

# STANDING IN THE PUBLIC INTEREST AT CORONER'S INQUESTS IN ONTARIO

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## I. INTRODUCTION

Along with the concepts of jurisdiction, justiciability and relevance, standing is one of the vehicles developed by the common law to limit the scope of inquiry by courts, tribunals and investigative bodies. In Ontario, subsection 41(1) of the *Coroners Act* casts the statutory test for standing in terms of whether a "person is substantially and directly interested in the inquest".<sup>1</sup> Clearly, this definition has its origin in the private law concern with limiting participation in private disputes to those with a direct interest in the issues upon which adjudication is sought.<sup>2</sup>

A coroner's inquest is a unique example of a state-sanctioned investigative forum with a purely public purpose. The development of the inquest has spanned a number of centuries. Like many aspects of modern government, its roots are grounded in a different day, serving different functions. Now, in most jurisdictions where the inquest continues to exist, its structure and its ostensible purposes are set out in statutes that establish a self-contained system of investigation and recommendation. Through public hearings, and at public expense, coroners use the vehicle of the inquest to inquire into the circumstances and causes of a broad range of deaths. In Ontario, although many inquests relate to deaths within institutional contexts,<sup>3</sup> the *Coroners Act* provides a potentially limitless authority for inquiry. Conceivably, the subject matter of an inquest can be as infinite as the conduct and situations which can produce

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<sup>1</sup> *Coroners Act*, R.S.O. 1980, c. 93, s.41(1). Unless otherwise cited, all references to the *Coroners Act* will refer to provisions of the 1980 Revised Statutes of Ontario.

<sup>2</sup> See generally, T. Cromwell, *LOCUS STANDI: A COMMENTARY ON THE LAW OF STANDING IN CANADA*, (Toronto: Carswell, 1986) at 165-91.

<sup>3</sup> See *Coroners Act*, s.10(2) and 10(4). With respect to deaths within facilities including: nursing homes; psychiatric hospitals; and homes for mentally disabled persons the *Act* requires immediate notice to the Coroner in order that an investigation can be held to determine whether an inquest ought to be ordered. Specifically with respect to a death within a correctional institution or while someone is in police custody, an inquest must be held.

death. In determining whether to order an inquest, the principal consideration is whether to do so would "serve the public interest".<sup>4</sup>

The multi-leveled function of the modern inquest in Ontario has been described as providing the means for the public ascertainment of facts relating to deaths, for focussing community attention on preventable deaths and for satisfying the community that the circumstances surrounding a death will not be "overlooked, concealed or ignored".<sup>5</sup> Notwithstanding the breadth and diversity of the issues which may be canvassed, the scope of inquiry is limited significantly by restricting participation to those people who are designated by the coroner "as a person with standing".

The purpose of this article is to examine the development and impact of the issue of standing at coroner's inquests in Ontario. A more general purpose is to assess the utility of incorporating a private law test for limiting participation into a forum established in the public interest. The discrete context of the inquest provides a useful paradigm for considering whether the inclusion of a private law mechanism impairs the pursuit of public obligations.

## II. AN HISTORICAL ACCOUNT

The role of the coroner has changed significantly over the centuries. While coroners once performed major functions within the administration of justice and the machinery of local government, these aspects of authority have diminished considerably. The one constant, however, is the coroner's general jurisdiction to inquire into sudden and unusual deaths.

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<sup>4</sup> Section 20 of the *Coroners Act* now provides:

When making a determination whether an inquest is necessary or unnecessary, the coroner shall have regard to whether the holding of an inquest would serve the public interest and, without restricting the generality of the foregoing, shall consider,

- (a) whether the matters described in clauses 31(1)(a) to (e) are known;
- (b) the desirability of the public being fully informed of the circumstances of the death through an inquest; and
- (c) the likelihood that the jury on an inquest might make useful recommendations directed to the avoidance of death in similar circumstances.

The matters described in subsections 31(1)(a) to (e) are the "who, how, when, where, and by what means" questions regarding the death.

<sup>5</sup> R.C. Bennett, *The Role of the Coroner's Office*, in *THE ROLE OF THE INQUEST IN TODAY'S LITIGATION* (Toronto: L.S.U.C., 1975) at 5. Dr. Bennett is now the Chief Coroner for Ontario. See his rulings in the *Conter Inquest*, discussed *infra*, at 653-54, as an example of limiting the scope of inquiry through standing.

The office of the coroner dates back to least 1194,<sup>6</sup> when it was established as part of Henry II's larger process of administrative reform.<sup>7</sup> Each county elected three knights and one clerk to act as "custodes placitorum coronae" or, in English, "keepers of the pleas of the Crown". These officials soon became known as "coroners" or "crowners." They assumed a number of functions previously performed by local sheriffs who had been the senior and most powerful Crown agents in each county.<sup>8</sup> It appears that in 1194 no instructions beyond keeping the pleas of the Crown were issued. The breadth of the rubric "pleas of the Crown", conceivably encompassing all offences, would suggest a large role in the incipient criminal process of medieval times. It was not until Bracton's time, some fifty years later, that one finds an attempt to explain the various obligations actually performed. The coroner's official duties included "receiving abjurations of the realm made by felons in sanctuary", hearing appeals and confessions of felons, and administering outlawries by appraising and holding lands and chattels subject to forfeiture.<sup>9</sup> The coroner was also empowered to attach or arrest witnesses and suspects. Criminals were sent to trial only by "presentment" or as a result of a finding of a coroner's inquest.<sup>10</sup> Although the coroner's inquest bore similarity to a modern preliminary inquiry,<sup>11</sup> the coroner's principal occupation, how-

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<sup>6</sup> While a formal ordinance known as the *Articles of Eyre* was published in 1194, there is some evidence that the office existed prior to that date: see Poole, *infra*, note 7 at 390. See Boys, *DUTIES OF THE CORONER*, 3d ed. (Toronto: Carswell, 1893) at 2. The author refers to the office of coroner as being "mentioned in the charter of Athelston to Beverly anno 925" but this source is considered dubious: see 9 *Halsbury's Laws of England* (4th) at para. 1001 [hereinafter *Halsbury's*].

<sup>7</sup> See generally R.F. Hunnisett *THE MEDIEVAL CORONER* (Cambridge: Cambridge University Press, 1961) at 1-8; A.L. Poole, *FROM DOMESDAY BOOK TO MAGNA CARTA* 1087-1216, 2d ed. (Oxford: Clarendon Press, 1955) at 387-91.

<sup>8</sup> One of the sheriff's major responsibilities was to collect and deliver revenues from the shire to the King. He also organized and commanded the local militia and presided over the shire court. Corruption and abuse of power during the 12th century led to the articles of eyre intended both to rationalize the administrative process and diminish the power of the sheriff. See Poole, *ibid.* at 387-390.

<sup>9</sup> See Hunnisett, *supra*, note 7 at 1-3. Abjuration of the realm was a form of self-imposed banishment. The hearing of appeals and confessions was a process whereby an accused person confessed before plea and accused his accomplices in an effort to obtain a pardon.

A declaration of outlawry as a result of conviction for a felony placed the convicted person beyond the protection of the law. As well, all lands and property were forfeited to the Crown. Findings of a coroner in respect of the lands and chattels of felons were reviewable by the King's Bench, "the sovereign coroner", on process grounds such as the failure to hear witnesses on behalf of the felon. See Hale, *HISTORY OF THE PLEAS OF THE CROWN*, 1736, (London: Printed by E. & R. Nutt & R. Gosling for F. Gyles, T. Woodward & C. Davis, 1736) Vol. 1 at 415, and Vol. 2 at 60.

<sup>10</sup> See W.S. Holdsworth, *A HISTORY OF ENGLISH LAW*, 7th ed. (London: Methuen & Co., 1956) at 296.

<sup>11</sup> *Ibid.*

ever, was to inquire into sudden and accidental deaths.<sup>12</sup> His attention, for criminal purposes, was restricted to homicide and suicide.<sup>13</sup>

Certain aspects of the coroner's early role, previously performed by the sheriff, have been offered as explanations for the focus on inquiries into deaths.<sup>14</sup> After the conquest, William I instituted a levy known as the murdrum, or murder fine, to protect Normans in a hostile environment.<sup>15</sup> A penalty was paid to the King by the community in respect of each deceased found in their district unless the residents of the hundred produced the murderer or it was established that the deceased was not a Norman.<sup>16</sup> Thus, the findings of a coroner as to whether a death was caused by murder or accident had financial implications, both for communities and the King's revenues. These fines produced a "not insignificant revenue", sufficiently lucrative that the practice continued until 1340, long after the original concern had disappeared.<sup>17</sup>

In cases of death through misadventure caused by an animal or object, a forfeiture known as a deodand was required. Hale explained:

As where a man falls from a horse, or house, or boat, or into a pit, or a tree or tile, fall upon him and kill him, or is killed by a beast, in this case the coroner ought to take an inquiry super visum corporis, and also of the manner and means how he came by his death and of the thing, whereby it happened, and of the value thereof, because in many cases there is a forfeit belonging to the king as a deodand. . . .<sup>18</sup>

Again, it fell upon the coroner not only to make a finding of misadventure and to attribute it to a particular cause, but also to determine ownership of the object, property or animal and to appraise its value.<sup>19</sup> Similar issues of ownership and appraisal arose in cases of homicide or suicide since a subsequent judgment would result in forfeiture of the felon's lands and chattels. It was the coroner's duty to commit relevant property to safe-keeping pending ultimate determination of the case by the justices.<sup>20</sup>

<sup>12</sup> See Poole, *supra*, note 7 at 391.

<sup>13</sup> See Hunnisett, *supra* note 7 at 5, who disagrees with Bracton and comments on the discrepancy between statute and practice. He finds: "Far from dealing with nearly all felonies *ex officio*, [the coroner] was necessarily concerned only with homicide and suicide."

<sup>14</sup> In C.J.E. Wood, *Discovering the Ontario Inquest* (1967) 5 OSGOODE HALL L.J. 243 at 244-45, the author emphasizes the collection of the murdrum levy. Hunnisett, *supra*, note 7 at 33, explains how the deodand "caused the coroner much trouble".

<sup>15</sup> See Poole, *supra*, note 7 at 392-95.

<sup>16</sup> One would think that by the 13th century in a stable, rural community, it would be easy to prove that a deceased was "English" unless the body belonged to a stranger. However, Hunnisett recounts that a "murdrum was adjudged in 21 cases at the 1248 Sussex eyre, in 51 cases in 1279, and in 92 in 1288. He suggests that the personal expense involved in attending at an inquest to establish "Englishry" was greater than the shared cost of the fine: *supra*, note 7 at 28.

<sup>17</sup> See Poole, *supra*, note 7 at 393.

<sup>18</sup> See Hale, *supra*, note 9 at 418.

<sup>19</sup> See Hunnisett, *supra*, note 7 at 31-34.

<sup>20</sup> *Ibid.* at 29-31.

A further function that related to the King's revenues involved inquiries into treasure trove and wrecks of the sea. Although this duty occupied coroners in the early 13th century,<sup>21</sup> the role dissipated probably as a result of the granting of rights in respect of wrecks at sea to local lords. As Hunnisett comments:

[T]he justices were not likely to insist that the coroner should concern himself with wrecks which could bring the King no profit.<sup>22</sup>

This observation highlights the curious combination of functions embraced by the coroner's subordinate role in medieval times: fact-finder, appraiser, and custodian of property but without any real adjudicative power.<sup>23</sup> In respect of criminal responsibility, the coroner's relationship to the criminal process consisted of making findings of causation which led to trials conducted by the justices. In medieval times, the coroner's role as custodian of the pleas of the Crown could more accurately be described as the custodian of the revenues generated by the pleas of the Crown.

