COMPETENCY, COMPELLABILITY & CORONER'S COURTS

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The application and effect of the sections of the Canada Evidence Act and the provincial Evidence Acts which negative the comon law rule against self-incrimination have always created troublesome issues not readily resolved. A recent series of cases concerning the position of a person called to give evidence before a coroner's inquiry as a result of which inquiry he may be charged with an offence, has revived interest in this area of the law. This interest has been particularly evident in Alberta, where the issue cannot at this time be said to be settled. The writer, a senior member of the Alberta Attorney-General's Department, deals with the specific issue of coroner's inquests against the background of a broad discussion of the principles of competency and compellability of witnesses.

INTRODUCTION

In April, 1965, Mr. Justice Cartwright (now Chief Justice) of the Supreme Court of Canada gave the majority judgment in the case of *Batary* v. *Attorney General for Saskatchewan,*[1] (hereinafter referred to as "the *Batary* case"). The main material facts of that case were that Batary and several others were charged with murder and the Crown indicated that it intended to call Batary and the others to testify at the coroner's inquest. At the Inquiry counsel for the accused objected that neither the Coroner nor the Crown could compel a person who has already been charged with the murder of the person whose death was being inquired into, to be sworn as a witness at the inquest. Mr. Justice Cartwright directed that an order issue prohibiting any Coroner in the Province of Saskatchewan from requiring the Appellant (Batary) to attend as a witness or give evidence.

The judgment indicated that section 5 of the Canada Evidence Act[2] did not purport to say who should or should not be compelled to take the witness stand. It only dealt with the rights and obligations of a witness who already was in the stand.

Since the foregoing, Mr. Justice McIntyre in the identical cases of *Re Nelson and Jacobson*[3] and *Re Maddess,*[4] in purporting to apply the *Batary* case, held that a person charged with careless driving under a provincial statute could not be compelled to testify at a coroner's inquest into the death resulting from the occurrence out of which the charge arose. These decisions were given in March of 1967. In July of 1965, Mr. Justice Sirois in the case of *Re Wyshynski and Jacobson,*[5] had held that a driver of a motor vehicle not charged was a compellable witness at the coroner's inquest inquiring into the death of the other driver arising out of the accident in which Wyshynski was involved. Counsel for Wyshynski stated that the peace officers were electing not to charge until after the inquest. The Court held that counsel's position was not

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1 [1965] S.C.R. 465, 51 W.W.R. 449, 46 C.R. 34.
2 R.S.C. 1952, c. 307.
3 (1967) 1 C.R. (N.S.) 235 (B.C. Supreme Court).
4 [1967] 3 C.C.C. 284 (B.C. Supreme Court).
5 (1965) 53 W.W.R. 422, [1966] 2 C.C.C. 199 (Sask. Q.B.).

a sound one since an inquest was an inquiry at which there were no parties and no accused and that it was merely an investigation to ascertain whether or not a crime had been committed. The applicant was said to be in the same position as other witnesses summonsed to testify and in a situation that was different than in the *Batary* case.

The foregoing decision in the *Wyshynski and Jacobson* case, was not applied in the decision of Mr. Justice Munroe of the Supreme Court of British Columbia in the case of *Re Wilson Inquest*,[6] where it was held that where the evidence of witnesses given at an inquest indicates that a person might reasonably be charged with an offence under the Criminal Code or under the Motor Vehicle Act arising out of the death, such person cannot be compelled to testify. Mr. Justice Dechene of the Supreme Court of Alberta, in an extraordinary remedy proceeding arising out of the inquest into the death of Joan Elizabeth Marr, an unreported case, where counsel admitted that there was evidence of a probable offence under The Highway Traffic Act (Alberta), followed the *Re Wilson Inquest* decision. Since the foregoing, the British Columbia Court of Appeal has overruled the decision of Mr. Justice Munroe by holding that a person not charged is a compellable witness.

The issues to be considered in the following submission may be reduced to the following:

1. If a person is not charged but there is evidence indicating a possible charge is he a compellable witness?
2. If a person is charged with a criminal offence arising out of the circumstances but not being an offence relating to the death, is that person a compellable witness?
3. Is a person charged with a provincial offence a compellable witness?

