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DISCOVERING THE ONTARIO INQUEST

J. C. E. Wood

In the history of the law there are many examples of institutions which have been frequently adapted to serve the changing needs of society. This article is an attempt to show how one of these institutions, the coroner's inquest, has developed, and to explain its importance in Ontario today. It has been written in the belief that the legal profession should be more aware of the law relating to the rights of witnesses before the coroner, the evidence given at the inquest, and the role of the coroner's jury. It is only when the faults and merits of an institution are known that it can be subjected to constructive criticism.

In Ontario the Coroners Act imposes a duty on everyone who knows of a death in certain circumstances to notify a coroner. With this notification the medico-legal investigation begins. The coroner takes possession of the body of the deceased and makes "...such further investigation as is required to determine whether or not an inquest is necessary". In most of the fifteen thousand deaths reported annually under the Act, the coroner is satisfied after preliminary inquiry that no further investigation is required and the matter ends there. He may, however, decide that such an informal

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2 R.S.O. 1960, c. 69 s. 7 as amended by 1960-61 c. 12 s. 3.

7(1) Every person who has reason to believe that a deceased person died,
(a) as a result of,
   (i) violence,
   (ii) misadventure,
   (iii) negligence,
   (iv) misconduct, or
   (v) malpractice;
(b) by unfair means;
(c) during pregnancy or following pregnancy in circumstances that might reasonably be attributable thereto;
(d) suddenly and unexpectedly;
(e) from disease or sickness for which he was not treated by a legally qualified medical practitioner;
(f) from any cause other than disease; or
(g) under such circumstances as may require investigation, shall immediately notify a coroner of the facts and circumstances relating to the death.

3 R.S.O. 1960 c. 69 s. 10(1).

4 This information was related to the writer by Mr. E. J. Hills, Executive Assistant to the Supervising Coroner of Ontario, in two interviews on November 16, 1966, and January 13, 1967.
procedure is not sufficient and issue his warrant for an inquest. An inquest is an enquiry by a fact-finding tribunal composed of a presiding coroner and five lay jurors to determine when, where, how and by what means a deceased person met his death. Unless the deceased was executed,\(^5\) died in a mine\(^6\) or while in custody,\(^7\) there is no legislation which compels the holding of an inquest. It is the coroner who has the primary responsibility of determining whether the public enquiry is necessary.\(^8\) Except in cases where a person is charged with a criminal offence arising out of a death,\(^9\) there is no statutory limitation of the coroner's power to order that an inquest be held on a body found in any of the circumstances set out in the Act.

**Historical Background**

The origin of the office of coroner is obscure but it seems probable that the institution was first developed around the turn of the twelfth century in order to serve as a check on the power of the sheriff as a royal judge.\(^10\) The first reference to the coroner as the official who passed judgment on the pleas of the crown, is found in the Articles of Eyre of 1194.\(^11\) By 1300 the coroner had assumed the duty of investigating deaths and a rigidly enforced procedure existed to ensure that he was notified when a body was found in his jurisdiction. However, as has been pointed out by an eminent coroner, it would...

... be a great mistake to attribute the development of such a system to any conscious effort on the part of the administration to discourage the perpetration of secret homicide, still less to further the arrest of the persons, if any, responsible for the death. In fact the system owed its existence entirely to the various valuable incidents [i.e., revenues] which had become attached to sudden deaths.\(^12\)

As a royal official, it was the coroner's primary duty to ensure that these revenues were paid to the king.

One of the most lucrative incidents was the *lex murdrum* which was used, in the early years after the Conquest by William I to prevent the killing of his Norman followers by local Saxons. This law originally levied a heavy fine on the lord of the district in which the body of a Norman was found unless the killer was produced within five days.\(^13\) By the end of the twelfth century the fine had been shifted to the Hundred, providing a major source of revenue long after its original purpose had been forgotten.\(^14\) Every body found was presumed to be that of a Norman unless the community could prove otherwise to the coroner by the technical presentment of Englishry, an increasingly

\(^{5}\) The Criminal Code, S.C. 1953-54 c. 51 s. 648.  
\(^{6}\) The Mining Act, R.S.O. 1960 c. 241.  
\(^{7}\) R.S.O. 1960 c. 69 s. 22; S.O. 1965 c. 20 s. 8.  
\(^{8}\) In practice, he often makes this decision in consultation with the Crown-Attorney.  
\(^{9}\) R.S.O. 1960 c. 69 s. 18.  
\(^{13}\) Havard, at 12.  
\(^{14}\) Id., at 11.
difficult task as geneological distinctions between Saxon and Norman faded. By the mid-thirteenth century the barons were complaining that their districts were too frequently amerced. Thus, in 1259 the Provisions of Westminster provided that fines would be imposed only in cases of felonious killing and so the law remained until the murdrum was abolished a hundred years later.\textsuperscript{15}

In addition to the fine assessed by the murdrum, a number of lesser profits accrued to the king on sudden death. If a felony was involved, the chattels of the felon were forfeited. Thus suicide, \textit{felo de se}, could not be allowed to go undetected. The king also had the right to the \textit{deodand}, "... the object, animate or inanimate, which was held to have the most proximate causal connection with a violent death, whether accidental or felonious in character."\textsuperscript{16}

After the abolition of the \textit{lex murdrum} there was less incentive for holding inquests so that the prestige of the coroner and the importance of the mediaeval inquest quickly declined.\textsuperscript{17} In 1487 a statute was passed requiring a fee be paid for every inquest held on a "body slain".\textsuperscript{18} The wording of this Act indicates that the investigation of sudden deaths was no longer of importance "... unless there was manifest evidence of felonious violence".\textsuperscript{19} A few years later the payment of fees, where the death occurred by misadventure, was specifically prohibited.

For almost 250 years, the coroner's powers remained unaltered. In 1751, an Act\textsuperscript{20} was passed authorizing the coroner to hold a public enquiry in any case of sudden and unexplained death. It provided that a fee would be paid to the coroner for every inquest "duly held" and specified that payment was to be approved by the justices in quarter sessions. For almost a century, the hostile attitude of these men prevented any significant increase in the number of inquests.\textsuperscript{21} In this the justices were supported by the higher courts which equated the words "duly held" with the earlier words "body slain", and refused fees for inquests where there was no evidence of a felony. As late as 1842, it was held that the coroner had no jurisdiction over a body, even if the death was sudden, unless there was "... a reasonable suspicion that the party came to his death by violent or unnatural means".\textsuperscript{22}

The justices continued to limit the coroner's powers until public agitation produced the County Coroners Act\textsuperscript{23} of 1860. This legislation provided salaries for coroners and thus gave the office a measure of independence. In 1887 the Coroners Act\textsuperscript{24} widened the power to hold

\textsuperscript{15} Id., at 13.
\textsuperscript{16} Id., at 14.
\textsuperscript{17} Id., at 24. (At the end of the General Eyres in the fourteenth century.)
\textsuperscript{18} 3 Hen. VII c. 1.
\textsuperscript{19} Havard, \textit{supra} note 12, at 36.
\textsuperscript{20} 1 Hen. VIII c. 7.
\textsuperscript{21} Havard, \textit{supra} note 12, at 38.
\textsuperscript{22} Per Lord Denman, C.J., \textit{R. v. Great Western Railway}, (1842) 3 Q.B. 333 at 340.
\textsuperscript{23} 23 and 24 Vict. c. 116.
\textsuperscript{24} 50 and 51 Vict. c. 71.
inquests, stating that they should be held not only in cases of violent or unnatural death, but also where a reasonable suspicion of criminal acts surrounded an apparently natural death.