By the time of Hale's writing in the early 18th century, the role of the coroner had been refined both by custom and by statute. Coroners were elected by the freeholders of each county.<sup>24</sup> Their position within the administration of justice was subordinate to the King's Bench and different from that of the justices of the peace. Although some of the ancient duties still applied,<sup>25</sup> the coroner's principal power was to inquire into deaths:

Regularly the coroner hath no power to take inquisitions but touching the death of a man and persons subito mortum and some special incidents thereto.<sup>26</sup>

Upon being notified of a death within the county, the coroner instructed a constable to summon at least twelve jurors "to make an inquisition touching the matter".<sup>27</sup> The jury was sworn and charged to view the body along with the coroner and to consider whether the death arose by murder, misadventure or suicide.<sup>28</sup> Part of the inquest's function was to determine the manner of death including the instrument which caused it and the

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<sup>21</sup> It continued later in some areas such as Northumberland, Cornwall, and Devon: see *ibid.* at 6-7.

<sup>22</sup> *Ibid.* at 7.

<sup>23</sup> Hunnisett states that while some held the view that coroners could pass judgment on felons caught in the act, there is no evidence to support this: *ibid.* at 6.

<sup>24</sup> See Hale, *supra*, note 9, vol. 2 at 55-56.

<sup>25</sup> *Ibid.* at 67-68, where Hale explains the limited powers of coroners in respect of appeals, the accusations of an approver and abjurations.

<sup>26</sup> *Ibid.* at 57.

<sup>27</sup> *Ibid.* at 59.

<sup>28</sup> *Ibid.* at 60.

place, length and depth of the mortal wound.<sup>29</sup> If an inquest found that a death was caused by the act of another, whether by malice or not, and whether justifiable or not, a finding of murder was required and the coroner would forward an account of all the evidence so that a bill of murder could be preferred.<sup>30</sup> The coroner would commit all persons considered responsible, whether as principals or accessories, to the custody of the sheriff pending ultimate adjudication of guilt by the petit jury.<sup>31</sup> Witnesses would be bound over by recognizance to the next gaol delivery as would anyone present at the death who was not considered guilty, since further evidence might be discovered against them.<sup>32</sup>

While the procedure of an inquest and the powers of a coroner resembled elements of the criminal process, and even played a threshold role in many prosecutions, it is clear that by the 18th century the jurisdiction of the coroner related to deaths in general. An inquest could result in findings of murder, death by natural causes, by misfortune,<sup>33</sup> or suicide. It was only when a finding of murder resulted that the criminal process was invoked. In those situations, the role of the coroner was distinct from the justice of the peace who subsequently examined persons in order to produce a written accusation setting out the particulars of the criminal allegation.<sup>34</sup>

The breadth of the coroner's jurisdiction was evidenced by the non-criminal aspects of the functional role. Whenever a person died in gaol, even if by natural causes, an inquest ought to have been conducted to determine whether the prisoner "died by the ill usage of the gaoler".<sup>35</sup> When a finding was made of death by misadventure as a result of a dangerous location, like a fall into a pit, the coroner was empowered to order the village to close the pit.<sup>36</sup> This special regulatory aspect of the coroners function has formally disappeared. However, it likely provided the genesis of the modern obligation to recommend ways to avert future deaths.

The current practice in England has been entrenched in a series of statutes<sup>37</sup> and the coroner continues to exercise general jurisdiction in

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<sup>29</sup> *Ibid.* at 58.

<sup>30</sup> *Ibid.* at 60-62.

<sup>31</sup> *Ibid.* at 64. The jurisdiction of the coroner did not extend to accessories after the fact but only to the responsibility of orders, abettors and accessories before the fact: *see ibid.* at 63.

<sup>32</sup> *Ibid.* at 64.

<sup>33</sup> In these cases, the inquiry would extend to the thing, or place which caused death so that ownership and value could be determined for the purpose of forfeiture and deodand: *see ibid.* at 62.

<sup>34</sup> *Ibid.* at 61.

<sup>35</sup> *Ibid.* at 57. This duty has continued to be part of the coroner's obligations: *see Coroners Act*, s.10(4), *as am. Child and Family Services Act*, 1984, S.O. 1984, c.55, s. 212(2).

<sup>36</sup> Hale, *ibid.* at 62. If the village failed to close the pit, it would be fined.

<sup>37</sup> *Coroners Act*, 1887 (U.K.), 1887, c.71; *Coroners Act*, 1892 (U.K.), 1892, c.56; *Coroners (Amendment) Act*, 1926 (U.K.), 1926, c.59; and *Coroners Act*, 1954 (U.K.), 1954, c.31.

respect of deaths and to play a threshold role in cases of homicide. Where an inquest results in a finding of murder, manslaughter or infanticide, the coroner is required to issue a warrant for the arrest of the persons considered responsible and a warrant of commitment for trial in the Crown Court.<sup>38</sup>

A similar relationship to the criminal process existed in Ontario in the 19th century. Although appointed coroners existed in Ontario prior to 1780,<sup>39</sup> the first statutory reference occurred in 1833 in an act dealing with criminal procedure.<sup>40</sup> This enactment detailed the pre-trial roles of both justices of the peace and coroners and it continued the English practice of permitting coroners to commit for trial when evidence at an inquest supported a finding of murder, manslaughter or responsibility as an accessory before the fact. After providing an opportunity for the accused person to cross-examine witnesses, the coroner was required to bind over witnesses by recognizance to the next Court of Oyer and Terminer, or General Gaol Delivery, and to deliver to that court a transcript of the evidence.<sup>41</sup>

The enactment of our first Criminal Code saw the repeal of the provisions empowering a coroner to commit for trial.<sup>42</sup> The only reference in the Code to the role of a coroner provided that upon a verdict or finding at an inquest of murder or manslaughter, the coroner would issue a warrant conveying the accused to appear before a magistrate or justice.<sup>43</sup> The function of committal for trial was to be performed by a magistrate or justice. The enactment of the Code represented the formal divorce of the coroner from the criminal process. In *Faber v. The Queen*,<sup>44</sup> De-Grandpré J., speaking for the majority, concluded:

Simple comparison of these enactments indicates that the coroner is not now a part of the structure of criminal justice. The link was completely severed in 1892, and subsequent legislative changes have only made this fact more apparent. The traditional role of the coroner, as it existed in England, disappeared, and was replaced by a duly Canadianized function,

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<sup>38</sup> See *Halsbury's*, *supra*, note 6 at para. 1153. If prior to the completion of an inquest a person has been charged before examining justices in respect of the death, the inquest is adjourned pending conclusion of the criminal proceedings: *ibid.* at para. 1114.

<sup>39</sup> See Wood, *supra*, note 14 at 246, where the author mentions an Ordinance of Governor Haldimand in 1780 providing for the payment of fees to coroners in Upper Canada.

<sup>40</sup> See *An Act Relating to the Bailing and Commitment, Removal and Trial of Prisoners, in Certain Cases* S.U.C. (1833), Will. IV, c. II [hereinafter *Bailing Act*].

<sup>41</sup> *Bailing Act*, s. 4. Wood points out that this provision was reproduced without change in subsequent statutes of 1841, 1869, and 1886: see *supra*, note 14 at 247.

<sup>42</sup> See Wood, *ibid.* at 247.

<sup>43</sup> *The Criminal Code*, 1892, S.C. 1892, c. 29, s. 568.

<sup>44</sup> (1975), [1976] 2 S.C.R. 9, 65 D.L.R. (3d) 423 [hereinafter cited to S.C.R.].

one which was not primarily of a criminal nature, but came to have a social context.<sup>45</sup>

Thus, while the placement of the coroner within the administration of justice had changed, the essential investigative character in respect of deaths had been placed squarely within a broad public and social framework.

To bring this historical framework into the 20th century requires some observations about the dimensions of the "social context" which DeGrandpré J. described. While the revenue-gathering and criminal process functions had disappeared over time, the focus remained on the causes of death. In the 1887 revised statutes, the authority to conduct an inquest was hinged to the preliminary belief that a death resulted from "violence or unfair means, or by culpable or negligent conduct" and not "through mere accident or mischance".<sup>46</sup> As well, inquests were required in all cases of death within a "penitentiary, gaol, prison, house of correction, lock-up house or house of industry".<sup>47</sup> This requirement has been explained as a means of providing a vehicle of public accountability and scrutiny to allay suspicions of impropriety or wrong-doing on the part of public officials.<sup>48</sup>

While we have seen historical support for a preventive role in respect of dangerous conditions or practises, the *Coroners Act* until recently made no provision for ameliorative recommendations. Writing in 1967, one author observed:

If jury recommendations were made in the early twentieth century, it is strange that it is not mentioned in the report on coroners made in 1921 by the Ontario Public Services Commission. By 1960 it had become usual practice for the jury to include recommendations on any matters involving public safety. Recent administrative changes in the Ontario government have emphasized the importance of this aspect of the verdict.<sup>49</sup>

He outlined an internal administrative scheme whereby inquest reports and recommendations would be forwarded to relevant government departments and the management of plants, hospitals and institutions in which a death occurred. Although the legislation before 1972 did not formally address a preventive aspect of the coroner's role, there can be little doubt that one had evolved over time.

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<sup>45</sup> *Ibid.* at 30. While DeGrandpré J. was concerned with the *Coroners Act of Quebec*, S.Q. 1966-67, c. 19, his comments about the nature of a coroner's inquest and the relationship to the criminal process are of general applicability. See also *R. v Macdonald, Ex parte Whitelaw* (1968), 2 D.L.R. (3d) 298 at 305, [1969] 3 C.C.C. 4 at 12 (B.C.C.A.).

<sup>46</sup> *An Act Respecting Coroners*, R.S.O. 1887, c.80, s.2 [hereinafter *Coroners Act*, 1887].

<sup>47</sup> *Coroners Act*, 1887, s.3.

<sup>48</sup> See Wood, *supra*, note 14 at 248-49.

<sup>49</sup> *Ibid.* at 250. The contemporary process is described by Bennett, *supra*, note 5 at 7. He noted that in 1974, 937 recommendations were obtained from 306 inquests.



