McGILL LAW JOURNAL
Montreal
Volume 19 1973 *Number 1*

Is There a Right Against Self-Incrimination in Canada?*

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Introduction

One of the leading Canadian scholars in the area of criminal procedure and evidence recently said of the "privilege against self-incrimination": [1]

> Like all legal clichés, this, too, tends to be highly misleading... Perhaps no phrase has been bandied about with more imprecision and with more unawareness of its legal and social significance... unless perhaps it be the phrase that everyone is presumed to be innocent until proven gnilty.[2]

The presumption of innocence is at least expressly included in our Criminal Code.[3] But nowhere is there statutory recognition of

* This article is based on research and writing submitted in partial satisfaction of the doctoral degree requirements at the University of Michigan. The writer wishes to express his gratitude to his supervisor, Professor Paul G. Kauper, and to Professors Kamisar and Estep for their comments and suggestions in connection with the general research and writing.

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[1] The term "self-*incrimination*" seems to have been the earliest form used at common law and thrust into prominence in the United States. More recently in Canada, "self-*crimination*" seems to be more widely used, probably because of the form adopted by the *Canadian Bill of Rights*, 8-9 Eliz. II, S.C. 1960, c. 44; R.S.C. 1970, App. III, which is discussed *infra*, at pp. 67 *et seq.* The terms are used interchangeably throughout this article.

[2] Alan W. Mewett, *Law Enforcement and the Conflict of Values*, (1970) 16 McGill L.J. 1, at pp. 6-7. Reprinted: (1969-70) 12 Crim. L.Q. 179, at pp. 185-86.

[3] *Criminal Code*, R.S.C. 1970, c. C-34:
Section 5(1):
Where an enactment creates an offence and authorizes a punishment to be imposed in respect thereof,
(a) a person shall be deemed not to be guilty until he is convicted thereof;

any general right or privilege against self-incrimination as such.[4]

Yet, there are countless references to such a right or privilege not only in the Canadian journals and law reviews but also in the cases. In its broad study of criminal procedure and corrections, the Ouimet Commission said of it simply that:

> ... it appears to the Committee that the privilege against self-incrimination is deeply involved in the feeling of justice or fairness with which contemporary Canadian society reacts to our criminal process.[5]

That reference is in many ways typical.

There is a suggestion that great consequences flow from the privilege, yet its precise significance is not explained. Rather, that significance is assumed. Such assumptions seem to have been made so often that the references take on the character of generalities spoken without understanding, but without fear of contradiction because of the absence of any clearer understanding on the part of the audience. With every reference and tacit concurrence the difficulty of challenging the assumptions increases.

What does the right or privilege against self-incrimination mean in Canada today? Does such a right really exist at all? In other words, is there any general principle in Canadian law which says that a man need not incriminate himself? [6]

There are certainly a number of specific rules both at the trial and pre-trial stages which seem to reflect such a principle. For example, there is the rule that an admission of a suspect or an

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[4] The *Canadian Bill of Rights, op. cit.*, is not considered here because it is not a statute *comme les autres*. The effect of the Bill is discussed *infra*, at pp. 67 *et seq.* Generally speaking, its effect has been limited and depends upon the nature of the so-called "right" or "privilege", as accepted by the cases prior to its enactment.

[5] *Report of the Canadian Committee on Corrections. Toward Unity: Criminal Justice and Corrections*, (Queen's Printer, Ottawa: 1969), at p. 54.

[6] The inquiry here does not extend to the consequences of the common law principle in civil proceedings. It may still be applicable in a limited number of situations, but has largely been replaced by statutory provisions. For example, Professor Julien D. Payne has pointed out:

> It seems that the right to be protected against questions tending to show adultery exists independently of statutes or rules of court, but it is now governed and limited by express enactment in all of the Canadian common-law provinces: (1968) 2 Ottawa L.R. 461, at p. 461.

The courts have also considered whether the Evidence Acts apply to a party being examined for discovery or whether the common law position prevails. In this regard, see: *Bell* v. *Montreal Trust Co.*, (1957) 6 D.L.R. (2d) 589 (B.C.C.A.); *Klein* v. *Bell*, [1955] S.C.R. 309; *Bank of Nova Scotia* v. *MacBrien*, [1953] O.W.N. 406 (Ont. H.C.).

accused to a person in authority may not be introduced in evidence unless it has been shown to have been made voluntarily on the part of the accused. Another example is the rule that an accused person may not be called by the Crown as a witness at his own trial.