In Canada the history of the office began sometime after the introduction of English criminal law to Quebec, through the Proclamation of 1763 and the Quebec Act eleven years later. An Ordinance, issued by Governor Haldimand in 1780, made provision for the payment of fees to the coroner and so it is reasonable to assume that there were coroners appointed in the colony at that time. In 1791, the Constitutional Act divided Quebec into Upper and Lower Canada. The appointment of coroners in what is now Ontario was a prerogative adopted and exercised by the Lieutenant-Governor of Upper Canada.

The duties of the office remained undefined except by the law of England. As the power and prestige of the English coroner reached its nadir in the late eighteenth and early nineteenth centuries, it is not surprising that the government of Upper Canada paid little attention to this institution and that the first Coroners Act, passed in the colony in 1850, was prompted by the administration's desire to cut down the number of inquests held. This act limited the coroner's jurisdiction to cases where it was "... made to appear ..." that there was "... reason to believe that the deceased died from violence or unfair means, or by culpable or negligent conduct, either of himself or of others under such circumstances as require investigation and not through mere accident or mishance". Not until the 1911 revision of the Act was the coroner given wider powers of determining when an inquest was necessary.

One of the significant features of the present English system is the coroner's power to commit for trial for homicide on an inquisition. In Canada, proceedings before a coroner are no longer the equivalent of an indictment. The first difference between procedures in England and Canada arose from an Act passed in Upper Canada in 1833 relating to the "Bailing and Commitment, Removal and Trial of Prisoners ...". The Act required the coroner, where a person was indicted on an inquisition for murder or manslaughter, to transcribe the evidence in the presence of the accused, giving him full

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25 The office may have been introduced in Nova Scotia much earlier.
26 ONTARIO PUBLIC SERVICES COMMISSION, INTERIM REPORT RESPECTING CORONERS, (1921) 3.
27 The English coroner was an elected official, but coroners in the colonies have always been appointed.
28 It may be that the coroner's authority was not as restricted in Canada at this time. In Firth, E.G., THE TOWN OF YORK 1793-1815 (Toronto, 1962) there is an account of an inquest on a drowning in York in 1802. Without evidence of violence, death by drowning was not a matter which the coroner could investigate in England.
29 S.C. (1850) 13 and 14 Vict. c. 56.
30 Supra, note 26, 1.
31 The Coroners Act, supra note 28, s. 1.
32 The word inquisition at one time meant an accusation brought by a jury returned to inquire into a particular offence, under which the verdict of a coroner's jury was generally classed. It is now often used loosely to refer to the formal verdict, and improperly as a synonym for inquest.
33 Statutes of Upper Canada (1833) 3 Will. IV c. 3.
opportunity of cross-examination, and to bind over witnesses to appear at the trial. This section was re-enacted in 1841, 1869 and 1886 without alteration, and seems to have combined the inquest with the preliminary hearing. It gave a party charged on a verdict the right to cross-examination, an advantage which did not exist at common law. The duty performed by the coroner was comparable to that now undertaken by a magistrate.

In 1892 this statute was repealed with the introduction of the Criminal Code which provided that no person could be committed for trial on the verdict of an inquest. The duties of the coroner under the Code were set out in section 568:

Every coroner, upon any inquisition taken before him whereby any person is charged with manslaughter or murder, shall if the person or persons, or either of them, affected by the verdict or finding is not already charged with the said offence before a magistrate or justice, by a warrant under his hand, direct that such person be taken into custody and be conveyed with all convenient speed before a magistrate or justice.

In such circumstances, the coroner was ordered to transmit the depositions taken before him to a magistrate or justice who then was to proceed in all respects as if the person had been brought before him on a warrant or summons. This section appears as section 448 of the present Criminal Code. Its wording has been revised to ensure that there can be no doubt as to the legal effect of the inquisition. The word "charged" has been replaced by "alleged" so that it is now clear that the verdict of the coroner's jury is no more than an allegation which, if it provokes the arrest of some person, must be followed by a preliminary hearing.

**Reasons for the Inquest**

After even a brief examination of the history of the coroner's office, it is evident that while certain duties have remained constant over the years the reasons for the existence of those duties have varied greatly. The present policy in Ontario is to leave undefined the instances in which a coroner should hold an inquest on a reported death. The grounds on which he is to base the decision are stated in

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34 Id., s. 4.
35 There is a good survey of the history of this section given by Wells, J. in Wolfe v. Robinson, [1961] O.R. 250 at 255 et. seq.
36 S.C. 1892 c. 29 s. 940.
37 S.C. 1953-54 c. 51.
38 This survey has been confined to the responsibilities of the coroner in connection with the investigation of death. At one time he was also required, among other things, to take the confession and abjuration of felons and to inquire of wrecks, royal fishes, and treasure troves. After stating that most of these duties are obsolete in Canada, the editors of Boys on Coroners (Fifth ed., Magone & Frankish, Toronto: 1940) at 47 warn that “any person who finds treasure of the nature mentioned... [i.e. gold, silver coin, plate or bullion]... should notify the coroner.”
the broadest terms. He is instructed by the Supervising Coroner that “where there is any indication that the death was not from natural
causes, he should hold an inquest.” Even when he knows what
caused the death, there may be cases where “the circumstances
surrounding the cause of death must be carefully examined if death
came about by other than natural causes.” He is told that this
examination is the function of the jury and the purpose of an inquest.
The question remains: why, and to what end is an inquest held?

The most obvious reason is to discover facts establishing
criminal responsibility for death. This is virtually the only purpose
which has been the subject of judicial comment in this country. The
courts have stated that “the Coroner’s Court is a common law
tribunal charged with making an investigation to find out if a crime
has been committed . . .” and that “. . . an inquest is primarily
intended to get early evidence as to persons responsible for the death
of the deceased . . .” Even though section 448 of the Criminal Code
explicitly recognizes that the verdict of the coroner’s jury may allege
that a person has committed murder or manslaughter, Canadian
judges prefer to view this enquiry as a mere determination of the
cause of death. In R. v. Hawken, Farris C.J., of the Supreme Court
of British Columbia, criticized a jury for making such an allegation
and asserted that “. . . a coroner’s jury is not a proper tribunal to
determine the criminal liability or innocence of any person who has
done a killing. The sole purpose of the coroner’s jury is to ascertain
how the deceased came to his death”.

If this were in fact the only purpose for holding an inquest, there
would be no justification for its existence.

As a way of detecting possible murderers and committing them for trial,
an inquest in a coroner’s court seems (considering the resources of the
modern police) inefficient and unnecessary as well as unfair.

There is no doubt that a medical official, assisted by police, could
investigate and elicit the relevant facts without a public hearing. In
many jurisdictions, where emphasis has been placed on the coroner’s
investigatory powers as a direct aid to the enforcement of the criminal
law, the public inquest has been eliminated.