### III. THE 1972 REVISION

The current statutory regime in Ontario was enacted in 1972. The *Act* detailed the obligations of the coroner and provided a clearer structure for the inquest process. It did not, however, recreate the coroners system. The new statutory regime was a refined lineal descendant of the medieval office — a product of its history and more recent events. The coroners system in Ontario attracted substantial attention in the late 1960's as a result of allegations of abuse of discretion in respect of ordering and conducting inquests and manipulations of the appointment process, made publicly by the Chief Coroner for Metropolitan Toronto.<sup>50</sup> Although a subsequent Royal Commission<sup>51</sup> found no improprieties, the system, its accountability and its place within the provincial governmental structure received ample media attention. Parts of the 1972 Act can be attributed to a desire to formalize aspects of process and decision-making that bear on issues of public accountability. With respect to the issue of standing, the two factors which most influenced the articulation of the current statutory test were the decision in *Wolfe v. Robinson*<sup>52</sup> and the *Report on the Coroner System in Ontario* published in 1971 by the Ontario Law Reform Commission.<sup>53</sup>

The *Wolfe* case involved an inquest into the death of a baby at which the jury's verdict found "that a contributing factor to the death of the said infant was the delay in administering accepted treatment; that is, exchange transfusion, because of the parents' refusal to give consent for this treatment. . . ." <sup>54</sup> At the inquest, counsel for the parents applied for the right to cross-examine witnesses, call evidence and make submissions. The coroner was advised by the Crown Attorney that the operative statute expressly prohibited the granting of the request and it was refused. The position of the Crown Attorney was clearly erroneous. The parents sought certiorari to quash the verdict of the coroners jury on the ground, generally, that the refusal of standing ignored the principle of *audi alteram partem* and thereby resulted in either a loss of jurisdiction or a failure to exercise jurisdiction.<sup>55</sup>

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<sup>50</sup> A Royal Commission (known as the "Parker Commission") was appointed by Order-in-Council dated April 13, 1967, to investigate various allegations made by Dr. Morton Shulman. Dr. Shulman had been the Chief Coroner for Metropolitan Toronto. His appointment was terminated a week before the Commission was appointed.

<sup>51</sup> See REPORT OF THE ROYAL COMMISSION TO INVESTIGATE ALLEGATIONS RELATING TO CORONERS' INQUESTS (Toronto: Queen's Printer, 1968), particularly the summary at 129-33.

<sup>52</sup> [1961] O.R. 250, 27 D.L.R. (2d) 98 (H.C.); *aff'd* [1962] O.R. 132, 31 D.L.R. (2d) 233 (C.A.).

<sup>53</sup> Ontario Law Reform Commission, REPORT ON THE CORONER SYSTEM IN ONTARIO (Toronto: Department of Justice, 1971).

<sup>54</sup> *Wolfe v. Robinson*, *supra*, note 52 [1962] O.R. at 133 (C.A.).

<sup>55</sup> *Wolfe v. Robinson* *supra*, note 52 [1961] O.R. at 251 (H.C.).

The application was unsuccessful both in the High Court<sup>56</sup> and in the Court of Appeal.<sup>57</sup> Neither parentage nor the likelihood of an adverse finding created any "right . . . to participate in the proceedings or, more particularly, to cross-examine the witnesses".<sup>58</sup> The *audi alteram partem* argument was rejected on the ground that the proceeding did not involve an issue between parties in the traditional judicial sense nor did it lead to a "determination of questions affecting either the litigant's person or his purse."<sup>59</sup> Both levels of court examined the historical antecedents to the operative statute and concluded that only the Crown Attorney or counsel representing the Attorney-General was given a right of participation. Wells J., held:

The passing of the Coroners Rules and the absence of any other provisions in the Statute of 1887, which was in effect a tidying up of the law relating to coroners, strengthens the view that apart from express statutory authority there is no right in counsel to appear, examine or cross-examine in the Coroners Court *unless the coroner grants such leave. There is undoubtedly a discretion in the coroner to allow such a procedure.*<sup>60</sup> [emphasis added]

Later, this article returns to the significance of his recognition of a discretion in common law to grant standing. Of course, a discretion properly exercised does not justify judicial intervention even if a judge would have viewed the question differently. In fact, Wells J. commented that the circumstances of the case may well have persuaded him to respond more favourably had he been sitting as the coroner.<sup>61</sup>

The historical analysis of Wells J. warrants repetition as a capsulized description of the evolution of inquests up to 1961:

[I]n the case of the Coroners Court it is a medieval institution which has not been so liberalized by statutes or judicial decision as all our other Courts have. If I may say so, there are very sound reasons why it should not be so liberalized. It is in fact, as I have said before, an inquisition or enquiry for the benefit of the Crown and its officers. There are no parties or issues before it; its duty is, if possible, to ascertain the cause of death. All the results which would flow from any enlargement or modernization of this power would simply be to duplicate the procedure which is already available in respect of any person accused of any crime by virtue of the Criminal Code. That is one of the reasons why the coroner's inquest has not been broadened in its scope and if I may say so it appeals to me as a very sensible reason for leaving the inquisition of the coroner just the way it is.<sup>62</sup>

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<sup>56</sup> *Ibid.*

<sup>57</sup> *Supra*, note 54.

<sup>58</sup> *Ibid.* at 143.

<sup>59</sup> *Ibid.* at 136.

<sup>60</sup> *Supra*, note 55 at 257-58, relying upon *Agnew v. Stewart* (1862), 21 U.C.Q.B.

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<sup>61</sup> *Wolfe v. Robinson*, *ibid.* at 262.

<sup>62</sup> *Ibid.* at 263-64.

The Court of Appeal confirmed the narrow investigative function of the coroner's inquest as it related to "sudden, violent or unnatural deaths" but went on to conclude that the inquest continued to be a "criminal Court of record" notwithstanding the narrowing of its function over the years.<sup>63</sup>

It was against this background and in the wake of the Parker Commission<sup>64</sup> that the Ontario Law Reform Commission examined and reported on the coroner's system. Because the process established by the 1972 statute conforms intimately with the recommendations of the Ontario Law Reform Commission, it is important to note the Commission's view of the broad, societal function to be performed by coroner's inquests particularly with respect to matters of public safety and deaths within public institutions:

The death of a member of society is a public fact, and the circumstances that surround the death, and whether it could have been avoided or prevented through the actions or agencies under human control, are matters that are within the legitimate scope of all members of the community. A major role within the framework of institutions that have been created by our society to reflect these facts of human existence is implicit within the office of the coroner . . . the role of the office of coroner must keep pace with societal changes, and where necessary, must move away from the confines of doctrines that are inconsistent with community needs and expectations in 20th century Ontario.<sup>65</sup>

The Report goes on to specifically note that coroner's inquests serve "a second major purpose" beyond determining the factual circumstances of a death. This purpose is described as the "means by which the effectiveness of such matters as legislation, regulations and industrial practices designed to ensure safe conditions in industry and the community can be tested in the light of circumstances which may indicate their inadequacy".<sup>66</sup> As well, the Commission recognized the prophylactic function of inquests in the sense that suspicions can be addressed by providing a public inquiry which not only serves as an evidentiary crucible but also as a symbol of community concern.<sup>67</sup>

The Report was a serious effort to structure a modern coroners system which defined the obligations of the coroner and provided the framework for their exercise within the contemporary social context. Its treatment of the question of standing, however, showed little insight into the issue. The matter of a statutory test was dealt with in one brief<sup>68</sup> paragraph making reference only to the English test and the recommen-

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<sup>63</sup> *Supra*, note 54 at 135-36.

<sup>64</sup> *Supra*, note 50.

<sup>65</sup> *Supra*, note 51 at 25.

<sup>66</sup> *Ibid.* at 30.

<sup>67</sup> *Ibid.* at 29.

<sup>68</sup> *Ibid.* at p. 89.

dation of the McRuer Report.<sup>69</sup> The English Coroners Rules provided that standing should be conferred upon "any person who in the opinion of the coroner is a properly interested person".<sup>70</sup> The McRuer Report recommended the adoption of a narrower "substantially and directly interested" test for inquests.<sup>71</sup> Without any analysis, the Law Reform Commission endorsed the McRuer formula.<sup>72</sup> Thus, the Commission's significant attempt to broaden and define the public context of coroners inquests which led to the 1972 revision was accompanied by a private law standing test. Perhaps unwittingly, the Commission, followed soon by the Ontario legislature, had created a modern vehicle with the aspirations of a Boeing 747 but the seating capacity of a Lear Jet.

#### IV. INTERPRETING AND APPLYING THE CURRENT STANDING TEST

The *Coroners Act* now specifically provides for standing and rights of participation:

s.41(1) On the application of any person before or during an inquest, the coroner shall designate him as a person with standing at the inquest if he finds that the person is substantially and directly interested in the inquest.

(2) A person designated as person with standing at an inquest may,

- (a) be represented by counsel or an agent;
- (b) call and examine witnesses and present his arguments and submissions;
- (c) conduct cross-examinations of witnesses at the inquest relevant to the interest of the person with standing and admissible.<sup>73</sup>

Subsection 41(1) uses the words "shall designate". Accordingly, section 41 provides a standing entitlement and guaranteed rights of participation in respect of those who are "substantially and directly interested". However, the provision on its face does not expressly interfere with any pre-existing discretion to grant standing to persons who do not satisfy that

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<sup>69</sup> Ontario, ROYAL COMMISSION INQUIRY INTO CIVIL RIGHTS (Report No. 1) vol. 1 (Toronto: Queen's Printer, 1968-69) at 497.

<sup>70</sup> See *Coroners Rules*, 1953, s. 1, 1953, No. 205, cited in 9 *Halsbury's Laws of England* (4th ed.) at 691.

<sup>71</sup> *Supra*, note 69. At the time of the McRuer Commission, the *Coroners Act* contained no provision in respect of standing. The Report considered public inquiries generally and approved the "substantial and direct interest" test which had been employed in the Australian Royal Commissions legislation for decades (at 450). In the same chapter, the Commission analogized between public inquiries and coroner's inquests as potential vehicles for causing harm or injustice by reason of allegations made and evidence adduced publicly (at 448). This conceptual linkage probably accounts for the adoption of the same test in respect of inquests since beyond simply offering it to fill the statutory void, there was no discussion (at 492).

<sup>72</sup> Interestingly, former Chief Justice McRuer was one of the Ontario Law Reform Commissioners in 1971.

<sup>73</sup> *Coroners Act*, R.S.O. 1980, c. 93, reflecting amendments to S.O. 1972, c. 98, s. 33.

requirement.<sup>74</sup> The *Coroners Act* pays particular attention to deaths within institutions and with respect to such facilities as nursing homes, psychiatric facilities and homes for mentally disabled persons, requiring immediate notice to be given to the coroner in order that an investigation can be held to determine whether an inquest ought to be held.<sup>75</sup> Specifically with respect to a death within a correctional institution or while someone is in police custody, an inquest must be held.<sup>76</sup> It should be no surprise that many of the cases involving the question of standing relate to prisons and psychiatric facilities.

Before examining the line of cases since 1972 relating to deaths within penal or mental health institutions, it can be said at the outset that coroners have almost universally denied standing beyond the set of persons who are related to the deceased or in respect of whom questions of responsibility or culpability may be addressed. Individuals who share a common interest or even a common existence with the deceased and groups which represent those individuals have consistently been denied standing at inquests.

In *Re Brown and Patterson*<sup>77</sup> the Divisional Court quashed a denial of standing in respect of a group of prisoners who wished to participate in the inquest into the death of another prisoner who had died while in segregation. The order was premised on concerns about the manner in which the coroner dealt with the application for standing:

The coroner must make his finding after proper inquiry, on the facts before him, on proper principles, and not arbitrarily or on the basis of extraneous considerations or under the misapprehension that he has a discretion.<sup>78</sup>

In the course of the judgment, Henry J. identified the notion of a "common experience" which some of the applicants shared with the deceased in that they lived within the same environment. He remarked that a suggestion that the environment may have contributed to the death "would be proper justification in law for a finding that those applicants are persons having a substantial and direct interest in the inquest".<sup>79</sup> When the request for standing was reheard by the same coroner, it was again refused and a subsequent application for judicial review was denied.<sup>80</sup>

A few years later, another death at the same institution generated an application for standing by three prisoners both in their personal capacity and in their capacity as the Inmates' Committee of Millhaven

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<sup>74</sup> *Infra*, at 660-66, I discuss the argument that substantial and direct interest may not be an exhaustive test for standing.