COMPETENCY AND COMPELLABILITY GENERALLY

Before commenting on the present status of compellability of witnesses at inquests in the light of the decision in the *Batary* case, and subsequent court rulings dealing with the subject, a cursory look at competency and compellability in general will be of value.

Competency:

A witness is considered to be competent if his testimony is admissible or if the witness's evidence is inadmissible and the inadmissibility is not attributable to any impediment of the witness. One might put it another way by saying the person has those qualities which render a witness "testimonially fit" and qualified to give evidence. It should also be noted that competency is not synonymous with credibility. Competency arises before one arrives at the stage where credibility is considered. Credibility is concerned with the degree of credit of the testimony or as to what weight the testimony should be given. A competent witness may give "incredible" evidence. This testimony could be given some weight unless it is also unbelievable. Competency is decided by the Court, credibility is for the jury to consider.

[6] (1968) 63 W.W.R. 108.

Compellability:

Compellability in the usually recognized sense is raised by the question—"Can the competent witness be compelled to go into the witness box?" However, if there is a prior consideration as to whether a person can be compelled to attend, then the question, "When is a person a witness?" may have to be asked. In the primary sense a person is a witness in respect of a fact if he has knowledge of that fact. Whether he is in law competent to testify is another matter and since the Court decides competency it seems that any person who may have some knowledge regarding the subject matter of the inquiry may be subpoenaed to attend. Since it is presumed that a person in competent, a subpoena should issue in respect of that person because the Court decides whether a proposed witness is in fact competent to testify. In this regard, it will be noted, section 22, subsection (1) of The Coroner's Act (Alberta)[7] reads:

> A coroner may issue a summons to any person who, in the opinion of the coroner, might be able to give material evidence as to the matters to be inquired into at the inquest.

PERSONS COMPETENT TO TESTIFY

As to who is competent to testify, one may start by observing that generally all adults are competent. However, competency does not depend on age only but upon understanding. Thus, a child may be competent if he has sufficient intelligence to understand the nature of an oath, and adults who, because of mental incapacity such as insanity or drunkenness, may be incompetent. A drunk adult would, of course, become competent when he becomes sober and an insane person when he becomes lucid, or perhaps at all times in areas in which he does not suffer aberration. In addition to the foregoing, the accused and his spouse are, subject to specific exceptions, incompetent witnesses for the prosecution. If the spouse of an accused is competent for the accused, then it appears strange that the spouse would be incompetent if testifying to the same set of facts for the prosecution; and it would seem more desirable to refer to the spouse as being non-compellable for the Crown. However, this situation can probably be explained by having reference to the historical background thereto. At common law parties who had an interest in the outcome of a proceeding were held to be incompetent and thus were not permitted to testify. The same was true of an accused and his spouse. In this regard note section 3 of the Canada Evidence Act, which reads:

> A person is not incompetent to give evidence by reason of interest or crime.

See also sections 4 and 5 of the same Act, which in part are set out below:

> 4. (1) Every person charged with an offence, and, except as in this section otherwise provided, the wife or husband, as the case may be, of the person so charged, is a competent witness for the defence, whether the person so charged is charged solely or jointly with any other person.
> (2) The wife or husband of a person charged with an offence against section 33 or 34 of the Juvenile Delinquents Act or with an offence against any of the sections 135 to 138, 140, 142 to 147, 149, 155, 156, 157, 158, 164, 184, 186, 189, 234 to 236, 241 to 244, 275, paragraph (c) of section 408 or an attempt to commit an offence under section 138 or 147 of the Criminal Code, is a competent and compellable witness for the prosecution without the consent of the person charged.

7 R.S.A. 1955, c. 62, as amended.

(3) . . . .
(4) Nothing in this section affects a case where the wife or husband of a preson charged with an offence may at common law be called as a witness without the consent of that person.
(5) . . . .

5. (1) No witness shall be excused from answering any question upon the ground that the answer to such question 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.
(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.