Stressing this aspect of the coroner’s function tends to obscure
the fact that there is a place for public enquiry in the framework of
the administration of justice today. It is a basic tenet of western

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39 Cotnam, Dr. H. B. (Supervising Coroner of Ontario, in a paper delivered in May, 1966 at the Continuing Educational Course for Coroners) WHEN AN INQUEST SHOULD BE HELD, at 2.
40 Id., at 3.
42 R. v. Barnes, (1921) 61 D.L.R. 523 at 648 per Orde J.; (1921) 36 C.C.C. 40 at 43.
43 Supra, note 37.
democratic thought that public confidence in authority is possible only if all facets of government are subject to public scrutiny. One role of the modern inquest is to ensure that the various agencies responsible for the enforcement of criminal law are acting with diligence. Although the inquest is not the only possible method of finding the facts, it is a valuable way of guaranteeing that the facts have been found.

The real reason why we have public inquests is so that no man's death can be hushed up. We have them not because they are the best possible form of investigation, but to ensure that there is an investigation. Any secrecy surrounding a death leads to scandal. "The public hearing of the causes of death allays suspicions and gives a sense of security." For this reason the inquest should be the legal conclusion to a sudden fatality in many cases where the coroner already is aware of the physical cause of death.

The importance of this function is shown in legislative as well as administrative policy. The Coroners Act requires that when a person dies in custody of an officer of a jail, reformatory, lockup or training school an inquest must be held. In such circumstances an internal investigation into the death can be suspect, especially when (as has occurred on occasion) the investigation is conducted by the officer responsible for the prisoner. Fear of public enquiry might deter an official from acting in such an improper manner; the inquest itself demonstrates to all that nothing improper took place.

The most important function of the coroner's inquest in Ontario today has no law and little history behind it. Its primary purpose is "... to demonstrate to the members of the public how they can protect themselves" and to help focus the pressure of public opinion on those in society who have the power to modify or eradicate hazardous conditions. The use of this institution as a means of public protection rather than as an adjunct to the criminal law or the administration of justice, has been recognized and exploited, in recent years to a greater extent in Ontario than in other jurisdictions. Its operation is extra-legal and its origin is in custom and administrative policy rather than in legislation or the common law.

It is difficult to establish when the coroner's jury first made positive recommendations in the verdict. In Ontario, the Coroners Act of 1850 provided that the inclusion of unnecessary words in the verdict would not vitiate an inquest, and although this was probably intended only to remove technical objections to the inquisition, it may also have allowed juries to include riders or comments without negating the proceedings. By the turn of the century, it had been settled that the superior courts would not alter the findings of a

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47 A comment in The Observer by Peter Clyne, January 61 cited by Dunn, infra note 48.  
49 Supra, note 7.  
50 Affleck, Coroner's Inquests, (1964-65) 7 CRIM. L.Q. 459.  
51 Supra note 29.
coroner's jury even though comments were made on the conduct of other parties toward the person whose death (a suicide) was being scrutinized. Juries were not encouraged to state their opinions. In the 1905 edition of his treatise on coroners, Boys cautioned that "... all statements not amounting to an accusation of crime had better be avoided, as they sometimes lead to further litigation." 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.

Until a few years ago inquest reports were often filed away in a Crown Attorney's office without further attention. Occasionally a report would be sent to the Attorney General's department and if it recommended changes which might be effected by a government agency, such as a variation in speed limits or highway markings, it might be referred to the appropriate authority for review. There was, however, no routine system for following up the recommendations made by the jury. In 1962 on the suggestion of a committee under the chairmanship of Mr. E. H. Silk, the Supervising Coroner's Office (a branch of the Department of the Attorney General), was reorganized and its staff increased. Moreover a system of assessing inquest verdicts and taking direct action to implement jury recommendations when possible, was established.

On concluding an inquest, the coroner now must submit a copy of the verdict to the Supervising Coroner's Office where all verdicts and findings are reviewed. If a verdict recommends action, the Supervising Coroner or some member of his staff tries to locate the person who can effect the changes suggested by the jury. A copy of the verdict and recommendations is then sent to him with a covering letter asking how he intends to remedy the situation. If the fatality occurred in an industrial plant, the management would be advised in this way. If it took place in a hospital or institution where methods could be changed to prevent such deaths in the future, the verdict would be sent to the administrative staff. When the jury recommends changes in legislation, the appropriate department of government is notified.

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52 In re Millar, (1857) 15 U.C.Q.B. 244; Ex parte Scratchley, (1844) 2 D. and L. 29.
54 Supra note 30.
56 Id.
57 The Coroners Act, R.S.O. 1960 c. 69, s. 35; S.O. 1965 c. 20 s. 12.
58 Supra note 4. (An estimated 75 per cent. of the some 1200 verdicts returned annually in Ontario include jury recommendations.)
The Supervising Coroner has no power to enforce the verdict and no legal sanctions can be applied to those who choose to ignore it. On the other hand, the techniques of persuasion used by his office are very effective. He has on file a list of names and addresses of more than 150 groups, including safety and accident prevention associations, government departments, safety councils, labour unions and even Home and School associations. If there is no response to the initial letter and no effort is made either to implement the changes suggested by the jury or to make a satisfactory explanation of why, as is often the case, such recommendations are impractical, a copy of the verdict is sent to one or more of these groups. The influence of such organizations as these often induces a recalcitrant official to make the recommended changes.\(^{59}\)

Thus the object of the coroner's inquest is no longer primarily to fix the immediate responsibility for a death but to identify and publicize the indirect factors which contributed to it. It is concerned with remote, not proximate causation. Once these factors have been discovered, the supervising coroner or his staff attempts to locate the individuals in a corporation, institution, or among the welter of government departments who can change them. Through the medium of pressure groups the weight of public opinion is brought to bear on that official to force him to act. Whatever the faults of the inquest may be, it effectively encourages legislative and administrative action.

On August 10, 1966, one span of the Heron Road Bridge in Ottawa collapsed during construction and nine men were killed. On November 29, a coroner's jury, after a seven day, $100,000 inquest, brought down a verdict which "... recommended that a code be developed covering the construction of bridge and culvert falsework and that the code be made mandatory throughout the province."\(^{60}\) By the middle of February 1967, legislation to this effect had been introduced by the Ontario government.

On January 24, 1967, a coroner's jury investigating the death of a thirteen year old girl, killed while crossing Highway 401, recommended that pedestrians be banned from using controlled access highways. On February 15, the Minister of Highways, George Gomme, announced that a new regulation prohibiting pedestrians from using certain highways, would be added to the Ontario Highway Traffic Act.\(^{61}\) It is difficult for one to argue with a headline in the Globe and Mail on November 17, 1966: "Inquest Recommendations Do Bring Results".

The Rights of Witnesses

The lawyer, asked by his client to attend an inquest in Ontario for the first time must view the prospect with some alarm. If he turns to the authorities\(^ {62}\) he will find that "in the coroner's court

\(^{59}\) Id.