<sup>75</sup> See *Coroners Act*, s.10(2).

<sup>76</sup> *Coroners Act*, s.10(4).

<sup>77</sup> (1974), 6 O.R. (2d) 441, 53 D.L.R. (3d) 64 (H.C.) [hereinafter cited to 6 O.R. (2d)].

<sup>78</sup> *Ibid.* at 448.

<sup>79</sup> *Ibid.*

<sup>80</sup> *In the Matter of an Inquest into the Death of Edward Nalon*, (14 April 1975), (Ont. Div. Ct.) (Zuber J.). [unreported].

Institution.<sup>81</sup> The request was denied by the presiding coroner but the inquest was adjourned to permit judicial review. The application was brought on expeditiously before a single judge of the High Court. The applicant's factum offered the following grounds in support of a substantial and direct interest:

1. Evidence would be adduced that the deceased was shot by a correctional officer during an escape attempt;
2. Evidence would raise questions relating to the use of firearms within the penitentiary environment;
3. The Inmates Committee was established pursuant to authorities set out in a Directive issued by the Commissioner of Penitentiaries (as he was then called) and was elected on a range by range basis so as to be representative of a substantive majority of prisoners at Millhaven Institution;
4. The deceased was a member of the Inmates Committee;
5. In order that the jury could best appreciate all evidence adduced, it was entitled to have someone reflecting the perspective of the prisoner population capable of calling witnesses, cross-examining witnesses and making submissions;
6. Prisoners at Millhaven Institution were entitled to have confidence that the inquest would be a full and open inquiry.<sup>82</sup>

The application was dismissed by Garrett J. who concluded that the coroner properly addressed himself to the issues.<sup>83</sup> He went further to voice his agreement with the coroner's decision. While Garrett J. was prepared to find a substantial interest, he held that there was no direct interest. He described the nature of the contemporary inquest in the following terms:

The object of an inquest is set forth clearly in section 25(1) and while section 25(3) does give the jury the right to make recommendations, the essential character of an inquest has not really changed. It has not become a hearing where anyone in the province can come in and expound his beliefs and it is not in my opinion, a societal oriented matter at all. Coroners juries have in modern times at least for the last 30 years, had the right to make recommendations after making the essential findings required of them.<sup>84</sup>

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<sup>81</sup> *Inmates Committee of Millhaven Institution v. Bennet*, (26 January 1978), (Ont. H.C.) (Garrett J.) [unreported].

<sup>82</sup> *Ibid.* (memorandum of fact and law on behalf of the applicants, para. 2).

<sup>83</sup> *Ibid.* (endorsement of Garrett J.).

<sup>84</sup> *Ibid.* at 2.

A similar rejection of the "common experience" argument occurred in *Re Meyer and Inmates Committee of the Prison for Women*.<sup>85</sup> While Eberle J. recognized the validity of the representative capacity of an inmates committee in respect of institutional issues,<sup>86</sup> he found no error in the coroner's decision and agreed that the committee had no direct interest.<sup>87</sup>

Over a period of years, one sees a concerted effort by coroners to restrict participation in inquests. This narrow view of standing has failed to acknowledge that the 1972 statute created a new function — that of a societal vehicle of inquiry. Both its essential narrowness and its roots within private law conceptions of standing are evident in the case of *Re On Our Own et al. and King* dealing with a death after the administration of psychotropic drugs.<sup>88</sup> At the opening of the inquest, the coroner explained his view of a "substantial and direct interest in the inquest":

[T]hat that means that someone who is a close relative of the deceased, as we have just discussed, can be named as a person with standing. Or in a case like this, those persons whose reputation or career or standing might possibly be put in jeopardy by the evidence at this inquest because of that person's involvement with the treatment of the deceased or supervising the treatment. In other words, persons who might be held accountable or responsible in some way for the death.<sup>89</sup>

The coroner proceeded to grant standing to the Queen Street Mental Health Centre and a number of doctors and professionals who had been involved with the deceased's treatment. He rejected the application made by counsel on behalf of a number of "incorporated, non-profit charitable groups organized to meet the needs and serve the community of past, present and future psychiatric patients". On a subsequent application for judicial review, Galligan J. concluded that the coroner heard full argument and directed himself to the proper test of whether the applicants were "substantially and directly interested in the inquest".<sup>90</sup> He found "no error in principle or in jurisdiction" and dismissed the application.<sup>91</sup>

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<sup>85</sup> *Re Inmates Committee of the Prison for Women and Meyer* (1980), 55 C.C.C. (2d) 308 (Ont. H.C.).

<sup>86</sup> *Ibid.* at 312.

<sup>87</sup> *Ibid.* at 310. On the issue of standing this decision was criticized in: Law Reform Commission of Saskatchewan, REPORT TO THE MINISTER OF JUSTICE (1984): PROPOSALS FOR A NEW CORONERS ACT (Saskatoon: The Commission, 1984) at p. 34. The Commission said:

Public groups with particular interests in a wide variety of matters might well contribute to the public scrutiny of conditions or practices in diverse areas.

<sup>88</sup> *Re On Our Own v. King* (7 November 1980), (Ont. H.C.) (Galligan J.) [unreported], arising from the inquest into the death of Aldo Alviani.

<sup>89</sup> *Ibid.* (applicant's statement of fact and law, para. 6 and Transcript, p.2).

<sup>90</sup> *Ibid.* (endorsement of Galligan J.).

<sup>91</sup> *Ibid.*

Not all coroners have subscribed to this narrow view. In 1983, Coroner Dr. Robert McMillan emphasized that the statutory test focused on the party's interest in the inquest not the death.<sup>92</sup> He was responding to a request for standing brought on behalf of the Ontario and Canadian Associations for the Mentally Retarded in respect of the inquest into the death of Richard Thomas. Counsel for the Associations had stressed that litigation relating to the death had been commenced and that the primary participants in the inquest would be concerned "to protect their own self-interests".<sup>93</sup> The Coroner ultimately granted standing over the objection of other parties in order to ensure that all relevant facts and issues were canvassed.<sup>94</sup> He cautioned that he would "not allow [the] inquest to become a public forum for the whole issue of the care of the mentally handicapped" adding that an inquest was not a Royal Commission.<sup>95</sup> In 1986, Coroner Dr. R. Isaac recognized the potential value of a "unique collective point of view, a consumerism argument"<sup>96</sup> and granted standing to a group called People First at the inquest into the death of John Dimun.<sup>97</sup> The deceased was developmentally handicapped and the Coroner characterized People First as the "only group which . . . represents people much like John Dimun. . . ."<sup>98</sup> The verdict of the coroners jury was accompanied by twenty recommendations dealing with various issues touching on the care of and housing for developmentally handicapped persons in the community.<sup>99</sup>

A more current example again reflecting the grip of the narrow view was the inquest held into the death of a prisoner of a penitentiary who had been recently transferred from a provincial psychiatric facility.<sup>100</sup> Aside from general issues relevant to penitentiary administration, the inquest pointedly exposed the problems of the mentally-ill offender caught between a federal regime of incarceration and a provincial mental health system. Standing was sought by the Psychiatric Patient Advocate Office, an agency established by the Ontario Minister of Health in 1982 to act as advocates for patients in provincially-operated psychiatric hospitals.<sup>101</sup> The mandate of the Psychiatric Patient Advocate Office includes both casework and systemic advocacy functions premised on their obligation

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<sup>92</sup> See ruling of Dr. R. McMillan, Presiding Coroner, *Inquest Into the Death of Richard Thomas*, (21 September 1983) at 5.

<sup>93</sup> *Ibid.* at 2-3.

<sup>94</sup> *Ibid.* at 5.

<sup>95</sup> *Ibid.* at 5-6.

<sup>96</sup> Ruling of Dr. R. Isaac, *Inquest Into the Death of John Dimun*, (25 November 1986), at 3. At his death, John Dimun was a 45 year old man with "the mind of a five year old".

<sup>97</sup> *Ibid.* at 5.

<sup>98</sup> *Ibid.*

<sup>99</sup> *Ibid.* (verdict returned 19 December 1986).

<sup>100</sup> Dr. B. Bechard, Presiding Coroner, *Inquest into the Death of Robert Pattison*, (8-9 April 1987).

<sup>101</sup> See T. Turner, M.F. Madill and D. Solberg, *Patient Advocacy: The Ontario Experience* (1984) INT'L J. OF L. & PSYCH. 329 at 330, 338.



to "advance the legal and civil rights of psychiatric patients in all provincial psychiatric hospitals".<sup>102</sup> Since its inception, the agency has developed expertise in respect of the legal, therapeutic and social issues facing psychiatric patients. One of the advocates had worked with the deceased and was called as a witness at the inquest. There was no suggestion that an adverse allegation might be made, and her individual request for standing was denied.<sup>103</sup> The Advocate Office's request was premised on its ability to use its expertise, through counsel, to enhance the fact-finding and recommending function of the inquest.<sup>104</sup> It was argued that its experience with psychiatric, pharmaceutical and institutional issues would assist the coroner and add an informed dimension to the presentation of evidence and submissions to the coroners jury. The request for standing was refused on the ground that the Psychiatric Patient Advocate Office could not show a direct interest in the death which constituted the focus of the inquiry.<sup>105</sup> Standing was granted to a relative of the deceased and to various correctional officers and employees of the Mental Health Centre at Penetanguishene.

Recently, a controversy over standing arose at a widely reported inquest into the death of a young woman killed by Melvin Stanton, a prisoner who was out of custody from a federal penitentiary on an unescorted temporary absence pass to a half-way house.<sup>106</sup> The Chief Coroner dismissed an application for standing on behalf of the union representing employees of the Corrections Service of Canada.<sup>107</sup> Counsel for the union had argued that the privatization of functions would be an issue at the inquest and that the union represented the only group concerned to expose the government's policy to full scrutiny.<sup>108</sup> In response, the Coroner embraced his counsel's concern to "narrow"<sup>109</sup> the focus and reminded

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<sup>102</sup> Report of the Review of Advocacy for Vulnerable Adults, *YOU'VE GOT A FRIEND: A REVIEW OF ADVOCACY IN ONTARIO* (Toronto: Queen's Printer, 1987) 59. For a more detailed discussion of the history and development of the Psychiatric Patient Advocate Office see Ontario, *ADVOCACY IN PSYCHIATRIC HOSPITALS EVALUATION OF THE PSYCHIATRIC PATIENT ADVOCATE OFFICE*, (Toronto: Ontario Ministry of Health, 1987).

<sup>103</sup> A. Kershaw, *Kingston Whig Standard*, (9 April 1987).

<sup>104</sup> Interview with D. Giuffrida, Legal Counsel to Psychiatric Patient Advocate Office. It was the intention of the P.P.A.O. to place nine recommendations before the jury for consideration. The denial of standing operated to exclude these issues from consideration.

<sup>105</sup> Counsel for the various correctional and mental health officers urged the jury to make no recommendations. Coroner's Counsel suggested a recommendation addressing the use of restraints when transporting "disturbed inmates". The Coroner made no suggestion as to possible recommendations. Ultimately, the jury made no recommendations: See A. Kershaw, *Kingston Whig Standard*, (10 April 1987).

