the Canada Evidence Act and similar provincial provisions is not wholly adequate as it only precludes testimony from being used as evidence at subsequent proceedings against the witness. ¹¹⁶ The full protection compatible with the basic principle underlying the rights of a suspect to remain silent and of an accused

¹¹⁵ S.O. 1972 c. 98.

¹¹⁶ The wording of the Act itself would seem to have offered some opportunity, now presumably lost, for an interpretation that would have stopped the testimony given from being "used" in other ways than merely as evidence at trial. It might be noted in this connection that the Supreme Court of the United States recently considered the constitutionality of "use immunity" statutes in *Kastigar v. U.S.*, 402 U.S. 971, 91 S.Ct. 1660, 29 L.E. 135 (1971), concluding that such devices did not detract from the Fifth Amendment rights, as long as the protection conferred on a witness could be effectively guaranteed to prevent the prosecution not only from using the testimony elicited in any subsequent prosecution of the witness, but also from using

to be non-compellable at his trial cannot, it is submitted, be accomplished by "use immunity", but requires a consistent and general application of the right to refuse to answer any question which may tend to incriminate oneself. The facts of the *Batary* case provide an excellent illustration of this. Although an inquest should not ideally be held or continued when criminal proceedings have commenced or are imminent, if it is held, persons already charged with criminal conduct in connection with the situation under investigation at the inquest should be able to refuse to answer questions which may tend to incriminate them. They should be neither non-compellable witnesses nor compellable witnesses who are protected by a "use immunity".

Another possible solution to this problem involves the introduction of a "transactional immunity" system. Under this system, although witnesses are compelled to testify, their testimony is obtained at the expense of providing them with complete immunity. In England, special inquiries created for the purpose of allaying public unrest or suspicion are conducted in accordance with such a principle. In the Report of the English Royal Commission on Tribunals and Inquiries,¹¹⁷ it was stated that:

[I]t has long been recognised that from a practical point of view it would be almost impossible to prosecute a witness in respect of anything which emerged against him in the course of a hearing before a Tribunal of Inquiry . . . So far no such person has ever been prosecuted.¹¹⁸

This passage was based not only on the difficulties concerning self-crimination resulting from public inquiries, but also on the potential prejudice which may be created by the publicity of such proceedings: "The publicity . . . which such hearings attract is so wide and so overwhelming that it would be virtually impossible for any person against whom adverse finding was made to obtain a fair trial afterwards."¹¹⁹

Considering the desirability of restricting the publicity of the hearings of such Tribunals, however, the Commission concluded:

[A]lthough secret hearings may increase the quantity of the evidence they tend to debase its quality . . . publicity may be hurtful to some witnesses who are called before the Tribunal and indeed to some persons who are mentioned and are perhaps not called to give evidence. But this is a risk which, on the rare occasions when such inquiries are necessary, must be accepted in the national interest.¹²⁰

it for investigative leads to incriminate the witness. The majority thought this could be accomplished by an affirmative burden of proof on the prosecution to show that their evidence was derived from a legitimate source, other than and independent of the compelled testimony. With all due respect, this seems a little far-fetched in practical terms. The dissent in that decision felt that such a guarantee was illusory, and that "use-immunity" statutes took away from protection guaranteed by the Fifth Amendment. See further: *Symposium on Witness Immunity*, 67 JO. OF CRIM. L. AND CRIMINOLOGY 129 (1976).

¹¹⁷ REPORT OF THE ROYAL COMMISSION ON TRIBUNALS OF INQUIRY, (Cmnd. 3121, 1966) (known as the 'Salmon Report').

¹¹⁸ *Id.* at 27.

¹¹⁹ *Id.*

¹²⁰ *Id.* at 38-39.