\(^{60}\) The Globe & Mail, November 30, 1966.


no one save the coroner, the jurors sworn on the inquest and the crown attorney or counsel representing the Attorney-General, has the right to examine witnesses." Furthermore, "Council representing interested parties has no more rights in the court than the other members of the public." Upon discovering that members of the public have no right to be present, and that "the power of deciding who shall be present and who not, rests with the coroner who . . . has a right to . . . turn out whom he thinks fit . . .", his fears must increase. In 1961 a jury found that a baby died because of delay in receiving a blood transfusion. When the father, a Jehovah's Witness, applied for a writ of certiorari quashing the proceedings and the verdict on the ground that the coroner had refused to allow his counsel to cross-examine witnesses, both the application and the subsequent appeal were dismissed. The court reasoned that because there are no parties before a coroner, and the inquest is not an adjudication of rights affecting persons or property, the principles of natural justice do not apply. Therefore the right of counsel to examine witnesses is not absolute. It is a small consolation for the lawyer to read in Boys On Coroners that " . . . if any of the family of the deceased, or any persons likely to be accused by the verdict desire to be present or to be represented by counsel such desire should be gratified except under very special circumstances". He will not be reassured by the observation that "as a matter of courtesy . . . a coroner usually permits counsel representing interested parties to suggest to himself or to the person examining certain questions to be put to a witness". The coroner both by common law and statute has virtually unlimited power to demand that witnesses be present at an inquest. Until the decision of the Supreme Court of Canada in Batary v. Attorney-General for Saskatchewan even a person charged with murder or manslaughter in connection with the death in question was a compellable witness at the inquest on the body of his alleged victim. The law now would allow such a person to refuse to testify, but some one who was merely suspected and not yet charged, would not be excused. Once a witness takes the stand he must answer every question put to him by coroner or jury and he has no right, as in England or the United States, to refuse to answer on the ground that the question might tend to incriminate him. He has, of course, the right to the protection of the Canada Evidence Act and various similar provincial acts which prevent the use of evidence given by

64 Boys On Coroners (Fifth ed.) supra note 53, at 156.
67 Supra note 64 at 184.
68 Johnson, supra note 63, at 38.
70 R. v. Barnes, supra note 42.
71 By reason of provisions in the provincial evidence acts substantially similar to s. 5(1) of the Canada Evidence Act, R.S.C. 1952 c. 307.
him at any subsequent proceeding other than a prosecution for perjury.

The admissibility of evidence in "...all criminal proceedings, and ... all civil proceedings and other matters ... respecting which the Parliament of Canada has jurisdiction ..." is governed by the Canada Evidence Act. If the Crown attempted to introduce as evidence in a criminal trial an admission or confession made by the accused in testimony at a previous inquest, the statement would be admissible unless excluded by Section 5(2) of the Act. The cases interpreting this section have clearly defined the limits of the protection which it gives.

If he does not, at the time the question is asked, object to answer, or, objecting, does not specifically base his objection on the ground that his answer may tend to criminate him, his statement will be deemed voluntary and may be subsequently used against him for all purposes.

No duty is imposed on anyone to caution a witness to whom a criminating question is put or explain to him what his rights are.

The legislatures of several provinces have tried to increase the protection given to persons appearing before the coroner. In Saskatchewan, a person giving evidence may be represented by a counsel who may examine witnesses. The coroner is required to inform the witness of his right to the protection of the Canada and Saskatchewan Evidence Acts. In Ontario the only legislative attempt to protect witnesses at an inquest is set out in Section 24(4) of the Coroners Act:

A witness shall be deemed to have objected to answer any question upon the ground that his answer may tend to criminate him or may tend to establish his liability to a civil proceeding at the instance of the Crown, or of any person, and the answer so given shall not be used or be receivable in evidence against him in any trial or other proceeding against him thereafter taking place, other than a prosecution for perjury in giving such evidence.

In this type of provision there is an apparent constitutional difficulty in defining jurisdiction over the regulation of procedure at an inquest. Even if the province has legislative authority in this area, however, the Ontario act is of doubtful validity and may be misleading.

A person who did not bring himself within the ambit of Section 5(2) of the Canada Evidence Act by objecting to answer a question put

73 Id., s. 2.
74 S. 5(2): Where with respect to any question a witness objects to answer upon the ground that his answer may tend to criminate him, or may tend to establish his liability to a civil proceeding at the instance of the Crown or of any person, and if but for this Act, or the Act of any provincial legislature, the witness would therefore have been excused from answering such question, then although the witness is by reason of this Act, or by reason of such provincial Act, compelled to answer, the answer so given shall not be used or receivable in evidence against him in any criminal trial, or other criminal proceeding against him thereafter taking place, other than a prosecution for perjury in the giving of such evidence.
76 The Coroners Act, R.S.S. 1965 c. 113, s. 16.
77 This matter may be of academic interest only since the section is seldom relied upon. It was first enacted as S.O. 1939, c. 9 s. 6 and has been in force for some 28 years, receiving judicial notice only once.
to him by the coroner, would be forced to base any objection to the admission of such evidence at a subsequent trial on the ground that the provincial Coroners Act prevented its use. Under Section 91(27) of the British North America Act, legislation relating to procedure in criminal matters is within the exclusive legislative authority of Parliament. Therefore, no provincial act may regulate this matter.78

In Wolfe v. Robinson,79 Wells J. assumed without discussion that Section 36 of the Canadian Act enabled Section 25(4) of the Ontario Coroners Act to increase the protection afforded to a witness at an inquest. This section of the Canada Evidence Act states:

In all proceedings over which the Parliament of Canada has legislative authority, the laws of evidence in force in the province in which such proceedings are taken, including the laws of proof of service of any warrant, summons, subpoena or other document, subject to this and other Acts of the Parliament of Canada, apply to such proceedings.

The cases in which this section has been interpreted80 have dealt primarily with matters of proof not covered by the Act, and are of little help in assessing the extent to which it could be used. But however these words are construed, the conclusion of Wells J. appears to be incorrect. The section clearly states that provincial laws only apply "... subject to this ... Act". The Ontario legislation is not supplemental, but is in direct conflict with it.81 To enact that "a witness shall be deemed to have objected" is to do no more than negate the effect of the words "where ... a witness objects". Section 25(4) of the Coroners Act, insofar as it purports to affect subsequent criminal proceedings, is merely an attempt on the part of the legislature to do indirectly what it could not do directly: amend the Canada Evidence Act.82

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78 It must be remembered that this section of the Act, as originally enacted in 1893, stated that "[N]o person shall be excused ... provided, however, that no evidence so given shall be used or receivable in evidence ...". On this wording it was held in R. v. Hendershot, [(1895) 26 O.R. 678] that a witness did not have to claim the privilege to receive protection against subsequent use of his evidence. Immediately following this decision, the Canada Evidence Act was amended by 61 Vict. c. 53, to read: "... provided, however that if with respect to any question the witness objects to answer upon the ground that the question may tend to criminate him ...".
79 Supra, note 65.
81 If Wells J. is correct, could the province abrogate the right to protection by the following enactment?
"A witness shall be deemed to have answered every question voluntarily and without objection on the ground that his answer may tend to criminate him ...".
82 Perhaps the province should not be criticized too severely. Twenty-one years ago the Canadian Bar Association passed a resolution recommending that the Canada Evidence Act "... be amended so as to provide that a witness may claim absolute privilege for any evidence given by him at any time unless it be shown that at the time he was compelled to give such evidence he was informed of his right to claim that privilege and elected not to do so, or waived the privilege at the time when it is sought to use the evidence in question in order to incriminate him." (1946) 24 Cdn. Bar. Rev. 703. Apart from the fundamental argument based on the premise that no one should be forced to incriminate himself such an amendment could contribute to the efficacy of proceedings such as an inquest. There is reason to believe that a witness will be more inclined to speak truthfully if he knows his words cannot be used against him.
Thus, apart from specific provincial legislation to the contrary, the power of the coroner is largely unrestricted. No member of the public has a right to attend an inquest, to be represented by counsel or to examine witnesses. With the exception of a person actually charged with murder or manslaughter in connection with the death under investigation, anyone can be compelled to testify and once on the stand must answer every question put to him. He is given the protection of the Canada Evidence Act only if he specifically claims it, and the coroner has no duty to advise a witness of his rights.