<sup>106</sup> Chief Coroner Ross Bennett, *Inquest into the Death of Tema Conter* (6 October — 12 December 1988).

<sup>107</sup> See Transcript of Submissions re: Standing at pages 26 — 48 of the Motion Record filed on the application for leave to appeal to the Court of Appeal in *Stewart and Khanna v. Bennett*, heard October 19, 1988.

<sup>108</sup> *Ibid.* at 40-45.

<sup>109</sup> *Ibid.* at 46.

participants that they were involved in "an inquest into the death of a young lady and [it] has nothing to do with labour management problems in the Federal Government".<sup>110</sup> Particularly reflective of the Coroner's concern to restrict the scope of the inquest was his refusal to grant standing to members of the institutional case management team and two institutional psychologists who participated in the hearing which resulted in Stanton's release.<sup>111</sup> In respect of the psychologists, whose professional integrity would clearly be on the line, the Coroner simply concluded that he could "see them only as witnesses"<sup>112</sup> and not as persons with a substantial and direct interest. While the issue of participation by the union may have been controversial, the dismissal of the individual applications was contrary to the view accepted by most coroners. Coming from the Chief Coroner, it suggests the urgent need for an authoritative re-thinking of standing limitations, either by the judiciary<sup>113</sup> or the legislature.

#### V. REVIEWING THE CORONERS' POSITION ON STANDING

The line of cases discussed above reflects a policy preference on the part of coroners in Ontario which operates to limit participation at inquests. Family members and individuals or institutions who may find themselves in a position of responsibility in respect of a death, or in respect of whom adverse allegations may be made,<sup>114</sup> can expect to be granted standing perfunctorily. Others, including individuals who shared a common experience or common environment with the deceased, or groups representing such individuals, can expect to be denied. The only conclusion which one can distill from the standing cases is that the application of the direct and substantial interest test, as applied by cor-

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<sup>110</sup> *Ibid.* at 48.

<sup>111</sup> *Ibid.* at 28-40.

<sup>112</sup> *Ibid.* at 31.

<sup>113</sup> While the union did not seek judicial review, both the members of the case management team and the psychologists did: see *Campbell v. Bennett and Stewart and Khanna v. Bennett*, (13 October 1988), Court File No. 910/88 (Ont. Div. Ct.). The Court, consisting of Van Camp, Steele and McKeown JJ., unanimously dismissed both applications. The endorsement *per* Van Camp J. read:

It should be stressed that these are applications for judicial review. It [sic] is not an appeal. The Coroner made his findings of fact on the evidence before him. He had the benefit of submissions from counsel. He directed his attention to the applicable law. There is nothing before us to show that he misinterpreted the law or that he did not understand it.

On October 19, 1988 leave to appeal to the Court of Appeal was granted. Upon resuming the inquest after leave to appeal had been granted, the Coroner reversed his earlier decision and designated the individuals as persons with standing. Hence, the appeal was abandoned.

<sup>114</sup> Compare the discussion of the *Conter Inquest*, *supra*, at 653-54.

oners, restricts standing to those who may have a legal claim to prosecute and those who may be the object of some future action, civil or criminal, affecting their legal rights or interests.<sup>115</sup> More important, however, is the observation that judges in Ontario have deferred to this restrictive interpretation of direct and substantial interest.

The jurisdiction exercised by superior courts on judicial review is supervisory and not appellate.<sup>116</sup> Notwithstanding the expanded role of judicial review in recent years as a result of the recognition of the duty to act fairly,<sup>117</sup> the grounds upon which relief can be sought are limited. Aside from arguments based on procedural defects, the judiciary plays a circumscribed role in respect of alleged errors of fact or law. For the most part, only errors of a jurisdictional dimension warrant judicial intervention in response to an error by an inferior tribunal.

However, when examining the judicial response to coroners' standing decisions, the refusal to intervene cannot be explained by the limited scope for review generated by the law of jurisdictional error. Section 41 (1) of the *Coroners Act* provides that the coroner "shall designate" as a person with standing anyone who satisfies the test of substantial and direct interest. Therefore, any one denied standing can seek judicial review and allege error in the application of the standing test on the basis that an error operated to deny them a statutorily mandated right of participation.<sup>118</sup> In retrospect, this has been the usual approach in standing

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<sup>115</sup> This is essentially a paraphrase of the view offered by Dr. King in *Re On Our Own*, *supra*, note 88.

<sup>116</sup> Particularly with respect to coroner's inquests, see *Re Evans and Milton* (1979), 24 O.R. (2d) 181 at 219, 46 C.C.C. (2d) 129 at 167 (C.A.), *per* Dubin J.A. [hereinafter *Re Evans* cited to O.R.].

<sup>117</sup> *Nicholson v. Haldimand-Norfolk Regional Bd. of Comm'rs of Police* (1978), [1979] 1 S.C.R. 311, 31 O.R. (2d) 195 [hereinafter *Nicholson* cited to S.C.R.] and, with respect to the expansion of judicial review, see *Martineau v. Matsqui Inst. Disciplinary Bd.* (1979), [1980] 1 S.C.R. 602 at 616-17, 106 D.L.R. (3d) 385 at 401 [hereinafter *Martineau* cited to S.C.R.] *per* Dickson J.

<sup>118</sup> There is some controversy over whether courts should defer to the procedural rulings of tribunals in the same way that curial deference applies to issues of law or fact. The preferable view is that reflected in *Consolidated-Bathurst Packaging Ltd. v. I.W.A. Loc. 2-69* (1986), 56 O.R. (2d) 513 at 516, 31 D.L.R. (4th) 444 at 447 (C.A.), where Cory J.A. suggested that deference could not extend to a "denial of a full and fair hearing". This is consistent with the "jurisdictional" nature of fairness and natural justice expressed by LeDain J. in *Cardinal and Oswald v. Director of Kent Inst.*, [1985] 2 S.C.R. 643 at 660-61, 24 D.L.R. (4th) 44 at 57.

A major consideration in respect of deference is the extent to which the enabling legislation amounts to a procedural code as compared to vesting substantial procedural discretion in the tribunal. Looking at the *Coroners Act*, particularly ss. 30-52, most issues of process are specifically legislated suggesting that procedural rulings should not be the object of deference. The use of the word "finds" in s. 41(1) may, at first blush, support an argument that it represents a vesting of subjective discretion such that only a patently unreasonable response to an application for standing would be reviewable. This view, however, ignores the impact of the ruling on the applicant. While infra-jurisdictional errors like rejecting a question or ruling evidence inadmissible may truncate a hearing, an erroneous denial of standing precludes a hearing entirely. In a case dealing

cases. Yet, after examining the factual underpinnings and the subsequent reasoning, judges seem to have accepted the coroners' interpretation and application of the standing test.<sup>119</sup>

While it is not necessary to become embroiled in the question of what is jurisdictional error<sup>120</sup> in order to find a path for review in standing cases, it is interesting to note that the current law of jurisdictional error stems from the notion of curial deference. Within the context of labour relations, the policy of curial deference was described by Dickson J., (as he then was) in the following terms:

The rationale for protection of a labour board's decisions within jurisdiction is straightforward and compelling. The labour board is a specialized tribunal which administers a comprehensive statute regulating labour relations. In the administration of that regime, a board is called upon not only to find facts, decide questions of law, but also to exercise its understanding of the body of jurisprudence that has developed around the collective bargaining system, as understood in Canada, and its labour relations sense acquired from accumulated experience in the area.<sup>121</sup>

Accordingly, errors made within a tribunal's jurisdiction are only reviewable if they are patently unreasonable while errors going to jurisdiction are always reviewable.<sup>122</sup> Even with respect to jurisdictional error, the Supreme Court has warned that courts "should not be alert to brand as jurisdictional, and therefore subject to broader curial review, that which may be doubtfully so".<sup>123</sup> Again judicial restraint is a function of deference to the expertise of the specialized tribunal. This is particularly interesting in the context of coroner's inquests since they cannot be characterized as specialized tribunals. If coroners in Ontario have expertise, it is in respect of medical issues not the public policy and public safety questions which are often generated by inquests. They have not, over a period of

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with a denial of the right to counsel at a prison disciplinary hearing, *Howard v. Presiding Officer of Inmate Disciplinary Ct. of Stony Mountain Inst.* (1985), 19 D.L.R. (4th) 502, 45 C.R. (3d) 242 (F.C.A.) Thurlow C.J.F.C. stated at 45 C.R. (3d) 263:

But in my opinion his denial of such a request cannot be regarded as a adjudication of the right and cannot prevent a superior court in the exercise of supervisory jurisdiction from determining the question on its own.

<sup>119</sup> The sole exception appears to be the decision of Henry J. in *Re Brown and Patterson*, *supra*, note 77.

<sup>120</sup> For a helpful discussion of the current and illusive law of jurisdictional error see D. Mullan, *The Re-Emergence of Jurisdictional Error* (1985) 14 ADMIN. L.R. 326; D. Mullan, *The Supreme Court of Canada and Jurisdictional Error: Compromising New Brunswick Liquor?* (1987), 1 CAN. J. ADMIN. L. & PRACTICE 71.

<sup>121</sup> *C.U.P.E. v. New Brunswick Liquor Corporation* [1979] 2 S.C.R. 227 at 235-36, 97 D.L.R. (3d) 417 at 424 [hereinafter cited to S.C.R.].

<sup>122</sup> *Syndicat des Employés de Production du Québec et de l'Acadie v. C.L.R.B.* (1983), [1984] 2 S.C.R. 412 at 441-44, 14 D.L.R. (4th) 457 at 479-81, *per* Beetz J.

<sup>123</sup> *Supra*, note 121 at 233.

years, decided a large number of cases and participated in the making of policy with respect to a defined area of social activity. In fact, the actual issues raised at a coroner's inquest are not pre-determined by a statutory grant of jurisdiction but rather are a function of the infinite ways in which deaths occur. Unlike labour boards, it cannot be said that coroners are central players in the development and understanding of a specialized sphere of jurisprudence. Thus, deference offers no explanation for the judicial restraint evident in response to the application of the test for standing by coroners. It is therefore doubly important to consider whether the judicial interpretation of the standing test is correct.

There are various arguments which support the view that the courts have erred in upholding the coroners' restrictive interpretation of the standing test. These arguments can be summarized in terms of (a) a failure to recognize the change in the purpose and function of the inquest, or (b) a failure to recognize a residual discretionary test for standing beyond that articulated in section 41 (1) of the Act.

(a) *Purpose and Function of the Inquest:*

In the case of *Re Royal Commission on Conduct of Waste Management Inc.*,<sup>124</sup> the Divisional Court considered whether an interest group known as "Preserve Our Water Resources Group" (POWR) was entitled to standing at an inquiry constituted pursuant to the *Public Inquiries Act* which provided that any person with a "substantial and direct interest in the subject matter" should be afforded rights of participation.<sup>125</sup> The Commission concluded that the group's general interest in the use of garbage as land fill and its impact on local water supplies was insufficient to constitute a substantial or direct interest. *The Public Inquiries Act* also contained a provision that granted standing to anyone against whom an allegation of misconduct might be made and it seemed that the Commissioner was influenced by this alternative test in interpreting the substantial and direct interest test.<sup>126</sup> The Court's conclusion that POWR should have been granted standing was premised on the group's interest in the integrity of the inquiry and its possible impairment by reason of alleged improprieties brought forward by the group.<sup>127</sup> These allegations of improprieties were related to the alleged corruption which gave rise to the public inquiry. In concluding that the substantial and direct interest test embraced a wider class of people than simply those against whom

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<sup>124</sup> (1977), 17 O.R. (2d) 207, 80 D.L.R. (3d) 76 (Div. Ct.) [hereinafter cited to O.R.].