A further solution to the problem of prejudice resulting from inquest publicity is either to hold the whole or part of the inquest *in camera* or to provide for the issuing of non-publication orders. This very proposal was made in the Rapport du Comité d'Etude du Barreau du Québec sur les Commissions d'enquête: "Nous recommandons donc que les lois provinciales soient modifiées pour permettre l'émission d'ordonnances de non-publicité selon les règles prévues par le Code criminel."¹²¹

Before examining the implications of this proposal, it is necessary to consider exactly what it entails. Ideally, it requires that all inquests which might give rise to criminal proceedings be held *in camera*. Alternatively, all coroners would be required to make non-publication orders whenever they were requested to do so by anyone with standing at the inquest who might, as a result of the inquest, be subjected to criminal proceedings. The question which must now be asked is whether this is too great a price to pay when the social purposes of the inquest are considered? Even if the price is not "too great," is this solution a practical one? Would it be preferable to simply delay the public release of inquest findings or the holding of the inquest itself until completion of the relevant criminal proceedings, thus facilitating the aims of both proceedings without affecting individual rights? Or would the resulting lapse of time prove unacceptably detrimental to fulfilling the purposes of inquest proceedings?

These questions are difficult to answer and involve delicate balances. It is submitted that the "ideal" solution from the point of view of maximizing individual protection would be to amend the Canada Evidence Act¹²² to restore the right to refuse to answer questions tending to incriminate the witness and introduce "non-publication" rules similar to those now included in the Criminal Code. In this way, reliable information could still be obtained at the inquest and its social purposes would not ultimately be interfered with.

Regardless of what solutions are chosen, however, one further problem remains: the method of their implementation. It is submitted that, in view of the complex constitutional issues involved in this area, any change which is desired must be made in a systematic and cooperative manner involving both provincial and federal agencies. These bodies must find solutions to their problems together and must be prepared to legislate them into effect by provincial and federal statutory provisions in such a way as to avoid any constitutional issues.¹²³ By employing such a cooperative and co-ordinated approach, some of the problems currently plaguing this area of the law may well be avoided.

¹²¹ *Supra* note 112.

¹²² R.S.C. 1970, c. E-10.

¹²³ Thus, for example, the Dominion Parliament could amend the Canada Evidence Act, and the provinces could bring their enactments, such as the Coroners Acts, into line therewith, while other changes made to provincial legislation could be adopted by reference as necessary in federal enactments such as the Criminal Code so that a total framework of interlocking, cross-referenced law on coroners' inquests resulted, none of which could be subjected to attack on grounds of constitutional invalidity.

V. DI IORIO AND THE CORONERS INQUEST: AN ANALOGY OF THE INDIVIDUAL PROTECTION ISSUES

Although, as has been demonstrated, the potential effects of a coroner's inquest on individual rights are considerable, these difficulties are relatively minor when compared with those which may result from a crime inquiry such as the one conducted by the Quebec Police Commission. The terms of reference of the inquiry,¹²⁴ its powers to compel testimony and commit for contempt, and the limited effects of section 5 of the Canada Evidence Act¹²⁵ and section 22(6) of the Quebec Police Act,¹²⁶ have a considerable impact on individual rights respecting incriminating statements and prejudicial publicity. It may well be that there is a need for such inquiries. It may even be that, in the interests of the preservation of law and order and the "fight against organized crime", such inquiries should be permitted to operate as "super police" wholesale investigation devices to aid in the enforcement of criminal law, even at the expense of individual rights.¹²⁷ However,

¹²⁴ See the text at note 1a, *supra*.

¹²⁵ R.S.C. 1970, c E-10.

¹²⁶ See S.Q. 1972 c. 16, s. 2, which permits *in camera* hearings and the receiving of the testimony of a witness in closed session, and further provides that, if the testimony of a witness is received *in camera*, it shall be confidential and, if used in the report of the Commission, shall not be connected with the witness who gave it.

¹²⁷ It should be noted that, although the RAPPORT DU COMITE D'ETUDE DU BARREAU DU QUEBEC SUR LES COMMISSIONS D'ENQUETE acknowledged that there might be a need for such an inquiry in Quebec, it went on to say:

[N]ous ne croyons pas que la commission devrait jouer le rôle d'une super-police pour poursuivre et condamner, dans l'opinion publique, ceux que la justice traditionnelle ne semble pas parvenir à atteindre, car alors, on assiste à la création et au fonctionnement d'un système de justice parallèle. Au contraire, la commission, en s'aidant d'experts de d'autres disciplines que le droit, devrait rechercher plutôt les causes de la criminalité organisée, inventorier les moyens de la police pour la combattre, explorer l'absence de coordination des divers ministères et organismes en vue de faire les recommandations qui permettraient une lutte plus efficace contre le crime organisé par notre système de police et par notre système judiciaire. C'est là un rôle, peut être moins sensationnel et moins percutant mais combien plus utile, à long terme, pour la sécurité des citoyens.