The totality of these and other rules could be said to constitute a general principle or right against self-incrimination. But the usefulness of such an observation is very limited. If the general principle is merely a way of describing a collection of specific rules with a variety of independent origins it has no functional capacity in itself. In other words, the law is to be found in the specific rule of evidence or procedure and cannot be deduced directly from the general principle.

The important question, then, is whether there is any general principle against self-incrimination which is *functional* rather than merely descriptive. If it is functional, then it is possible to have a situation where no specific rule of evidence or criminal procedure is applicable, yet where the general principle could be applied to achieve a particular result. In other words, legal consequences would flow from the principle itself. It would be something more than the collectivity of previously existing rules.

The effect of such a result would, of course, be to create a new rule or extend an existing one. However, the rule or extension thus born would have been deduced directly from the general principle, so that the approach would be in contrast to the usual common law approach within a framework of *stare decisis.*

It is not possible or even appropriate to attempt to describe the latter process here. Whatever is involved, the approach is clearly *not* to say, for example: "There is a principle that a man need not incriminate himself. To allow this procedure would offend that principle. Therefore this procedure is not allowed."

It may also be argued that while the principle may not be applied as such, it is so strong an underlying policy basis as to bring about the same result in the clothing of *stare decisis.* For the purposes of this inquiry, such a result would be treated as an application of the general principle.

Finally, it might be said that the existence of the principle is to be found not in its functional operation today, but in the fact that it was the driving force which resulted in the creation of the statutory provisions and the now crystallized common law rules of which examples were given earlier. It is submitted that such a suggestion recognizes that a general right once existed but no longer does. The inquiry here is limited to the present state of the law in Canada.

To put the matter another way, where there is no specific statutory provision or established common law rule, can defense counsel ever invoke a general principle that a man need not incriminate himself and thereby achieve a specific result for his client in a particular case? [7]

In the course of the inquiry as to the functional operation of the concept, there should also emerge incidentally an impression as to the extent to which the concept is an accurate *description* of our system. In other words, quite apart from any operational effect, can we say that the specific laws and procedures which in fact exist in Canada consistently protect individuals against self-incrimination? If they do that to a considerable extent, it may be useful to use the concept of a right against self-incrimination as descriptive of our system. On the other hand, the extent to which examples of such laws and procedures might be found to be incompatible with the concept would, to that degree, derogate from and eventually eliminate the usefulness of the concept even as descriptive of the collectivity of existing procedures.

I. Physical Evidence and Pre-Trial Statements

In recent years, there have been a number of decisions of the Supreme Court of Canada dealing with questions related to statements made by an accused prior to trial. Some of the judgments clearly seem to treat the self-incrimination concept as having a functional aspect of its own. At the very least, the concept seems to be recognized as having a cybernetic nature in the sense of being something more than the specific rules, if not independent of them. It is submitted, however, that such suggestions in no way form the *ratio decidendi* of the decisions. Rather, the decisions must be taken to have finally obliterated any optimism which may have previously existed about the application of a general principle against self-incrimination in the area of pre-trial statements made by an accused.

In *R.* v. *Wray*,[8] the accused confessed to the police after a lengthy interrogation. He then led them to a swamp and showed them

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[7] In addition to "right against self-incrimination" and "privilege against self-incrimination", other phrases that have been used include "the right to remain silent", *"nemo tenetur seipsum prodere"*, and *"nemo tenetur seipsum accusare"*. For the purposes of this article, they will be used interchangeably. In *R.* v. *Corning Glass Works of Canada*, (1970) 16 C.R.N.S. 329 (Ont. C.A.), Arnup, J.A., delivering the judgment of the Court, pointed out (at p. 331) that the distinction between *nemo ... prodere* and *nemo ... accusare* has "ceased to have any real significance".

[8] [1971] S.C.R. 272.

exactly where the murder weapon was hidden. The confession was held to be inadmissible under the voluntariness rule, but the facts leading to the discovery of the rifle, and such parts of the confession as were confirmed to be true by the discovery, were held to be admissible in evidence.

If the voluntariness rule which excludes certain evidence at trial is based on a more general principle or policy against self-incrimination, one would have expected a rather different result in *Wray*. The admissible portions of the statement were incriminating as was the evidence discovered as the result of it. All of these incriminating pieces of evidence were revealed directly as the result of pressures brought to bear upon the accused for that very purpose.