The incompetency when the spouse testified for the accused was removed and thus in those areas where the incompetency was not removed by statute it appears that the witness is still held to be incompetent. Sections 4 and 5 set out areas of competency and compellability of an accused and the spouse. Having dealt with the anomaly that an apparent "competent spouse" witness is not compellable because of an incompetency one can go on and make the observation that there are competent witnesses who are not compellable; for example, the sovereign and ambassadors. With these illustrative exceptions out of the way one can make the generalization that a competent witness is usually compellable. Avory, J., in the case of *John Henry Lapworth*,[8] stated:

> I read that as meaning that if the known state of the law is such as to confer competency without any statute, the compellabiliy follows as a matter of course from that competency . . . .

Of course one can dispose of the converse in one observation which appears obvious, *viz.*, a witness who is incompetent is non-compellable.

WITNESSES IN MATTERS OF PROVINCIAL JURISDICTION

As to competency and compellability in matters under the jurisdiction of the Alberta Legislature, reference is made to section 6 of the Alberta Evidence Act[9] which reads:

6. (1) The parties to an action and the persons on whose behalf the action is brought, instituted, opposed or defended are, except as hereinafter otherwise provided, competent and compellable to give evidence on behalf of themselves or of any of the parties.
(2) The husbands and wives of the parties and persons mentioned in subsection (1), are, except as hereinafter otherwise provided, competent and compellable to give evidence on behalf of any of the parties.
(3) Nothing in this section shall be deemed to make the defendant in a prosecution under an Act of Alberta compellable to give evidence for or against himself.

Also, as to privilege, etc., see sections 7, 8, 9, 10, 35(a).

COMPELLING THE WITNESS—ATTENDANCE

Now if a witness is competent and compellable how is he compelled? In civil cases a witness is served with a subpoena and given conduct

8 (1930) 22 Cr. App. R. 87.
9 R.S.A. 1955, c. 102, as amended.

money. If he fails to appear he is in contempt of court and can be physically brought into Court. In criminal cases he is served with a subpoena and conduct money is not required. The subpoenaing of witnesses in criminal matters is set out in Part XIX of the Criminal Code of Canada. As mentioned in the *Re Wyshynski and Jacobson* case, "Part XIX of the Criminal Code—Procuring Attendance of Witnesses—contains no provision for the prepayment of witnesses fees in criminal matters . . ." Part XIX provides for the form and issuing of a subpoena as well as for the arrest of a witness under warrant. It also provides for committing for contempt a witness who, when present, refuses to testify, produce documents, or sign depositions. We should bear in mind that in addition to Part XIX of the Code, section 36 of the Canada Evidence Act reads:

> 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.

As to attendance of witnesses in provincial matters see section 23 of the Alberta Evidence Act, which reads:

> 23. Where a witness who has been
> (a) served in due time with
> (i) a subpoena issued out of any court in the province, or
> (ii) a notice authorized instead thereof, and
> (b) paid his proper witness fees and conduct money, make default in obeying the subpoena or notice without any lawful and reasonable impediment, the witness, in addition to any penalty he may incur for a contempt of court, is liable to an action, on the part of the person by whom or on whose behalf he has been subpoenaed or summoned, for any damage that such person sustains or is put to by reason of the default.

Cognizance must also be taken of the definition of "action" and "court" in that Act as found in section 2.

COMPELLING THE WITNESS IN ATTENDANCE TO TESTIFY

The foregoing deals with the attendance of witnesses. It may be advisable at this time to deal briefly with the compelling of a witness to take the stand and to be sworn.