Although the law of Ontario denies the witness almost all rights at an inquest, the usual practice of coroners in recent years has done much to mitigate the effect of the law. Despite the fact that Dr. Cotnam, Supervising Coroner for Ontario, has argued strenuously against any introduction of the right to counsel and to examination of witnesses for fear that “inquests could become marathon trials” his office now urges coroners to allow counsel for interested parties to appear and question witnesses directly. It also instructs the coroner to include in his opening remarks a warning to witnesses as to their right to claim the benefit of the Canada Evidence Act. These privileges are granted by most coroners as a matter of course without disastrous consequences. The suggestions made by the supervising coroner are not compulsory, however and there are still coroners in Ontario who, if they allow counsel at all, insist on having all questions directed to themselves. It would be quite possible for a coroner to grant privileges to counsel in some inquests and not in others. The decision is considered a matter of individual prerogative and the supervising coroner’s staff maintain that all they can do is suggest that the coroner exercise his prerogative in a particular way. Thus the protection given to a witness in Ontario varies widely within the province depending on the attitude of the coroner in authority.

The Jury

Every inquest in Ontario, except those in provisional judicial districts, must be held with a jury of five members, a simple majority having the power to return a verdict. The method of selecting this jury is left to the coroner. His choice is limited only by Sections 27 and 28 of the Coroners Act which specify that each juror must be named on the voters’ list of the municipality and marked on it as qualified to serve; that he must not have acted in this capacity at an inquest during the preceding year, nor be an officer, employee or inmate of a jail, hospital or other similar institution where the inquest is on the body of a person who died therein. In theory, the coroner’s jury is like other juries a “... body chosen from the general population at random”. In fact the recommendation of the Ontario Public

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84 Supra, note 4.
85 Id.
86 The Coroners Act, supra note 1, s. 26.
87 Id., s. 30.
Services Commission “... that greater care be taken in the selection of jurymen, who should be citizens of character, intelligence and good standing”, has been carried out in practice, if not in law.

The coroner’s jury in Ontario is often “hand picked”, especially in cases where the coroner anticipates that matters of public importance may be involved. Methods of selection vary, but the following procedure is commonly used. The coroner, or occasionally, a member of the staff of the supervising coroner’s office, choses approximately fifteen names from the voters’ list of persons whose occupations indicate that these potential jurors will have a better than average status and education. In smaller communities where individual identities may be known to the coroner, he may attempt to select the more influential citizens and exclude less respectable members of society. The jury is then summoned from the names on this preliminary list.

Although the propriety of this procedure has not yet been questioned, it is probable that the courts would not regard it with favour. In Devine, an English coroner picked his jury from a panel of sixteen or seventeen “regular jurymen”. Talbot J., in quashing the verdict of this jury, stated that although he was “... not called on to say whether the practice [was] actually illegal ... it [was] ... improper ...” and “... quite contrary to the principle of the jury system, which is the determination of questions of fact by persons taken at haphazard from the general body of qualified persons”. It is true that some methods of selecting juries can be most reprehensible, but it is difficult to argue with the wisdom of the Ontario practice. It would be better if there were in Ontario, as there is in Quebec, legislative authority for such procedure.

The role of the jury at an inquest in Ontario now differs considerably from the role of the jury in other proceedings. It is not only required to establish fact but also to give advice. The value of recommendations and their potential influence must depend on the quality of the jury. There would be little achieved by spending $100,000 for a seven day inquest on a death resulting from a bridge collapse if the jury were incapable of formulating some positive preventive measures. It is also true that the persuasive power of the verdict will depend on the prestige of the jurymen. In an interview with a Toronto reporter, one coroner recalled presiding at twelve separate inquests into deaths which occurred at a railway crossing before an underpass was built at the site. He was quoted:

Jury after jury recommended that something be done but it wasn’t till we deliberately packed a jury with prominent, powerful men that the situation was corrected.

89 Supra, note 30 at 10.
90 Supra, note 4.
92 Id., at 34.
93 The Coroners’ Act, R.S.Q. 1964, c. 29 s. 26:
The jury shall consist of five persons chosen by the coroner from amongst the leading persons of the place where the inquest must be held.
The jury is of proven value when an inquest is held primarily to reveal dangerous situations and initiate action to prevent similar deaths in the future. In other cases, however, its usefulness should be questioned.

The inquest is still used to some extent as a means of investigation outside of the normal enforcement procedures of the criminal law, and it is in relation to this function that the jury has been most frequently criticised. Should a panel of laymen be called upon to do detective work which “... calls for ... training, experience and special skills that the layman utterly lacks”?95 Any justification for the retention of the jury in cases where a crime is suspected does not lie in the jury’s capacity to determine the cause of death with greater accuracy than the police or other officials, but rather in the belief that the presence of an unofficial element at the enquiry ensures that there are no “... ground[s] for public suspicion that anything is being concealed or covered up ...”.96 The merits of the jury at this type of inquest outweigh its faults only if one concedes that the public would not be satisfied without it.

Evidence

Coroners in Ontario are not restricted by evidentiary rules, for generally: “... a coroner’s inquest is not bound by the strict law of evidence”.97 The decision on the admissibility or inadmissibility of evidence is made by the coroner, who may ask for advice from the Crown Attorney, but need not follow it. There is a belief prevalent among those who have attended inquests that “anything goes”. It is certainly true that evidence is not usually excluded merely because it is opinion or character evidence, or offends the rules against hearsay or secondary evidence.98 This feature of the inquest provokes criticism by lawyers, and if the inquest is held as the preliminary to a criminal charge there is valid ground for this criticism.

In law “there are no parties before the coroner and until there is a verdict, no one is in any way involved,”99 but in practical terms that verdict and the way it was reached may prejudice a person who is charged with a crime in connection with the death. The contents of a verdict alleging murder or manslaughter will probably be broadcast throughout the community from which an impartial jury will have to be chosen. The finding of the jury does not finally determine any matter but it can force a man to defend himself against a criminal prosecution resulting from the jury’s verdict. There is no reason to believe that the inquisitorial jury can without guidance, discern unreliable evidence more readily than the trial jury, and the errors which may be made have serious consequences. As Dr. Harvard points out,

95 Puttkammer, E.W., ADMINISTRATION OF CRIMINAL LAW (Chicago: 1953) 112.
96 Supra, note 30 at 7.
97 R. v. Devine, supra note 91 at 36.
98 The writer was present at an inquest where a coroner admitted copies of highly prejudicial letters, of negligible probative value and proven only by hearsay, despite the objections of the Crown Attorney.
... It is easy to see that a very high standard of judicial ability is necessary if justice is to be done, and to be seen to be done, in an investigation conducted under relative freedom from the rules of evidence.100

The standard of judicial ability of Ontario coroners falls far short of the optimum.