However, the decision of the majority clearly indicates that the overriding consideration was the relevance and reliability of the evidence. In the two majority judgments,[9] there is no reference, either express or implied, to "self-incrimination".

Mr. Justice Spence dissented on the basis that the trial judge has a discretion to exclude relevant and reliable evidence if it would bring "the administration of justice into disrepute". In the latter phrase, he seems to be referring to the potential disrespect for the system which would result from admitting the evidence and thereby failing to express disapproval of improper police behaviour. He added:

> ... it would not only have brought the administration of justice into disrepute but it would have been a startling disregard of the principle of British criminal law, *nemo tenetur seipsum accusare*. Surely no authority need be stated to establish that as the most basic principle in our criminal law.[10]

The majority was obviously not at all startled.

Mr. Justice Cartwright, another dissenter,[11] was not so sure. Early in his judgment he pointed out that if a principle against self-incrimination forms part of the basis of the voluntariness rule,

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[9] Martland, J. (Fauteux, Abbott, Ritchie and Pigeon, JJ. concurring) and Judson, J. (Fauteux and Abbott, JJ., also concurring with him).

[10] [1971] S.C.R. 272, at p. 305.

[11] The third dissenter was Mr. Justice Hall who held that a trial judge did have a discretion to reject admissible evidence in certain circumstances. He relates the discretion to the accused's "constitutional right to a fair trial". It is difficult to disagree with the majority that the admissibility of such evidence has very little to do with fairness *at trial*. Rather, it involves the fairness of police methods of obtaining evidence at the pre-trial stage. Hall, J. may be suggesting that pre-trial procedures cannot be separated from fairness at trial, since generally they are ultimately directed to that stage. However, the authorities discussed *infra*, at pp. 7 *et seq.*, indicate that the majority was more correct in law.

then mere relevance or reliability is not sufficient to determine admissibility. He said:

> If... the exclusion of an involuntary confession is based also on the maxim *nemo tenetur seipsum accusare* the truth or falsity of the confession does become logically irrelevant. It would indeed be a strange result if, it being the law that no accused is bound to incriminate himself and that he is to be protected from having to testify at an inquest, a preliminary hearing or a trial, he could none the less be forced by the police or others in authority to make a statement which could then be given in evidence against him. The result which would seem to follow if the exclusion is based on the maxim would be that the involuntary confession even if verified by subsequently discovered evidence could not be referred to in any way.[12]

The Chief Justice went on to decide that the portions of the confession which were verified were admissible, but that the trial judge had a discretion to exclude them, along the lines suggested by Spence, J., and that an appeal court should not interfere with an exercise of that discretion.

On the basis of the last sentence of the quoted passage and his conclusion that verified portions of the confession were admissible, it seems clear that Cartwright, C.J. rejected the suggestion that any principle against self-incrimination applied to statements made by an accused prior to trial.

The Supreme Court of Canada handed down its decision in *Piché* v. *The Queen*[13] on the same day as the *Wray* decision. In *Piché*, the Court decided that the voluntariness requirements had to be satisfied to establish the admissibility of any admission by an accused, even if it might generally be described as exculpatory rather than inculpatory. Both types of statements could be said to be "incriminating" in the general sense of being harmful to the accused. Thus, one might have expected at least some reference to a general principle against self-incrimination if it had any relevance at all to pre-trial statements.

However, the majority[14] dealt with the matter simply by pointing out that the distinction between exculpatory and inculpatory statements was not supportable on the early authorities which formulated the voluntariness rule. Chief Justice Cartwright (Spence, J. concurring) agreed with the majority and stressed the illogicity of the "exculpatory-inculpatory" distinction. However, he also added:

> If, on the other hand, one regards the rule against the admission of an involuntary statement as being based in part on the maxim, *nemo tenetur*

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[12] [1971] S.C.R. 272, at p. 280.
[13] [1971] S.C.R. 23.
[14] Hall, J. (Abbott, Martland, Ritchie, Spence, and Pigeon, JJ. concurring).

> *seipsum accusare,* the right of an accused to remain silent is equally violated whether, when he is coerced into making a statement against his will, what he says is on its face inculpatory or exculpatory.[15]

He does not offer any support for the suggestion that the rule in *Piché* should be based on the maxim. In view of his judgment in *Wray* and the alternative manner in which he makes the reference, it is difficult to take it very seriously.