Supra note 112, at 561-62.

However, Bill C-83, referred to above (*see* notes 34, 35 and accompanying text, *supra*) which would have amended the CRIMINAL CODE to provide for crime inquiries, clearly contemplated an investigative inquiry. Under the proposed section 775:

Where the Lieutenant Governor in Council of a province is of the opinion that, in order to combat crime in any of its aspects, including organized crime in the province, more knowledge regarding criminal activities within the province that are believed to involve, primarily, offences in relation to which proceedings would ordinarily be instituted at the instance of the government of the province and be conducted by or on behalf of that government, is required *than is likely to be available through ordinary investigative procedures*, he may, from time to time, by order, establish a special commission of inquiry . . . to inquire into and report upon any aspect of those activities that is described in the order and such other matters relevant or incidental thereto as may be described in the order. (Emphasis added).

careful thought should be given to the dangers this may pose in the long run and to their potential effects in terms of the *further* erosion of the rights of the individual.

The Law Reform Commission of Canada recently conducted a study on commissions of inquiry. In its Working Paper,¹²⁸ the Commission stated that: "[C]ommissions of inquiry should be used with caution and restraint and should be accompanied by appropriate safeguards for the protection of the individual."¹²⁹

It then proceeded to suggest that such commissions should be divided into two major types, those with advisory functions and those that are primarily investigative. The advisory commissions would neither need nor be granted automatic subpoena powers, for example, and generally would raise few problems respecting individual protection. Investigatory commissions, on the other hand, would need these powers and consequently would raise problems of self-crimination and prejudicial publicity. A crime inquiry similar to the one created by the Quebec Police Commission undoubtedly falls into the second category. It is therefore useful to include at this point proposals made by the Law Reform Commission in relation to these investigative inquiries.

A. Problems of Self-Crimination

The Commission's Working Paper not only acknowledges the problem of self-crimination that is inherent in investigative inquiries, but also recognizes the dilemma involved in attempting to solve it. It states that:

[O]nce it has been accepted that commissions to investigate are desirable in certain circumstances, it is irrational to introduce protection for witnesses that will in many instances prevent meaningful investigation. . . . An inquiry barred from examining wrongdoing that may lead to criminal prosecutions would have very little room for manoeuvre.¹³⁰

The Working Paper concludes that section 5(2) of the Canada Evidence Act,¹³¹ which requires a witness to answer but protects him from the use of that answer in criminal proceedings against him, should be maintained. It recommends, however, that this protection be made available automatically¹³² and not, as is presently the case, only at the request of the witness. The Working Paper rejects any 'general immunity' approach:

The solution is not for the authorities to forfeit the right to prosecute an individual when they wish to obtain his testimony before an inquiry: there is no good reason for bestowing what would in effect be immunity upon inquiry witnesses.¹³³

¹²⁸ LAW REFORM COMMISSION OF CANADA, COMMISSIONS OF INQUIRY, WORKING PAPER 17 (1977).

¹²⁹ *Id.* at 1.

¹³⁰ *Id.* at 36.

¹³¹ R.S.C. 1970, c. E-10.

¹³² By s. 87 of the CODE, s. 38 would apply to "every investigation, inquiry, hearing, arbitration or fact-finding procedure governed by the law of Canada."

¹³³ *Supra* note 128, at 37.

These proposals, it is suggested, may well represent the maximum protection against self-crimination that is likely to be granted an individual testifying at a crime inquiry. As there seems to be a current movement away from any privilege to refuse to answer incriminating questions, arguments for reversion to such a privilege stand little chance of acceptance at this time. The modern need for information seems to outweigh the historical respect for the dignity of the individual.