Since Confederation, it has been the policy in Ontario to appoint medically trained men as coroners.101 Today practically all of the more than 400 such officials in the province are doctors.102 This policy has been dictated by practical considerations. When a death is reported to the coroner, he must immediately view the body and make a preliminary assessment of the cause of death to decide whether further investigation is necessary.103 If an autopsy is required the coroner must be able to interpret the results given by the pathologist. Apart from the fact that few lawyers would be inclined to undertake such tasks, the doctor is obviously the best qualified person to perform the investigatory duties of the office. Medical training is not, however, the most suitable preparation for the coroner’s judicial duties, for which a knowledge of law is necessary.

The Supervising Coroner’s office, which is responsible for recruiting and training coroners, does give some instruction on the conduct of an inquest. A few years ago104 it initiated an introductory three day course of formal lectures on such matters as evidence and procedure.105 This course is too brief to teach more than the rudiments of the law of evidence but few doctors can afford to spend a longer time away from their practices. As long as the coroner must be a doctor, it is impossible to enforce technical rules of admissibility at the Ontario inquest.106

The present system is not without merit, even though it may subject a person suspected of a crime to unfair publicity and unnecessary prosecution. Throughout this article it has been argued that the most useful service rendered by the inquest is its contribution

100 Havard, supra note 12 at 181.
101 Supra, note 30 at 3.
102 Supra, note 4.
103 The Coroners Act, supra note 1, s. 10.
104 Until the reorganization of the supervising Coroner’s office in 1962, the newly appointed coroner was simply handed a hundred page guide book with the suggestion that he ask the Crown Attorney for advice. Supra note 55 at 8.
105 Supra, note 4.
106 One consequence of the present system should be noted. There is, of course, no presumption of innocence at an inquest since no one is “accused”. When a verdict based primarily on legally inadmissible evidence is reached by a jury, the Crown Attorney is placed in an anomalous situation. If the verdict actually alleges murder or manslaughter, a preliminary hearing must be held to conform with the requirements of s. 448 of the Criminal Code; if it merely implies that a crime was committed by a named individual, the publicity given to such a verdict leaves the Crown Attorney little choice but to lay the charge himself. In either case, there may be little or no evidence which could be introduced in court to prove the alleged crime, and the accused is subjected to a preliminary hearing and must defend himself against a charge, on what amounts in law not to reasonable and probable grounds but to suspicion.
to the promotion of public safety. With respect to this function the informality of proceedings before the coroner is an asset. The publicity given to a verdict cannot really be said to be prejudicial where no one is in jeopardy of a criminal prosecution. There is, however, the danger that someone may be prejudiced in the wider interpretation of the word by publicity given to the proceedings. The fact that technical evidentiary rules cannot be applied does not justify the admission of testimony, frequently offered by a grief-stricken relative of the deceased, which only tends to impugn the character of someone connected with the death. If the inquest, for practical reasons must be conducted by a doctor, then greater emphasis should be placed on his instruction in judicial aspects of the office so that he may recognize and exclude prejudicial evidence of little or no probative value.

In stressing the need for fairness on the part of the coroner, it should be noted that it is extremely difficult to have the verdict of an inquest quashed. The courts have held\textsuperscript{107} that even when the conduct of the enquiry has been irregular, a writ of certiorari will not be granted unless the applicant can show a greater interest in the proceedings than any other member of the public. It seems that it is virtually impossible for anyone other than the natural representative of the deceased, or a person actually accused of a crime, to acquire this status. In \textit{Young v. Attorney-General of Manitoba, Boxall and Fryer},\textsuperscript{108} a child, injured in an accident, died after being admitted to hospital and examined by Dr. Young. The verdict of the coroner's jury stated, without naming the doctor, that two contributing factors were an excessive dosage of morphine and lack of any actual treatment. Some months later the matter came under investigation by the Trial Committee of the provincial College of Physicians and Surgeons, and the inquisition, with a transcript of the evidence, was submitted to this body.\textsuperscript{109} Dr. Young then applied for a writ certiorari quashing the verdict. Although it conceded that there were a number of valid objections to the conduct of the inquest, the Court refused the application because it was not brought by a “person aggrieved”; the doctor had no greater interest than any other member of the public that would give him a right to have the inquisition quashed.

Although this legalistic approach to the law appears to work injustice to those who are affected collaterally by a verdict, it must be remembered that little would be achieved by quashing an inquest. Once a verdict has been reached and publicized, the damage has been done.

\textit{The Constitutional Question}

One distinctive feature of the law of coroner's inquests in Canada is the schizophrenic approach to it taken by provincial legislators.\textsuperscript{107} R. v. Farley (1865) 24 U.C.Q.B. 384; \textit{Young v. Attorney General of Manitoba, Boxall and Fryer} (1960) 25 D.L.R. (2d) 352; Wolfe v. Robinson, \textit{supra} note 66.\textsuperscript{108} \textit{Supra} note 107.\textsuperscript{109} An inquest is not a preliminary hearing and depositions taken before the coroner cannot ordinarily be read as evidence at a criminal trial. R. v. Laurin (1902) 5 C.C.C. 548.
After Confederation, the provinces continued to regulate all aspects of this institution as they had done before. For the last three generations, however, doubt has existed over the validity of much of the provincial legislation in this area. The doubt has arisen as a result of a number of judges' statements defining proceedings before the coroner as “procedure in criminal matters” and therefore within the exclusive legislative competence of Parliament under section 91(27) of the British North America Act.

The problem seems to have arisen with the almost identical declarations of Meredith C.J. in Hendershott, and Robertson J. in Hammond. In both these cases, which dealt with the question of the admissibility of evidence taken before the coroner at later criminal proceedings, the court decided that the proceedings before the coroner, even though no one was charged, was a matter within the jurisdiction of the Parliament of Canada. Although Robertson J. did advert to the Criminal Code, concluding without explanation that it recognized the inquest as a criminal court, both decisions were based on Blackstone and purported to follow the English decision in Herford. Whether or not that case was in fact the decided opinion of a very strong court, as Meredith C.J. believed, there is no doubt that the weight of English opinion in 1898 was to the effect that the coroner's court was a court of record and a criminal court of the realm. In Barnes, decided in 1921, Riddell J. cited the authorities relied on in Hammond, and with the rest of the court stated that the practice and procedure of an inquest were federal matters. Four decades later Schroeder J.A. asserted: “It is too late in the day to contend . . . that the Coroner's Court is not a criminal court of record”, and stated as obiter dicta his view of the law:

The Coroner's Court being a criminal court of record, only the Parliament of Canada has authority to enact legislation as to the Rules of Practice and Procedure to be followed in that forum in accordance with the provisions of s. 91(27) of the B.N.A. Act. It is common ground that, except to the extent that ss. 448, 488, 648 and 649 of the Criminal Code, S.C. 1953-54, c. 51 touch upon the office of coroner, there is no other Federal Legislation now in force affecting that office, and Parliament has not seen fit to enact, nor has it authorized the enactment of Rules of Practice