With a child of tender years the Court, once the child is on the stand, questions him to ascertain his competency. This is done without swearing the witness. However, where any incomptency is not due to the lack of knowledge and consequences of taking an oath, it appears that the Court swears the witness before further testing competency; if competency is established, then in certain cases the Court swears the witness again before giving his evidence. As indicated, it is for the judge to determine the competency of a witness and this is done by a preliminary examination of a proposed witness. In the past it had been done by examination on a *voir dire*. In those times a special form of oath was to the following effect: "You shall true answer make to all such questions as the court shall demand of you"; whereas the oath for giving evidence in proof of the cause was and still is to the following effect: "The evidence you shall give to the Court and jury sworn between our Sovereign Lady, the Queen, and the prisoner at the box, shall be the truth . . . "

As to an expert whose competency is only established upon it being shown that he has the necessary special qualifications to give an opinion in the area in issue, his evidence is receivable when qualifications are shown and the examination is usually done after he is sworn in with the usual oath. The modern practice is more in keeping with the following quotation from Phipson's *Manual of the Law of Evidence*:[10]

> Objections to competency used to be decided by the judge on the voir dire (i.e. vrai dire), the witness being sworn to answer truly all such questions as the court should demand of him; but the modern practice is either to interrogate the witness before swearing him or to elicit the facts upon the examination-in-chief, when, if his incompetency appears, the evidence will be excluded by the judge.

SUMMARY

A brief summary of the general position appears to be as follows: (One or two cases being added without discussion)

Non-Competent

1. Insane person
2. Lack of understanding (Usually children of tender years)
3. Atheists (no longer so—they may affirm)
4. Witness whose present state due to drunkenness, etc.

Competent but not Compellable

1. Sovereigns, ambassadors
2. Limited compellability of bank or officer (see section 29, subsection (5) of the Canada Evidence Act)

Competent for Defence but not for Crown

1. Spouse in certain cases.

THE CORONER'S INQUEST

Immunity

At common law there was apparently no immunity to compellability at Coroner's inquest except as to the situation referred to in the *Batary* case. Though that decision and other authorities has designated the coroner's court as a criminal court of record the Appeal Court of British Columbia indicates that the proceedings are not those of a court of law. There is no power to make decisions affecting person or property; there is no charge, no accused. It would, insofar as adjudication in a coroner's court is concerned, be congruent in most aspects to a fire inquiry. In that aspect also, it would be no different than an inquiry set up under a Public Inquiries Act, or questioning under a Securities Act—and here reference might usefully be made to the case of *Lymburn* v. *Mayland*.[11] The coroner's court differs from those other inquiries referred to only in that it is a procedure, permanent in form and of historical significance, set up to inquire into deaths.

Compellability

At any inquiry it would appear that if a witness is competent he is, generally speaking, compellable. Thus, it could be argued that unless charged, a person is subject to attend if in the opinion of the coroner he

10 Phipson, Sidney Lovell, *Manual of the Law of Evidence*, (9th ed. by D. W. Elliott), London, Sweet & Maxwell, 1966.
11 (1932) 57 C.C.C. 311.

has evidence to offer. He is subject to be sworn and can claim the protection of section 5 of the Canada Evidence Act. This appears to be the ruling in the *Re Wyshynski and Jacobson* case, and *Whitelaw* v. *McDonald and Attorney General for British Columbia.*[12]

Secondly, what is the situation if a person is charged but not with the death; i.e., not murder, manslaughter, or criminal negligence causing death? That is to say, supposing one of the drivers involved in an accident causing death was charged with impaired driving. On a careful reading of the Supreme Court of Canada decision in the *Batary* case, it could be argued that such a person is compellable. One can hardly argue that he is immune on the basis that no person can be compelled to incriminate himself, and the law as to that aspect alone, is more fully dealt with in the dissenting judgment of Fauteux, J. in the *Batary* case. Here reference is made to the reference in that judgement to such cases as *Re Regan,*[13] a case dealing with the compelling of one accused to testify against another accused when they are charged separately. The case states that he can be compelled to testify. An interesting English case dealing with charges before the inquest is concluded (though it doesn't deal with compellability) is *Re Harold Beresford.*[14]

POSITION OF PROVINCIAL OFFENCES

Thirdly, the *Re Maddess* and *Re Nelson and Jacobson* cases, hold that a person charged with a provincial offence is not compellable at an inquest. It is the writer's submission that a good case can be made out (at least in some jurisdictions not yet bound by decisions in their provinces) to the contrary.