Another of the judgments worth considering in this context is the dissenting opinion of Laskin, J.A., as he then was, in the decision in *DeClercq* v. *The Queen,*[16] since he is now, of course, a member of the Supreme Court of Canada. In considering the nature of the voluntariness rule with regard to pre-trial statements made by an accused, he said:

> Although the basis of the exclusion of confessions improperly extracted from an accused has not hitherto been regarded, at least in our cases, as based on the privilege against self-crimination, there is the respected opinion of Dixon, J., as he then was, of the High Court of Australia in *McDermott v. The King* (1948) 76 C.L.R. 501 at p. 513, that the rules respecting confessions and the privilege against self-crimination are related.[17]

Thus, he clearly recognizes that in Canada the voluntariness requirements for the admissibility of confessions are not based on any policy against self-incrimination.[18] The Australian judgment has had no effect in Canada and it is difficult to envision it as having any future influence.

There is no reference in *Wray, Piché* or *DeClercq* to the earlier Supreme Court of Canada decision in *A.-G. Que.* v. *Begin.*[19] The issue in that case was the admissibility of a blood test which was taken without compliance with the voluntariness rule. The Court was unanimous in holding that the factor governing the admissibility of the blood samples in question was simply their relevance and not the manner in which they were obtained. Thus, blood samples taken from an accused would be admissible even though they had been

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[15] [1971] S.C.R. 23, at p. 26.

[16] [1966] 2 C.C.C. 190 (Ont. C.A.).

[17] *Ibid.,* at p. 194.

[18] The weight of authority in Canada indicates that the underlying policy concern of the voluntariness rule is the reliability of the evidence in question. See: E. J. Ratushny, *Unravelling Confessions,* (1970-71) 13 Crim. L.Q. 453, at pp. 474-79.

[19] [1955] S.C.R. 593. Followed in: *Validity of Section 92(4) of the Vehicles Act, 1957 (Sask.),* [1958] S.C.R. 608. See also the comment by Barry L. Strayer, (1958) 36 Can. Bar Rev. 265.

taken by force without the consent of the accused.[20] The *ratio decidendi* was, therefore, that physical evidence taken from an accused's person was to be treated as any other physical evidence.[21]

However, all of the judges sitting also agreed that the privilege against self-incrimination had no application to statements made by an accused prior to trial. Kerwin, C.J. pointed out that

> ... a confusion has arisen between the rules as to the admissibility of statements, or admissions, and those relating to self-incrimination.[22]

Fauteux, J. stated:

> La source du conflit, dans la jurisprudence canadienne, paraît procéder d'une méprise... sur la raison et l'objet de la règle excluant les aveux extrajudiciaires de l'accusé et la raison et l'objet de la maxime *nemo tenetur seipsum accusare*, assurant à une personne contrainte par la loi de répondre à des questions, le privilège de faire l'objection qui aura pour effet d'empêcher que la réponse donnée ne soit utilisée contre elle.[23]

He went on to include in the second category not only the privilege of a witness to prevent his testimony being used against him in future proceedings[24] but also the privilege of an accused not to testify at all.[25]

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[20] Furthermore in light of the *Wray* case, there would not exist any discretion to exclude the evidence on the basis of the methods used to obtain it: *supra*, at p. 5.

[21] One would have expected that if the concept of self-incrimination had any existence at all, it would at the very least operate to prevent the courts from recognizing, in any way, evidence obtained through a personal assault. Yet, as Kerwin, C.J. put it:

> It was stated in that case [*Kuruma* v. *The Queen*, [1955] A.C. 197, at p. 203 (P.C.)] and, I repeat, 'we are not now concerned with whether an action for assault would lie against the police officers...': [1955] S.C.R. 593, at p. 596.

Thus, no matter how undignified or repulsive police methods might be in taking samples of breath, blood, hair, fingerprints or even stomach contents, the evidence obtained would be admissible. See also: *R.* v. *Johnston*, [1965] 3 C.C.C. 42, where the Manitoba Court of Appeal held that psychiatric evidence obtained through interviews fell within the scope of *Begin* rather than the voluntariness rule.

[22] [1955] S.C.R. 593, at p. 596. Kerwin, C.J. gave judgment for himself and for Abbott, J. On this point, see also: *R.* v. *Mazerall*, [1946] 4 D.L.R. 336 (Ont. H.C.) and [1946] 4 D.L.R. 791 (C.A.); *R.* v. *Lunan*, (1947) 3 C.R. 56 (Ont. C.A.); *Boyer* v. *The King*, (1948) 7 C.R. 165 (Que. C.A.).