B. Problems of Prejudicial Publicity

In its Working Paper, the Law Reform Commission also recognizes the dangers of prejudicial publicity arising from investigative inquiries, noting that "[p]ublicity surrounding a commission of inquiry may jeopardize the right to a fair trial of a commission witness who is an accused at the time of the inquiry, or subsequently becomes one" ¹³⁴ It proposes to meet these problems by giving an investigatory commission discretion to hold *in camera* hearings and to place restrictions on the reporting to public hearings. Witnesses would have the right to request the commission to exercise these discretions. In so doing, the commission should "[w]eigh the value of publicity with the harm that might be suffered by the witness and others if particular testimony is made public." ¹³⁵

In considering these proposals, it once again becomes apparent that the need for public ascertainment of the "truth" will preclude any measures which go beyond the commission's discretion to hold *in camera* hearings or to make non-publication orders. It is hoped, however, that guidelines will be developed concerning the exercise of this discretion. It is imperative that it neither remains too "open-ended" and arbitrary nor results in a rigid policy of open hearings and full reporting with the denial of publicity seen as a "highly unusual step". ¹³⁶

C. Equal Protection For All

Hudson J. stated in 1945 in *Re Storgoff* that: "Uniformity of procedure in criminal matters throughout Canada is a cardinal principle of the Canadian constitution." ¹³⁷ When provincial legislation, though not dealing with

¹³⁴ *Id.*

¹³⁵ *Id.* at 35.

¹³⁶ It should also be noted that, in addition to these rules and guidelines, many problems of prejudicial publicity could be avoided both in public inquiries and in other proceedings by more responsible public reporting. Recent examples of the effects of irresponsible and sensational coverage in the Ottawa "homosexual ring" case and the Toronto "Yonge Street homosexual orgy/child killing" case should not be overlooked.

¹³⁷ [1945] S.C.R. 526, at 566, 84 C.C.C. 1, at 43, [1945] 3 D.L.R. 673, at 711 (*sub nom* Rex v. Storgoff). This case also contains an interesting passage quoted by Rinfret C.J., *id.* at 543, 84 C.C.C. at 19, [1945] 3 D.L.R. at 689:

The law . . . from which our criminal law is derived furnishes no infallible test by which for all purposes one can determine whether a given proceeding is civil or criminal.

(*Re McNutt*, 47 S.C.R. 259, 21 C.C.C. 157, 10 D.L.R. 834 (1912) (Duff J.)).

criminal law and procedure in its narrow sense, establishes a coercive inquiry such as the Quebec crime inquiry, the impact of such an inquiry on Canadian criminal processes directly threatens this "cardinal principle". When the federal Parliament does the same thing, it is submitted that the policies behind sections 1(b) ("Due Process"), 2(d) ("Protection against Self-Crimination"), (e) and (f) ("Fair Hearing") of the Bill of Rights¹³⁸ are being denied substantive effect, although these provisions are possibly not technically infringed.¹³⁹

The effect of such an inquiry may be to create indirectly one set of procedures for those suspected of involvement in the type of crime under investigation and another set of procedures, which confer a greater degree of individual protection for those not suspected of involvement in that type of crime. Do we want the establishment of one brand of justice for "organized criminals" and another one for everyone else? Where might this kind of approach lead ultimately? If the preservation of law and order requires a readjustment of the balance between the State and the individual so as to improve the position of the investigator and prosecutor, surely this should be done in such a manner as to subject all persons to the *same* reduction in individual protection?

D. *The Problems of Discretion*

As Beetz J. stated in the *Di Iorio* case:

There is no doubt that the power to establish a commission of inquiry can be abused. This is true of almost any power, as has been said

¹³⁸ R.S.C. 1970, c. 44, Appendix III, as amended by S.C. 1970-71-72 c. 38, s. 29.

S. 1(b) reads:

1. It is hereby recognized and declared that in Canada there have existed and shall continue to exist without discrimination by reason of race, national origin, colour, religion or sex, the following human rights and fundamental freedoms, namely,

...
(b) the right of the individual to equality before the law and the protection of the law ...

S. 2(d), (e) and (f) read:

2. Every law of Canada shall, unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the *Canadian Bill of Rights*, be so construed and applied as not to abrogate, abridge or infringe or to authorise the abrogation, abridgment or infringement of any of the rights or freedoms herein recognized and declared, and in particular, no law of Canada shall be construed or applied so as to

...
(d) authorise a court, tribunal, commission, board or other authority to compel a person to give evidence if he is denied . . . protection against self crimination or other constitutional safeguards;

(e) deprive a person of the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations;

(f) deprive a person charged with a criminal offence of the right to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal . . .

¹³⁹ See, e.g.: W. TARNOPOLSKY, *THE CANADIAN BILL OF RIGHTS* ch. VII (2nd ed. 1975).

repeatedly, and does not make it of federal rather than of provincial concern.¹⁴⁰

The Law Reform Commission also alluded to this in its Working Paper on Commissions of Inquiry. It recommended that the establishment of an investigative inquiry, with all its powers and special risks, should be an "exceptional measure," taken only in a matter "of substantial public importance". Further, the mandate of such an inquiry should be "quite specific and as narrow as is reasonable in the circumstances." Just as there may be abuse of the power to establish an inquiry, so too, there may be abuse of its processes. Such abuse may be prevented partly by rules of law and partly by the responsible exercise of discretion by those in whose hands it lies. In general, it is considered better to control potential abuse through laws and guidelines than to rely on the proper exercise of discretion.¹⁴¹ Temptation should be removed as far as possible lest the sin be committed, for the fact of the sin may be difficult to establish and its effects difficult to expunge.

It is difficult to solve the problems of individual protection raised by crime inquiries, coroners' inquests, and other inquisitorial proceedings with powers to compel testimony, without seriously restricting them in achieving their purposes. It is, however, risky to rely upon the responsible exercise of discretion by those charged with the investigation and prosecution of criminals as a means of avoiding a solution by specific rules, or to place much faith in a doctrine of "abuse of process" to control those exercising the discretion. The simplest and easiest courses are to ignore the problems and risks, or dismiss them as an unfortunate but acceptable product of achieving the purposes of the various inquiries involved. With respect, it is submitted that the easy courses may be dangerous, not only to the appearance of equity and justice, but to the preservation of a civilized system of law which came, through one route or another, to the realization that the needs of society are best served in the long run, not by a ruthless emphasis upon the "order of the State" and the pursuit of "truth" at any cost, but a strong and even-handed respect for the individual's fundamental right, freedom, and dignity. If we look hard at the protections accorded under our present law to persons suspected and accused of crime, we cannot

¹⁴⁰ *Supra* note 1, at 98, 8 N.R. at 409, 73 D.L.R. (3d) at 537. It might be observed that some of the judgments in *Di Iorio* mention that there is no evidence before the Court that the inquiry is "a colourable attempt to evade procedural provisions of the Criminal Code" (Dickson J., 35 C.R.N.S. at 93, 8 N.R. at 40, 73 D.L.R. (3d) at 539) or that "there was abuse in the administration of the Police Act" (Beetz J., 35 C.R.N.S. at 98, 8 N.R. at 409, 73 D.L.R. (3d) at 543). It is interesting to speculate on the significance of these references.

Could there be room for the use of an "abuse of process" argument if the proceedings of the crime inquiry, or of a coroner's inquest, or any such inquisitorial tribunal, were used to avoid the restrictions of the "usual" criminal investigation and prosecution processes? How could this work in practice?

¹⁴¹ This is of course subject to the general doctrine of abuse of process which permits disallowance of the results of irresponsible exercises of discretion.

but conclude that many of them are paper protections, and that it is by no means accurate to say that such persons have most of the advantages in the legal contest with the State.¹⁴² We should beware of assuming too readily that the accused or suspected person has so many rights that little harm will be done by taking a few away. It is still better to let some guilty persons escape rather than to risk sacrificing the innocent, or the rights of the individual, upon the altar of "law and order", without a conscious decision, taken after anxious and careful consideration, that such risk is an unavoidable cost to pay for an essential need.

VI. CONCLUSION

The problems concerning individual protections exemplified by the Quebec Crime Inquiry admit of no easy resolution. *Di Iorio* is disappointing in its limited treatment of these problems, and other proposed solutions would not appear to be entirely satisfactory either. The complexity of the problem and lack of success to date must not deter further attempts to improve the situation, but, as a former chairman of the U.S. Senate Subcommittee on Constitutional Rights has warned:

While we search for solutions, I prefer that history judge our time and our institutions in terms of our concern for the protection of civil liberties, constitutional rights and individual freedom, rather than in terms of our unrestrained pursuit of transgressors.¹⁴³

¹⁴² See, e.g.: Hooper, *Discovery in Criminal Cases*, 50 CAN. B. REV. 445 (1972).

¹⁴³ Hennings, *The Wiretapping-Eavesdropping Problem A Legislator's View*, 44 MINNESOTA L.R. 813, at 834 (1959-60).