First of all provincial offences are not crimes, otherwise they could not be dealt with by the provinces. And as pointed out by the Supreme Court of Alberta, Appellate Division, in the case of *R.* v. *Covert,*[15] the province may regulate procedure and evidence with reference to the so called "provincial crimes". Other cases in this area are:

Saumur v. *Recorder's Court*[16]
In re McNutt[17]
Mitchell v. *Tracey*[18]
Nat Bell Liquors Ltd., v. *The King*[19]
The King v. *Bell*[20]
Chunk Chuck v. *The King*[21]
Nadan v. *The King*[22]

It is appreciated, of course, that the decisions in *Re Wyshynski and Jacobson,* and *Whitelaw* v. *McDonald and Attorney General for British Columbia,* do not agree as to which Evidence Act should apply at a coroner's inquiry, the provincial Evidence Act or the Canada Evidence Act. A very important case in connection with this aspect of applicable procedure is the case of *Toronto Railway Company* v. *The King,*[23]

12 (1969) 66 W.W.R. 522 (B.C.C.A.)
13 (1937) 71 C.C.C. 221 (N.S. Supreme Court).
14 (1952) 36 Cr. App. R. 1.
15 (1916) 28 C.C.C. 25 (Alta A.D.).
16 [1947] S.C.R. 492 at 494.
17 (1913) 47 S.C.R. 259, 21 C.C.C. 157.
18 (1919) 58 S.C.R. 640.
19 [1922] 2 A.C. 128, 37 C.C.C. 129.
20 [1925] S.C.R. 59, 43 C.C.C. 286.
21 [1930] A.C. 244, 53 C.C.C. 14.
22 [1926] A.C. 482, 45 C.C.C. 221.
23 (1917) 29 C.C.C. 29 (J.C.P.C.).

which holds that it was competent to the Parliament of Canada under section 91, subsection (27) of the B.N.A. Act, 1867, in legislating as to criminal law and procedure, to declare that what might previously have constituted a criminal offence should no longer be so although a procedure in form criminal was kept alive. Therefore, one can no doubt have a criminal court by designation where the Federal Government has not set up the procedure and has left this to the provinces. This to a measure is the position taken by the British Columbia Court of Appeal in the case of *Whitelaw* v. *McDonald and Attorney General for British Columbia.*

Section 24 of the Coroner's Act (Alberta) states:

> (1) The coroner in an inquiry into a death shall examine on oath all persons who tender their evidence respecting the facts and all persons he thinks it expedient to examine as being likely to have knowledge of relevant facts.
> (2) A person who is suspected of causing the death, or who has been charged or is likely to be charged with an offence relating to the death, shall not be excused from answering any question on the ground that his answer to the question might tend to incriminate him, but if he objects to answering the question on that ground the coroner shall give him the protection afforded by section 5 of the Canada Evidence Act and by section 8 of the Alberta Evidence Act.
> (3) Such person may be represented by counsel who may examine and cross-examine witnesses called at the inquest and may on behalf of his client take the objection referred to in subsection (2).
> (4) Counsel appointed by the Attorney General to act for the Crown at an inquest may attend thereat and may examine or cross-examine the witnesses called, and the coroner shall summon any witness required on behalf of the Crown.

RESOLUTION OF CONFLICT

It is the writer's submission that where section 5 of the Canada Evidence Act is applicable it is so by virture of the said section and not by reference to it in the Coroners Act. That is, the coroner could not withhold or give the protection of section 5 of the Canada Evidence Act re incriminating answers. Where there is no relief from answering, section 5 affords the protection. As to whether the Court should advise such a witness of his rights, the case of *Attorney General for Alberta* v. *Shepherd*[24] is of interest though the issue arose under different circumstances. It should be noted also in this regard that the immunity afforded by section 5 cannot be granted in advance of the witness giving testimony: *R.* v. *Mottola and Vallee.*[25] Whether section 24, subsection (2) of the Coroner's Act (Alberta) adds anything to section 5 of the Canada Evidence Act or to section 8 of the Alberta Evidence Act is immaterial, because it at least serves the purpose of drawing the coroner's, and thus the witness" attention to the sections in the Evidence Acts.

24 (1965) 53 W.W.R. 318.
25 (1959) 124 C.C.C. 288 (Ont. C.A.).