[23] [1955] S.C.R. 593, at p. 600. Fauteux, J. gave judgment for himself and Taschereau, J. Cartwright, J., as he then was, agreed with the conclusions and the reasons given in this judgment.

[24] Embodied in the *Canada Evidence Act*, R.S.C. 1970, c. E-10, and discussed *infra*, at pp. 50 *et seq.*

[25] [1955] S.C.R. 593, at p. 601, speaking of the "confession-rule" and the "privilege-rule":

> Et par application de ces règles, les aveux extra-judiciaires de l'accusé,

In the light of these straightforward statements representing all five members of the Supreme Court, it is difficult to see the basis upon which judges can continue to suggest that the concept of self-incrimination has any application at all to pre-trial statements made to persons in authority.[26] We also saw earlier that the references in recent Supreme Court of Canada decisions tend to be sporadic, unexplained and by dissenters. It is difficult to resist the conclusion that they are no more than rhetorical and emotive appeals delivered without any precise object or expectation. It is, perhaps, likely that they were advanced by counsel in the same way in the hope of strengthening other arguments in some vague, supportive way.

Thus, the concept of self-incrimination is not applicable at all to the pre-trial stage. The *Wray* case is conclusive authority that it does not apply to physical evidence and the *Begin* case also clearly decides that samples of blood taken from an accused are in the same category as other physical evidence. Nor does it apply to pre-trial statements unless it is simply another way of describing the voluntariness rule, no more and no less. But if that is the case, why

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faits à des personnes en autorité, ne sont admissibles que lorsqu'ils sont volontaires; *l'accusé ne peut être contraint à rendre témoignage dans son procès*, et la personne qui est contrainte par la loi à répondre peut, en faisant objection, se protéger contre l'usage futur de la réponse qu'elle donne. [Emphasis added].

This aspect is discussed *infra*, at pp. 28 *et seq.*

[26] Nor do the earlier leading Supreme Court of Canada decisions in this area contain any serious suggestion that the voluntariness rule is related in any way to a principle against self-incrimination. See, e.g., *Monette* v. *The Queen*, [1956] S.C.R. 400; *R.* v. *Fitton*, [1956] S.C.R. 958; *Boudreau* v. *The King*, [1949] S.C.R. 262; *Gach* v. *The King*, [1943] S.C.R. 250; *Sankey* v. *The King*, [1927] S.C.R. 436. It has already been suggested that the voluntariness rule is based on considerations related primarily to the reliability of the evidence: *supra*, n. 18. Yet, there are still occasional examples of lower courts relating the voluntariness rule to a general principle against self-incrimination. E.g., in *R.* v. *Bird*, [1967] 1 C.C.C. 33 (Sask. Q.B.), Disbery, J. found a statement to be involuntary and said:

> To admit it would, in the words of Mackenzie, J.A., in *R.* v. *Scory*, (1945) 83 C.C.C. 306, at p. 315 ... constitute: '... a violation of the historical common law principle embodied in the maxim *nemo tenetur seipsum accusare*, unless shown to have been voluntarily and freely made...': [1967] 1 C.C.C. 33, at p. 43.

In the *Scory* case, no authority was cited in support of the association of the voluntariness rule with the maxim and in neither case was the maxim of any relevance to the decision reached. With respect to the learned trial judge, he erred in adopting the *Scory dicta*, particularly in light of the intervening and more authoritative comments in *R.* v. *Begin*.

not simply use the phrase "voluntariness rule"? To do otherwise is simply to increase the potential for misunderstanding.[27]

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[27] The inclination to apply the concept of self-incrimination to pre-trial statements might have received some impetus from the U.S. decision in *Miranda* v. *Arizona,* 384 U.S. 436 (1966). However, a survey of the Canadian decisions indicates that it has had no effect upon our case law. It is difficult to see how it could, in view of the very different constitutional frameworks of Canada and the United States. The earliest reported Canadian decision referring to *Miranda* seems to be *R.* v. *Birza,* (1969) 7 C.R.N.S. 13 (B.C.Co.Ct.). The relevant portion of the judgment of Shultz, Co.Ct.J. is as follows:

> The evidence sought to be introduced here would not be admissible in the United States of America by reason of the judgments of the Supreme Court of the United States in *Escobedo* v. *Illinois,* 378 U.S. 478 (1964), and *Miranda* v. *Arizona,* 384 U.S. 436 (1966). The evidence sought to be introduced here was obtained in violation of the 'Judges' Rules' of England... Neither the law of the United States, nor the 'Judges' Rules' of England, is law in Canada and this judgment is not based upon either. This judgment is based upon an evaluation of 'all the surrounding circumstances' as disclosed by the whole of the evidence... (1969) 7 C.R.N.S. 13, at pp. 18, 19.