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110 (1895) 26 O.R. 678.
111 (1899) 29 O.R. 211.
112 Id. at 224.
114 Which, it is submitted, it was not. The court in this case decided that a coroner had no authority to hold an inquest to inquire into the origin of a fire which had not resulted in a death. The relevant words in the case, “we entertain no doubt that a prohibition may issue to a Court exercising criminal jurisdiction as well as to a Civil Court”, (per Cockburn C.J., (1860) 121 E.R. 135) were merely an answer to the argument that, since the inquest was a criminal court there was no authority for the prohibition.
116 Supra note 42.
117 Supra note 111.
118 Although, as pointed out by Middleton J., [49 O.L.R. 391] it was not essential to decide this point since the relevant provisions of the Canada and Ontario Evidence Acts were substantially similar.
120 Id. at 139.
or Procedure applicable to a coroner's inquisition. The Provincial Legislation has not done so and, indeed, if it had, the legislation would be ultra vires of that legislative body.\textsuperscript{121}

The difficulty with this line of cases is that none of them discusses the differences between the English and Canadian institutions. The question was not whether the inquest in England was a criminal court of record for certain purposes, but whether, in Canada, procedure before the coroner is a matter which, for purposes of constitutional division of power, should be classified as "procedure in criminal matters" over which Parliament has jurisdiction, or "administration of justice within the province" under the authority of the provincial legislature. It is submitted that the Criminal Code of 1892 did not, as stated by Robertson J.,\textsuperscript{122} recognize the inquest as a criminal court; it divorced the conduct of these proceedings from the ambit of the criminal law and substantially altered the character of the inquisition. By expressly stating that "[n]o one shall be tried upon any coroner's inquisition",\textsuperscript{123} Parliament destroyed the legal effect of the inquest and rendered proceedings before the coroner entirely preliminary in nature. Section 568 of the Code,\textsuperscript{124} which imposed on the coroner the ministerial duty of directing that a person charged by a jury of murder or manslaughter be taken into custody and conveyed before a justice, did no more than recognize that the verdict itself would provide reasonable and probable grounds for believing that the person named in it was guilty of an offence.\textsuperscript{125} Even if all other differences between Canadian and English inquests were ignored, this should preclude the courts from relying on English precedents to establish the nature of such proceedings. English law, if relevant at all, should only have the persuasive force of analogy.

The problem of classification of proceedings before the coroner is not merely academic. At the very least, there is now considerable doubt and confusion as to the validity of much of the legislation in this area. These doubts induce a certain amount of hesitation on the part of the provincial governments and impede the introduction of

\textsuperscript{121} The irony in Wolfe v. Robinson is that by taking its reasoning to a logical conclusion, every Ontario inquisition would be defective on its face. Although the number of jurors returned to serve on a grand jury can be determined by the province, "... the regulation of the number of jurors who may be required to say if a charge is well founded, is a matter of criminal procedure and it comes within the legislative power of the Parliament of Canada", (per Wurtele, J. in an address to a grand jury noted in (1898) 2 C.C.C. 213 at 215. See R. v. Cox, (1898) 2 C.C.C. 207. LASKIN, CANADIAN CONSTITUTIONAL LAW, (Second ed., 1960), 813-4.) If proceedings before the coroner are criminal proceedings and analogous to proceedings before a grand jury, (as stated in Robin v. McMahon (1915) 27 C.C.C. 407, 50 Que. S.C. 267, and R. v. Golding (1876) 39 U.C.Q.B. 259) then it follows that the Ontario legislation making the verdict returnable by a simple majority (1911), and reducing the number of jurors to five (1939), is ultra vires. A verdict which was not unanimously returned by twelve jurors would still be irregular. (See R. v. Golding.)

\textsuperscript{122} Supra note 112.

\textsuperscript{123} S.C. 1892 c. 29 s. 940. Presently enacted as S.C. 1953-54 c. 51 s. 488(3).

\textsuperscript{124} S.C. 1892 c. 29. [Now s. 448. See supra note 37.]

\textsuperscript{125} It is submitted that this duty is analogous to that imposed on a police officer by s. 438 of the Criminal Code, when he receives delivery of an arrested person.
reforms in the inquest. Some of the difficulties in the law are inherent in the terms of the British North America Act and will continue until the Supreme Court of Canada decides this specific question. It is possible, however, that the provincial legislatures could themselves clarify the situation.

The Ontario Coroners Act does not purport to be a codification of all laws relating to coroners. As observed in Re Sidley, the law that is applicable is the common law of England, superimposed upon which is the statute, and where the statute conflicts with the common law, the statute must prevail, and where the statute is silent on any matter the common law should prevail.

When asked to state the law applying to any particular situation, the courts must turn to the history of the inquest and the law of England. Herein lies the danger of overlooking the material differences between the institution as it was and is in England, and the institution as it exists in Ontario today. The committee appointed to study the coroner's system in Ontario in 1960 concluded that the state of the law did not require any basic correction and "... only those comparatively few points which require alteration warrant legislative treatment". It is here suggested, with respect, that the law should be codified.

There are few, if any, of the common law powers and duties of the coroner, as they exist in fact today, which could not be validly regulated by the provincial legislature. There is no question as to the validity of the Public Inquiries Act under the authority of which commissioners are often appointed to make inquiries, take evidence, and reach a conclusion which may become the basis of a criminal charge. On occasion such commissions have been appointed in Ontario to investigate the circumstances surrounding a death. Apparently the Province could, as has been done in Nova Scotia, abolish the office entirely. If the Coroner's Act were a code in which the powers and duties of the statutory "coroner" were defined and limited, the courts would have to decide whether proceedings under it were within the jurisdiction of the province by determining the nature of those proceedings. It is submitted, that in such a case

126 In Batary v. Attorney General for Saskatchewan [1965] S.C.R. 465, the question of the constitutional validity of provincial coroners acts was argued in depth. In holding that the province could not force a person charged with murder to give evidence at an inquest, the court confined itself to attempts "... to abrogate or alter the existing rules which protect a person charged with crime from being compelled to testify against himself ...". (per Cartwright J. at 478) Whatever the nature of procedure at an inquest, this decision merely establishes that such legislation being legislation relating to criminal law and procedure in criminal matters lies within the exclusive legislative authority of Parliament.


128 R.S.O. 1960 c. 323.

129 Supra note 56 at 6.


131 See Re Huston (1922) 52 O.L.R. 444.

132 Mentioned infra.
there would be little likelihood of the courts holding such proceedings to be “procedure in criminal matters”.

Other Systems

Until the latter part of the nineteenth century, the coroner system was virtually the only method of medico-legal investigation used in common law countries. In 1887, largely as a result of the irregularities of the Boston coroners who were elected officials without special qualifications (as elsewhere in the United States), the office in that city was abolished and a medical examiner system was instituted. With minor variations this innovation is spreading throughout the United States.

In this system the coroner is replaced by the medical examiner, a full-time appointed official, trained in medicine, who conducts the preliminary investigation and determines the cause of death. The office is not independent and is usually under the authority of the district attorney. In most cases the medical examiner can only question witnesses in private. Where a public inquest can still be held by him, the jury has been eliminated. The decision as to the laying of a criminal charge is usually left to the public prosecutor.