<sup>125</sup> *Public Inquiries Act*, R.S.O. 1980, c. 411, s. 5(1). Interestingly, the prarsia premises standing on "satisfactory" the commission of a "substantial and direct interest." This is surely a stronger indication of vested discretion than the use of "finds" in s. 41(1) of the *Coroners Act*. Yet, the Divisional Court was not discouraged from intervening and asserting a broad conception of public interest standing.

<sup>126</sup> *Supra*, note 124 at 208-09.

<sup>127</sup> *Ibid.* at 211.

allegations of misconduct might be made, the Divisional Court indicated that the question of standing required consideration of the terms of reference of the Commission.<sup>128</sup> In other words, standing must be viewed from the perspective of the nature and purpose of the inquiry in question.

While it makes sense to assert that an appropriate conception of standing at an inquest can only be developed in relation to the inquest's intended scope, understanding the nature and function of a contemporary inquest is not an easy task. It is true, as Garrett J. said, that an inquest is not "a hearing where anyone in the province can come in and expound his beliefs".<sup>129</sup> However, it has also been judicially recognized that the nature of the contemporary inquest has been "radically changed".<sup>130</sup> The role of the coroners' inquest may, in the first instance, be investigative, but its public function clearly extends to prophylactic and preventive issues. This was the view expressed by the Ontario Law Reform Commission in their report which led to the current statutory structure.<sup>131</sup> DeGrandpré J. speaking for the majority of the Supreme Court of Canada, described the contemporary inquest as exercising "a duly Canadianized function" within a "social context".<sup>132</sup>

Of particular importance in assessing the intended function of the contemporary inquest is its statutory structure and particularly section 31 which is accompanied by the marginal annotation "Purposes of Inquest".<sup>133</sup> Section 31 (1) of the *Coroners Act* requires the inquest to determine who the deceased was, how the deceased came to his death, when the deceased came to his death, where the deceased came to his death, and by what means the deceased came to his death. Section 31 (2) precludes the coroners jury from making any finding of legal responsibility or expressing any conclusion of law. More importantly, s. 31 (3) empowers the jury to "make recommendations in respect of any matter arising out of the inquest". It is the power to make recommendations which gives effect to the preventive and prophylactic function anticipated by the Ontario Law Reform Commission.

In *Re Masset Band Council, Russ and Yeltatzie*,<sup>134</sup> Hutcheon J. considered a certiorari application brought on the ground that the Masset Band Council should not have been denied standing at an inquest. The inquest dealt with deaths arising from the crash of a plane operated by one of the only two airlines which linked the Masset community on the Queen Charlotte Islands with the mainland. The test for standing, according to the British Columbia statute, was cast in terms of "any person

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<sup>128</sup> *Ibid.*

<sup>129</sup> *Supra*, note 81 at 2.

<sup>130</sup> *Supra*, note 116 at 206, *per* Reid J.

<sup>131</sup> *Supra*, note 53 at 25. *See also* the comment in the McRuer Report, *infra*, note 186.

<sup>132</sup> *Faber v. The Queen*, *supra*, note 44 at 30.

<sup>133</sup> *See Coroners Act*, s.31.

<sup>134</sup> (1976), 73 D.L.R. (3d) 154, [1977] 2 W.W.R. 93 (B.C.S.C.) [hereinafter cited to W.W.R.].

whose interest may be affected".<sup>135</sup> This test is closely analogous to the Ontario test in that it seems to speak to private interests. In concluding that the Band Council should have been granted standing, Hutcheon J. focused on the prospect that the jury might make recommendations in respect of future flight operations.<sup>136</sup> While the *Coroners Act* of British Columbia did not specifically authorize the jury to make recommendations, he noted that it had become a common practice for coroners juries to do so.<sup>137</sup> It was because of the possible impact of potential recommendations that Hutcheon J. found the requisite degree of interest in the Band Council.

The narrow interpretation of "substantial and direct interest" conforms with traditional views of standing as applied in respect of judicial proceedings dealing with private actions. As well, similar tests have been applied historically to limit the scope of public law litigation and it is only recently that courts have begun to free public law issues from the constraints of the private law mould.<sup>138</sup> It is difficult, however, to continue to support the translation and adoption of the narrow private law test into a context which is clearly public in nature. It is no longer uncommon to see the judiciary applying expansive conceptions of standing in respect of inquiries which have a public interest dimension. For example, standing has been granted to a group of parents seeking judicial review of the dismissal of a school principal.<sup>139</sup> The need to move beyond private law interpretations of standing when the public interest is in issue has been succinctly explained by LeDain J.A. in *Canadian Broadcasting League v. C.R.T.C. (No. 2)*:<sup>140</sup>

I do not think the narrow test of the interest required for status that is found in some of those cases has application in this particular context to a right of appeal which must be seen in relation to a public right of intervention to assert and protect the individual interest in broadcasting.<sup>141</sup>

The "substantial and direct interest" test might have its roots in private law actions but its contemporary applicability must be determined within the context in which it now operates. The public nature of inquests and

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<sup>135</sup> *Ibid.* at 93-94, reciting *The Coroners Act*, R.S.B.C. 1960, c. 78, s.23.

<sup>136</sup> *Ibid.* at 95-96.

<sup>137</sup> *Ibid.* at 95.

<sup>138</sup> See the discussion, *infra*, at 662-65.

<sup>139</sup> *Re Ratepayers of the School Dist. of New Ross Consol. School and Chester and Dist. Mun. School Bd.* (1979), 102 D.L.R. (3d) 486 (N.S.S.C. T.D.) per Glube J., subsequently applied by Nunn J. in *Palmer v. Nova Scotia Forest Indus.* (1983), 60 N.S.R. (2d) 271 at 335-36, 2 D.L.R. (4th) 397 at 481 (N.S.S.C.T.D.). In another example, the Ontario Divisional Court held that the meagre opportunity provided by statute to offer representations in the public interest entitled someone who came forward to seek judicial review of a licensing decision: *Re Temple and Liquor License Bd. of Ontario* (1982), 41 O.R. (2d) 214, 145 D.L.R. (3d) 480.

<sup>140</sup> [1980] 1 F.C. 396, 101 D.L.R. (3d) 669 [hereinafter cited to F.C.].

<sup>141</sup> *Ibid.* at 406.

their preventive and prophylactic functions require a more broadened interpretation.

(b) *Residual Discretion to Grant Standing*

The current standing provision in the *Coroners Act* requires the coroner to grant standing to a person "if he finds that the person is substantially and directly interested in the inquest". This provision was originally enacted in 1972 in response to an era during which standing was perfunctorily denied even to the family of the deceased or to those who might ultimately be held accountable for the death.<sup>142</sup> While there was no entitlement to standing before 1972 Wells J. accepted that the coroner had the discretion at common law to permit standing.<sup>143</sup> In retrospect, regardless of the appropriateness of the test chosen, it was laudable for the legislature to create a statutory entitlement to standing for a class of persons. In doing so, however, the legislature did not expressly remove the pre-existing discretion to grant standing to persons not included in that class. The argument that, by defining a class with a statutory entitlement, the legislature has excluded all others is untenable. It ignores the nature of standing and the coroner's ability, within the strictures of the *Coroners Act*, to control the process of the inquest. Moreover, the maxim of statutory interpretation "*expressio unius*" has fallen somewhat into disfavour in administrative law, particularly with respect to procedural incidents.<sup>144</sup>

Recognizing that there is a residual discretion to grant standing, a coroner's failure to consider a request beyond applying the rigid "substantial and direct interest" test can be reviewed on the ground of declining to exercise jurisdiction. To stake out this kind of claim, a party would need to provide a factual framework which explained how its experience or perspective related to the issues to be exposed at the inquest in a way that would enhance the fact finding function and promote the public interest in a full and fair inquiry.

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<sup>142</sup> See *Wolfe v. Robinson*, *supra*, note 54 at 143 (C.A.).

<sup>143</sup> See *Wolfe v. Robinson*, *supra*, note 55 at 257-58 (H.C.), and the discussion, *supra*, at 640-41.

<sup>144</sup> See the cautious and restrictive use of this maxim advocated by Laskin C.J.C. in *Nicholson*, *supra*, note 117 at 321-22. Compare the views of Gonthier J., recently appointed to the Supreme Court of Canada, in the lower court decision in *Bibeault v. McCaffrey*, [1984] 1 S.C.R. 176, quoted at p. 184 of the report. Although on appeal Lamer J. agreed with Gonthier J.'s conclusion that the list of participants was exhaustive, his reasons flowed more from the legislative scheme as a whole than a rudimentary application of "*expressio unius*." In a more recent case dealing with the ability of a public officer to intervene in his official capacity, LeDain J. applied the maxim to preclude the official's participation. He noted the "reservations and cautions" previously expressed by the Supreme Court: See *Director of Investigations and Research v. Newfoundland Tel. Co. and Nfld. Bd. of Comm'nrs. of Public Utilities*, [1987] 2 S.C.R. 466 at 483-84, 68 Nfld. & P.E.I. R. 1 at 19.



Particularly as a result of the enactment of the Charter and the concomitant growth of public law litigation, resort to a form of public interest standing has commonly been the tool by which interested individuals or groups have attempted to expand the scope of judicial inquiry.<sup>145</sup> In many Canadian jurisdictions, the rules of practice expressly empower courts in their discretion to increase the set of participants by granting intervenor's status. Rule 18(1) of the Rules of the Supreme Court of Canada provides that "[any] person interested in an appeal or a reference may, by leave of a judge, intervene therein upon such terms and conditions, and with such rights and privileges, as the judge may determine".<sup>146</sup> The predecessor rule, drafted in much the same language, has been interpreted broadly by the Supreme Court.<sup>147</sup> In Ontario, the Rules of Civil Procedure provide for both party and non-party intervention:

- 13.01(1) Where a person who is not a party to a proceeding claims,
- (a) an interest in the subject matter of the proceeding;
  - (b) that he or she may be adversely affected by a judgment in the proceeding; or
  - (c) that there exists between him or her and one or more of the parties to the proceeding a question of law or fact in common with one or more of the questions in issue in the proceeding,
- the person may move for leave to intervene as an added party.

13.02 Any person may, with leave of a judge or at the invitation of the presiding judge or master, and without becoming a party to the proceeding, intervene as a friend of the court for the purpose of rendering assistance to the court by way of argument.

It has been argued that the distinction between a party intervenor and one who intervenes as a friend of the court is inadequate to accommodate the proper function of public interest intervention.<sup>148</sup> This criticism, however, depends on whether public interest intervention can be accom-

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<sup>145</sup> For a thoughtful discussion of the development of public interest intervention, see P.L. Bryden, *Public Intervention in the Courts* (1987) 66 CAN. BAR REV. 490.

<sup>146</sup> S.O.R./87-292.