Thus the medical examiner functions as an auxiliary of other law enforcement agencies, his duties being primarily investigatory. Even in those jurisdictions where the examiner is empowered to hold a public hearing, the frequency of inquests has declined. In an account of the medical examiner system in Philadelphia, it is pointed out that the office is identical, from the standpoint of legal authority, to the old office of coroner, except that the name of the official has been changed. Furthermore, he is now appointed to the office which is a branch of the department of health, and the jury has been abolished.

The effect of these changes is surprising. In 1955, inquests were held in 1102 cases in the city; three years later there were no inquests in Philadelphia, and in subsequent years only two or three have been held annually. Under such a system it appears that the faults of the inquest are eliminated by abandoning the inquest.

In Canada, every province but Newfoundland used the coroner system until 1960. In that year, after experimental introduction in the Halifax-Dartmouth area, the legislature of Nova Scotia repealed the Coroners Act and instituted a variation of the medical examiner system throughout the province. The medico-legal investigation of death in Nova Scotia is now conducted under the authority of the

133 Hadard, supra note 12, at 184.
134 Id., at 183.
136 Id., at 215, n. 74.
137 Id., at 229, n. 188.
138 The office of coroner was abolished in Newfoundland in 1875 (38 Vict. c. 8). Since then inquests have been held by Magistrates.
139 The Medical Examiners Act, R.S.N.S. 1954 c. 173.
140 R.S.N.S. 1954 c. 51.
Fatalities Inquiries Act\textsuperscript{141} which provides for the appointment by the Governor in Council of a Chief Medical Examiner and one or more Medical Examiners for each county.\textsuperscript{142} It is now the medical examiner, a qualified medical practitioner, who takes charge of the body and conducts inquiries whenever anyone is found dead in circumstances requiring an inquest by statute, where the cause of death is undetermined, or where violence, undue means or culpable negligence is suspected.\textsuperscript{143} Upon completion of his inquiry, he must file a report with the Clerk of the Crown. If he believes that the death was caused by violence, undue means or culpable negligence, or that there are reasonable grounds for suspicion, he must forward a copy of the report to a Provincial Magistrate who may hold an inquest if he considers it necessary for the full investigation of the cause of death.\textsuperscript{144} Except when an inquest is mandatory by statute, or when the Attorney General or Prosecuting Officer has specifically ordered that one be held, the decision as to whether or not a public hearing of the circumstances surrounding the death shall take place, is made solely by the Magistrate.\textsuperscript{145} In effect the Fatalities Inquiries Act has divided the judicial and investigatory powers and duties, previously combined in the coroner, between two separate officials.

At first glance the system seems appealing. It is essentially identical to the one advocated by the Ontario Public Services Commission of 1921 which reached the conclusion that,\textsuperscript{146}

A physician possesses special qualifications for determining the cause of death and...a physician...should make the preliminary inquiry. A magistrate skilled in the examination of witnesses and in all that pertains to bringing out the facts is...the proper person to conduct an inquest.

It is probable that the Nova Scotia system gives greater protection to all connected with the death. The Magistrate, who in Nova Scotia, must be a barrister of five years experience, is accustomed to the usual evidentiary rules and to the practice of cross-examining witnesses and he is probably more likely to exclude irrelevant matters. As there is no jury, proceedings may be conducted with greater speed and certainty. On the other hand the system seems to have at least one major disadvantage;\textsuperscript{147} it all but destroys the usefulness of the inquest as a vehicle for positive reform.

It would be surprising if the twelve active Provincial Magistrates in Nova Scotia had the time or the inclination to hold a public hearing on a death unless there was a clear possibility that it resulted from

\textsuperscript{141} S.N.S. 1960, c. 6.
\textsuperscript{142} Id., s. 2.
\textsuperscript{143} Id., s. 4.
\textsuperscript{144} Id., s. 7.
\textsuperscript{145} Id., s. 10.
\textsuperscript{146} Supra, note 26, at 6.
\textsuperscript{147} Another is suggested by an anomaly in Ontario law. By Section 6 of the Ontario Coroners Act a magistrate may be directed to act as coroner in a provisional judicial district. If a charge arises from the inquest, the magistrate who presided at it then has to sit on the preliminary hearing. The Canada Evidence Act gives little protection to a witness in such circumstances. Could such a situation occur under the Fatalities Inquiries Act?
criminal conduct. With no jury, recommendations would rarely be made. If a magistrate could properly comment on the factors which contributed to a death his words would have far less influence than those of a jury. In fact, in Nova Scotia as in other jurisdictions where the medico-legal system has been reformed to improve its operation as a method of detecting crime, the annual number of inquests has declined. The changes made in an effort to correct the faults of the inquest have rendered it powerless to initiate positive safety measures. It now remains as an institution of minor importance in bringing possible criminals to justice.

Conclusion

The coroner's inquest in Ontario deserves both approbation and criticism. It is a valuable means of ensuring that hazards, inherent in our modern way of life, are brought to the attention of the public, and its recommendations often stimulate action to remove those hazards. On the other hand, the characteristics which enhance the value of the inquest as a forum for promoting safety measures curtail those rights which must be guaranteed to all if public confidence in the fairness of the administration of justice is to be maintained. The publicity which the verdict of a jury can command gives the inquest its power to initiate changes; that publicity is highly prejudicial to a man suspected of crime. The jury which is necessary to propose ways in which fatalities can be prevented, can err in criminal matters with serious consequences. The freedom from evidentiary rules, which allows a wide range of views on matters involving public safety is a danger where the finding of a jury can force someone to answer an accusation. Is it possible to modify the present system to prevent injustice, and yet retain the benefit of those features which contribute to injustice?

Perhaps the protection of the Nova Scotia system could be combined with the advantages of the Ontario inquest. A number of men, trained in the law, could be appointed as "associate coroners" whose duties would be confined to conducting inquests in certain circumstances. At inquests presided over by an "associate coroner" there would be no jury, the ordinary rules of evidence would apply and all interested parties would have a right to counsel and to a reasonable opportunity of examining witnesses. The jurisdiction of the "associate coroner" might be defined by classifying the deaths which are reported to the coroner under section 7 of the Coroners Act. Whenever the coroner decided an inquest was necessary and no matters of public safety were anticipated, or there was reasonable grounds for suspecting that the death was caused by murder or manslaughter, he would be required to order that the inquest be held before an

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148 In a letter of January 17, 1967, Mr. G. S. Gale, solicitor with the Department of the Attorney General, Nova Scotia, informed the writer that there were no statistics available on the number of inquests held in that province, although he believed that... "the frequency of inquests [had] declined somewhat due to administrative decisions of [the] Department."

149 Supra, note 2.
"associate coroner". In all other cases the inquest would be conducted by the coroner under existing rules. Although there would be deaths which would be difficult to classify, it is in precisely those cases where there is nothing to be gained from the standpoint of public safety, that the inquest is most unfair. It is submitted that much of this unfairness could be eliminated without impairing the usefulness of the inquest if the changes suggested above were made.

Whether on not the institution is changed in substance, there is an urgent need for legislative action to clarify the law. The function of the inquest and the role of the coroner have changed so dramatically in the last few years that the common law can not adequately serve the needs of contemporary society. There should be a codification of the law in this area which clearly defines the powers and duties of the coroner and which gives to the Supervising Coroner the authority to modify procedures where necessary. If the inquest is to operate effectively it must be recognized as an instrument of social policy and freed of the limiting burden of uncertain law.