<sup>147</sup> In *Norcan Limited v. Lebrock*, [1969] S.C.R. 665 at 666, 5 D.L.R. (3d) 1 at 2, Pigeon J. held that "any interest is sufficient to support an application under that rule subject always to the exercise of discretion". While Bryden, *supra*, note 145 at 502 characterized Pigeon's comment as a reference to financial interests, he also notes a number of pre-Charter decisions in which a more "expansive approach" was applied by the Supreme Court: *Robertson and Rosetanni v. The Queen*, [1963] S.C.R. 651, 41 D.L.R. (2d) 485; *A.G. of Canada v. Lavell*, [1974] S.C.R. 1349, 38 D.L.R. (3d) 481; and *Morgentaler v. The Queen*, [1976] S.C.R. 616, 53 D.L.R. (3d) 161. In the post-Charter era, intervenor status has often been granted but also sometimes denied in an array of cases not always easy to reconcile: see J. Welch, *No Room at the Top: Interest Group Intervenors and Charter Litigation in the Supreme Court of Canada* (1985) 43 U. OF T. FAC. L. REV. 204 at 213-14; Bryden, *supra*, note 145 at 502-04.

<sup>148</sup> See Bryden, *ibid.* at 496-98, where he discusses the analogous provisions, Rule 8.01 and 8.02 of the *Nova Scotia Rules of Practise* and the case of *A.G. Nova Scotia v. Beaver* (1984), 66 N.S.R. (2d) 419 (S.C.T.D.).

modated by Rule 13.01(1)(a) which speaks only to "an interest in the subject matter of the proceeding".<sup>149</sup> A narrow interpretation of "interest" would leave only Rule 13.02 available to a potential public interest intervenor which, on its face, would produce a restricted level of participation.<sup>150</sup> Bryden, in a recent article, offered a three-tiered conceptual framework which more appropriately places the differences between potential intervenors into a format which allocates different levels of participation. He distinguishes between (a) party intervenors, in respect of whom an outcome may have direct impact on their well-being; (b) public interest intervenors, who by reason of their constituency are interested in the legal principles under consideration; and (c) *amicus curiae* who participate to ensure that an issue or perspective is not overlooked. While different levels of participation may be a relevant device for maintaining control over the process, it is important to note that both the grant of status and any order restricting participation is within the discretion of the court. Even more important is the recognition that courts in jurisdictions where the rules do not specifically address intervention have exercised their discretion to permit added participants.<sup>151</sup>

A useful paradigm for developing a discretionary public interest basis for standing can be found in the analysis offered by the Supreme Court of Canada in *Thorson*,<sup>152</sup> *MacNeil*,<sup>153</sup> *Borowski*,<sup>154</sup> and *Finlay*.<sup>155</sup>

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<sup>149</sup> See P.R. Muldoon and D. Scriven, *Intervention as an Added Party: Rule 13 of the Ontario Rules of Civil Procedure* (1985) 6 ADVOCATES Q. 129 at 147-148 where the authors suggest that recent cases support the view that the Rule does not require a direct interest in the traditional sense.

<sup>150</sup> In the case of *Lavigne v. O.P.S.E.U.* (1986), 55 O.R. (2d) 449, 29 D.L.R. (4th) 321 (H.C.), three affiliates of the respondent union (the National Union of Provincial Government Employees, the Ontario Federation of Labour, and the Canadian Labour Congress) applied to be added either as a party or an intervenor. While facts existed to support the argument that a judgment in favour of the applicant would adversely affect the affiliates as well as the respondent, this issue was not argued since the applicant consented to the addition of the affiliates simply as intervenors. The order made no mention of whether Rule 13.01 or 13.02 was being applied. In any event, both at trial and in the Court of Appeal, the intervenors were given full rights of participation.

<sup>151</sup> See, e.g., *Re C.L.C. and Bhindi* (1985), 17 D.L.R. 4th 193 (B.C.C.A.) [hereinafter *Bhindi*]; *McMillan Bloedel v. Mullin*, *infra*, note 166.

<sup>152</sup> *Thorson v. A.G. Canada* (No.2) (1974), [1975] 1 S.C.R. 138, 43 D.L.R. (3d) 1.

<sup>153</sup> *Nova Scotia Bd. of Censors v. MacNeil* (1975), [1976] 2 S.C.R. 265, 84 D.L.R. (3d) 1.

<sup>154</sup> *Minister of Justice of Canada v. Borowski*, [1981] 2 S.C.R. 575, 130 D.L.R. (3d) 588 [hereinafter cited to S.C.R.]. For discussions of this case see D.J. Mullan and A.J. Roman, *Minister of Justice v. Borowski: The Extent of the Citizen's Right to Litigate the Lawfulness of Government Action* (1984) 4 WINDSOR Y.B. ACCESS TO JUST. 303; H. Kushner, *Case Comment: Minister of Justice v. Borowski* (1983) 17 U.B.C.L. REV. 143; M. Pickard, *Why Joseph Borowski Has Standing* (1986) 36 U.T.L.J. 19.

<sup>155</sup> *Minister of Finance of Canada v. Finlay*, [1986] 2 S.C.R. 607, [1987] 1 W.W.R. 603 [hereinafter *Finlay* cited to S.C.R.].

The public interest exception with respect to constitutional issues was described by Martland J. in *Borowski*:

I interpret these cases as deciding that to establish status as a plaintiff in a suit seeking a declaration that legislation is invalid, if there is a serious issue as to its invalidity, a person need only to show that he is affected by it directly or that he has a genuine interest as a citizen in the validity of the legislation and that there is no other reasonable and effective manner in which the issue may be brought before the Court.<sup>156</sup>

The trilogy of cases, before it became a quartet with the addition of *Finlay*, was commonly limited to the issue of standing in respect of constitutional questions.<sup>157</sup> *Finlay*, however, extended the discretionary "public interest exception" to situations of alleged administrative illegality.<sup>158</sup>

As explained by LeDain J. in *Finlay*, although the exception was originally recognized to protect the "public interest in the maintenance of respect for the limits of legislative authority",<sup>159</sup> it is equally important to provide similar protection to "the public interest in the maintenance of respect for the limits of administrative authority".<sup>160</sup> In applying it to *Finlay's* case, LeDain J. felt compelled to address the "traditional judicial concerns about the expansion of public interest standing".<sup>161</sup> While the function of an inquest is investigative and not adjudicative, the considerations offered by LeDain J. can be translated into counterparts which are relevant to the inquest system.

LeDain J. summarized the set of traditional concerns under three headings. First, he recognized "the concern about the allocation of scarce judicial resources and the need to screen out the mere busybody".<sup>162</sup> This is addressed by the requirement that the case present a serious issue and that the party seeking standing have a "genuine interest" in that issue. Secondly, LeDain J. noted "the concern that in the determination of an issue the court should have the benefit of the contending views of the

<sup>156</sup> *Supra*, note 154 at 598.

<sup>157</sup> See, e.g., *Waddell v. Schreyer* (1981), 126 D.L.R. (3d) 431 (B.C.S.C.); *Rosenberg v. Grand River Conservation Authority* (1976), 12 O.R. (2d) 496, 69 D.L.R. (3d) 384 (C.A.); *Islands Protection Society v. The Queen* [1979] 4 W.W.R. 1 (B.C.S.C.); *Carruthers v. Langley* (1984), 11 ADMIN. L.R. 245 (B.C.S.C.); compare Reed J. in *Energy Probe v. Atomic Energy Control Board*, [1984] 2 F.C. 227 at 247-48, 8 D.L.R. (4th) 735 at 749 (T.D.); A. Roman, *Annotation to Carruthers v. Langley* (1984), 11 ADMIN L.R. 246.

<sup>158</sup> The decision in *Finlay*, *supra*, note 155 has not been the subject of unqualified approval. See W.A. Bogart, *Understanding Standing, Chapter IV: Minister of Finance v. Finlay* (1988), 10 SUP. CT. L. REV. 377; J.M. Evans, *Developments in Administrative Law: The 1986-87 Term* (1988) 10 SUP. CT. L. REV. 1 at 11-33.

<sup>159</sup> *Supra*, note 155 at 626-31.

<sup>160</sup> *Ibid.* at 631.

<sup>161</sup> *Ibid.*

<sup>162</sup> *Ibid.* at 633.

persons most directly affected by the issue".<sup>163</sup> It appears that this arises from two inter-related matters which have direct applicability to the judicial context in that proper adjudication requires that facts are presented as completely as possible and that substantive arguments are made as comprehensively as possible. As well, the binding nature of judicial decisions requires that those who will be most intimately and directly affected by them have an opportunity to participate.<sup>164</sup> According to LeDain J., this second concern is addressed by the requirement that the court be satisfied that there is no other "reasonable and effective" way for the issue to come forward. His third concern was expressed in terms of "the proper role of the courts and their constitutional relationship to the other branches of government".<sup>165</sup> In his view, this is addressed by the requirement of justiciability which ensures that issues brought before courts are the appropriate subject matter for judicial consideration.

To translate the elements of this analysis into the context of the inquest, it is necessary to recognize and reconcile differences between the function of adjudication and the functions of an inquest. The issue of scarce resources, equally applicable to an inquest which involves the expenditure of public resources, can be addressed in terms of whether the party seeking standing has a genuine concern in a serious issue. The question of justiciability can be described simply in terms of the appropriateness of the issue raised. The public interest in investigating a death makes something an appropriate subject for inquiry if it can be seriously related to the prevention of similar mishaps in the future. The remaining traditional concern, providing a forum for contending points of view, does not arise in respect of inquests. Since this aspect flows from the binding nature of decisions, it can apply only to adjudicative tribunals. However, it does highlight the legitimate question of whether the inquiry has had a full opportunity to properly carry out its function.

LeDain J.'s analysis in *Finlay* can support an argument for a discretionary public interest exception for standing at coroners inquests. The elements can be translated into the inquest context such that standing would flow from a showing that (1) the party has a genuine concern in a serious issue related to the death in question, or (2) the prevention of future tragedies, and (3) that participation in the inquest, in light of the party's special experience or perspective, would add a useful dimension to the proper role of the inquest.

This approach to public interest standing is not entirely novel. Essentially, it conforms with the test offered by Esson J.A. in *MacMillan Bloedel v. Mullin*<sup>166</sup> which raised the question of whether various tribal councils could intervene in the controversy over logging rights on Meares

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<sup>163</sup> *Ibid.* at 633-34.

<sup>164</sup> See Cromwell's discussion of the interest test which explains, from a variety of perspectives, the influence of these matters: *supra*, note 2 at 168-75.

<sup>165</sup> *Supra*, note 155 at 632-33.

<sup>166</sup> [1985] 3 W.W.R. 380 (B.C.C.A., in Chambers) [hereinafter *MacMillan Bloedel*].

Island. The intervenants had no direct interest in the issue between the parties but all had an interest in the issue of aboriginal title in British Columbia.<sup>167</sup> The rules of practice in British Columbia contained no express provision permitting intervention but the existence of a discretionary power had been recognized.<sup>168</sup> In granting the application for standing, Esson J.A. focused on the public interest group's ability to "bring a different perspective to the issue".<sup>169</sup> He explained his reasoning in a form which is consonant with the analysis offered above:

I do not mean to say that every application by private or public interest groups which can bring a different perspective to the issue should be allowed. I say only that, in some cases, that is a factor which will overcome the absence of a direct interest in the outcome. In each case, it will be necessary to consider the nature of the issue and the degree of likelihood that interveners will be able to make a useful contribution to the resolution of the issue, without injustice to the immediate parties.

The issue whether aboriginal rights existed and whether, if they did, they were extinguished is one of great general importance. It is one in respect of which the applicants have a special interest and concern and in respect of which they are in a position, by reason of the long and full consideration which they have given to the issue, to make a valuable contribution.<sup>170</sup>

In other words, standing was granted because the tribal councils had a genuine concern in a serious issue central to the inquiry and their participation would enhance the scope of the inquiry.<sup>171</sup>

This view of a discretionary basis for public interest standing is not mired in private law tradition but conforms with modern public law approaches. In many cases, the analysis applied in *MacMillan Bloedel* would provide a strong argument for standing at coroners' inquests in respect of those people who shared a common experience or common environment with the deceased. Similarly, serious claims could be presented by interest groups whose experience and expertise would assist the inquest in achieving its broader societal function. The recognition of a common experience and common environment basis for standing would not be new but would simply resurrect the view offered by Henry J. in *Re Brown and Patterson*,<sup>172</sup> the first post-1972 standing case. It is not without a degree of cynicism that one wonders whether the line of standing

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<sup>167</sup> *Ibid.* at 382.

<sup>168</sup> *Ibid.* at 382 relying on *Hirt v. B.C. College of Physicians and Surgeons* (1985), 63 B.C.L.R. 185, [1985] 3 W.W.R. 350 (C.A.). See also *Bhindi*, *supra*, note 151.

<sup>169</sup> *MacMillan Bloedel*, *ibid.* at 383.

<sup>170</sup> *Ibid.* at 383-84.

<sup>171</sup> For a similar ruling in respect of a public interest inquiry, see *BBM Bureau of Measurement v. Director of Investigation* (1982), 63 C.P.R. 63 (F.C.A.) which focused on genuine interest and the ability to offer a different perspective.

<sup>172</sup> *Supra*, note 77 and the discussion following.

cases after *Re Brown and Patterson* would have taken a different direction had they not arisen within the controversial atmosphere of penitentiaries.

#### VI. THE INAPPROPRIATENESS OF A SUBSTANTIAL AND DIRECT INTEREST TEST

It remains to be seen whether courts in Ontario exercising supervisory jurisdiction can be persuaded that the narrow conception of standing adopted by coroners should be expanded. In the absence of a broader judicially-crafted conception of public interest standing, the legislature must reconsider the appropriateness of the substantial and direct interest test if it expects the community to have any confidence in the coroners system.

While many of the standing cases have arisen within the institutional contexts of penitentiaries and mental health facilities, the limiting nature of the current standing test becomes clear when one moves to more readily understood environments. For example, assume a death in an apartment complex in respect of which evidence will be adduced relating to the safety of life within that complex. According to the present state of the law, other tenants who continue to live within that complex will likely be denied standing as would any group representing those tenants. If we look to the workplace as an example, employers, and even suppliers of tools and materials the safety of which may be implicated by evidence adduced at an inquest, can always expect to be granted standing in a case involving accidental death. Co-workers or a union formally representing workers in the workplace can expect to be denied rights of participation. In these examples, co-tenants or co-workers can have little confidence that a full and fair inquiry will be conducted. This would require them to accept that the coroner's counsel can be sufficiently well-educated about the subtleties of the deceased's environment and the perspective of those who share that environment to place all relevant evidence before the inquest in a manner which will enable proper consideration by the jury. In specialized contexts, this is doubtful. Given the societal function of an inquest, the confidence of the community, particularly that segment which shared a common environment or common experience with the deceased, is fundamental. The denial of standing to this group tends to discount the public dimension of the inquest, particularly its preventive aspect. It is hard to generate trust in public institutions when those with intimate concerns are excluded.<sup>173</sup>

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<sup>173</sup> Exclusion is the subject of a recent symposium entitled *Excluded Voices: Realities in Law and Law Reform* published in (1987) 42 U. MIAMI L. REV. 1. In her contribution, *Excluded Voices: New Voices in the Legal Profession Making New Voices in Law* 29, C. Menkel-Meadow, at 41, observes aptly:

By analyzing the lines that exclude and by exposing the logical gaps we see that lines that exclude serve the particular political purposes of the line drawers.

This late in the evolution of the coroner's inquest it cannot be seriously argued that the system does not operate in the public arena to promote the public interest. Regardless of its history, which confirms the public nature of the process,<sup>174</sup> the Coroners Act itself prescribes the essential public dimensions of an inquest. When determining whether to order an inquest, the issue for a coroner is whether it "would serve the public interest".<sup>175</sup> The scope of this determinant is amplified by requiring the coroner to consider "the desirability of the public being fully informed" and the likelihood that a jury will produce helpful recommendations "directed to the avoidance of death in similar circumstances."<sup>176</sup> After an inquest has been conducted the jury is specifically empowered to make recommendations not only in respect of prevention of a similar death but also in respect of any other matter arising out of the inquest.<sup>177</sup> While the Act appears to entrench the public and preventive nature of the inquest, it also directly prohibits any finding of private responsibility.<sup>178</sup> Nonetheless, through an unduly narrow conception of standing, inquests have become another vehicle of discovery for those who may find themselves involved in a future controversy over responsibility for the death.

In other jurisdictions, the statutory framework for coroner's inquests specifically requires that notice and rights of participation be afforded to certain defined groups which may have an interest in the environmental aspects of the investigation into a death. For example, in England,<sup>179</sup> New Zealand,<sup>180</sup> and Saskatchewan,<sup>181</sup> trade unions are automatically entitled to standing in respect of deaths which may have arisen as a result of industrial accidents or industrial disease relating to the workplace. One might suggest that special recognition for unions is simply a function of political deference. More appropriately, it recognizes the real interest which a union and its members have in promoting a safe and healthy work environment.

For Ontario, the answer lies not in the designation of special status but rather in the recognition of the relationship between standing and the

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<sup>174</sup> See the discussion, *supra* at 638-45 and 647-48.

<sup>175</sup> *Coroners Act*, s.20.

<sup>176</sup> Ss. 20(b) and (c).

<sup>177</sup> S. 31(3).

<sup>178</sup> S. 31(2).

<sup>179</sup> *Coroners Rules* 1953, S.I. 205, R.16(2).

<sup>180</sup> *Coroners Act* 1951, R.S.N.Z., Vol. 1, 616, s. 17(3) which is not restricted to industrial accident or a disease:

When any inquest is held in respect of the death of any person who was not at the date of his death a member of any industrial union registered under [the *Industrial Relations Act* 1973], a representative of that industrial union shall be deemed to have sufficient interest, within the meaning of the section, in the result of the inquest.

<sup>181</sup> *Coroners Act*, R.S.S. 1978, c. C-38, s.17(5).

societal function of inquests.<sup>182</sup> If the legislature intends to maintain a coroners system in the public interest, it cannot continue to condone the narrow scope of inquiry which now exists. The situation of those who shared a common experience or environment with the deceased must be given due respect and the specialized expertise of interest groups, most of which are publicly funded, should be tapped. The integrity of the system requires a broader conception of standing.

## VII. CONCLUSION

In his discussion of public interest intervention in Canada, Bryden introduced his analysis by observing:

Generally speaking, however, the opportunity to develop a sense of the public interest and urge it on those who wield governmental power is regarded as one of the most important, and most desirable, features of life in a democracy. If all this is true, it should not surprise us to find that individuals, and more particularly organizations made up of people with similar interests, have as much desire to influence the exercise of governmental authority by judges as they have to influence the decisions of politicians or administrative agencies.<sup>183</sup>

One might argue that because an inquest is not adjudicative in nature that broader participation in the public interest is unwarranted. This argument ignores the essential preventive dimension of an inquest which not only extends to public safety but also seeks to promote public confidence that deaths and their prevention are taken seriously.

These aspects of the coroners inquest were in the forefront of the attention of Ontario Law Reform Commission when it issued its 1971 report leading to the current statutory structure. The Commission said:

A modern coroner system has a major function in the area of public safety, exercised primarily through the inquest. In this respect, the inquest is and

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<sup>182</sup> The Law Reform Commission of Saskatchewan has rejected the "substantially and directly interested" test, as well as specially designated status, in favour of a "substantial interest" test which would permit the granting of standing to some representative and public interest groups: *supra*, note 87 at 34-35. The Quebec standing provision is open-ended:

A coroner shall recognize as an interested person any person, association, government department or agency requesting to be acknowledged as such and that proves his or its interest in the inquest to the satisfaction of the coroner.

The coroner shall state his reasons for refusing the request.

See s.136, *An Act Respecting the Determination of the Causes and Circumstances of Death*, S.Q. 1983, c. 41, s.185, replacing *Coroners Act*, R.S.Q. 1977, c. C-68. In New Zealand, the general standing provision is phrased in terms of a "sufficient interest in the subject or result of the inquest: see s.17(2), *Coroners Act*, *supra*, note 179.

<sup>183</sup> *Supra*, note 145 at 491.



should continue to be an important means by which the effectiveness of such matters as legislation, regulations, and industrial practices designed to ensure safe conditions in industry and the community can be tested in the light of circumstances which may indicate their inadequacy. The inquest serves as the focal point for this test by synthesizing facts and expert and lay opinion in the findings and recommendations of the jury.<sup>184</sup>

Curiously, the report of the Commission recommended the introduction of the "substantial and direct interest" test for standing. While its enactment in 1972 ensured that some individuals who had previously been excluded from participation would henceforth be guaranteed standing, it now seems apparent that the standing test has become the principal tool for limiting the scope of inquiry.

No one would question that it is the responsibility of the presiding officer at an inquest to control the process of the inquest and to ensure that the vehicle is not manipulated for some ulterior purpose. Standing, however, is not the only available instrument of control. Evidence and cross-examination are always subject to restrictions when they extend beyond the limits of what is relevant to the inquiry at hand. In *Re Royal Commission on the Northern Environment*<sup>185</sup> a decision of a Commissioner denying standing to the Grand Council of the Treaty No. 9 Bands was quashed. In question was the application of s. 5(1) of the *Public Inquiries Act 1971*.<sup>186</sup> Linden J., when interpreting the "substantial and direct interest" test, noted the need to consider the "potential importance of the findings and the recommendations to the individual involved." After finding that the Grand Council was entitled to standing, he commented on the Commissioner's power "in relation to the day-to-day operation of the inquiry" and reminded the Commissioner that relevance continued to be the key determinant of which witnesses would be called and how cross-examinations should proceed. The judgment recognized the essential distinction between standing and protecting the process from abuse.

The social objectives to which the report of the Ontario Law Reform Commission aspired have been lost or consciously abandoned. Ironically,<sup>187</sup> the current conception of standing, as it has been applied, restricts participation to those people whose interest is directly related to the question of responsibility. This distorted result dramatically demonstrates the inappropriateness of injecting a traditional private law test into a public forum. The "substantial and direct interest" test has no utility in a forum created to serve the public interest.

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<sup>184</sup> *Supra*, note 53 at 30.

<sup>185</sup> [1983] 3 C.N.L.R. 89, 144 D.L.R. (3d) 416 (Ont. Div. Ct.).

<sup>186</sup> R.S.O. 1971, c. 49.

<sup>187</sup> The brief discussion on standing at inquests in the McRuer Report, *supra*, note 69, ended, at 492, with the following caution:

An inquest should be kept within the bounds of its manifest purpose — an inquiry in the public interest. It should not be a process devised as a preliminary round to the determination of civil liability.