In *R.* v. *Frank,* (1969) 8 C.R.N.S. 108 (B.C.C.A.), counsel for the accused argued that a promise on the part of the person in authority

> ... negated the force of that part of the *Miranda* warning that a statement made by the prisoner would be used against him, and rendered the warning nugatory.

Davey, C.J., delivering the judgment of the Court, gave short shrift to that submission. He simply said:

> That argument might be valid in the United States, where such warning is required by the *Miranda* judgment of the Supreme Court of the United States, but it cannot apply in Canada where no warning, still less any particular form of warning, is required by law, and the presence of a warning, and its form, or its absence, are only circumstances that ought to be considered in determining whether the Crown has proved the alleged statement to have been made voluntarily: *Boudreau* v. *The King,* and *Regina* v. *Fitton.*: (1969) 8 C.R.N.S. 108, at p. 115.

The only other reported Canadian case which refers to *Miranda,* is another decision of Shultz, Co.Ct.J. In *R.* v. *Lavoie,* (1971) 2 C.C.C. (2d) 185, it was argued that *Miranda* could be used to interpret the *Canadian Bill of Rights.* Judge Shultz distinguished the applicability of the U.S. case from the problem at hand (related to statements made under compulsion of statute). But he also added that our law with regard to the admissibility of statements is quite different:

> It is apparent... that the *Miranda* case, being an opinion of the Supreme Court of the U.S.A., is of binding authority in that country, but not in Canada, where the 'procedural safeguards' formulated in the *Miranda* case are not conditions precedent to admissibility.: (1971) 2 C.C.C. (2d) 185, at pp. 194-95.

No doubt defense counsel, operating under the restriction of the voluntariness rule, will continue to invoke *Miranda* from time to time. However, at this time at least, they cannot do so with a great deal of optimism.

II. Evidential Consequences of Pre-Trial Silence

It might be argued, however, that the concept is present at the pre-trial stage in manifestations other than exclusionary rules of evidence. It could be pointed out, for example, that a person is not required to say anything to the police. He is entitled to remain silent in the face of police questioning. There is no legal sanction if he fails to respond. Does not that indicate a "right to remain silent" or a "right against self-incrimination"?

It does, perhaps, but only in the same general sense that people are entitled not to do a lot of other things as well. There is no penalty in Canada for not participating in Dominion Day celebrations, for example, but no one speaks of a general right against compelled celebration.

It is submitted that the general absence of sanctions for pre-trial silence does not flow from any concept of self-incrimination. Rather, it is a consequence of the principle of Rule of Law which is fundamental to our constitution. More particularly, it means that all acts or omissions are legal unless they are specifically made illegal. The idea has been expressed in the phrase *nulla poena sine lege*. Thus, silence when questioned by a police officer is no more illegal than silence when questioned by one's wife, although in both situations one might have other reasons for wanting to answer.

Furthermore, there are a number of exceptions to the so-called "right to remain silent" prior to trial. In other words, there are situations where adverse consequences recognized in law will accrue to an accused who maintains silence.

The very existence of these exceptions lends support to the proposition advanced above. However, there have been regular suggestions that these exceptions should be limited by a general principle that an accused is entitled to remain silent. It is therefore useful to examine some of these suggestions and the manner in which the courts have treated them. The object is, again, to determine whether there is any such principle in the sense of it having a functional aspect, rather than as merely descriptive of the normal consequences of *nulla poena sine lege*.

One situation where adverse consequences may be suffered by an accused, due to his silence, involves the well-recognized rule of evidence related to "adoptive admissions" or "statements made in the presence of a party". A consequence of this rule is to treat the silence of an accused in the face of a statement by another as an acknowledgment by the accused of the truth of that statement. But for that to occur the circumstances must have been such

> ...that the ordinary person in the party's position would reasonably be expected to deny the statement if it were untrue. In other words, the only reasonable inference to be drawn from the party's silence must be that he believed the statement to be true.[28]

It is obvious that the rule pays no obeisance to silence. To the contrary, it recognizes silence in certain circumstances as an indication of gnilt.

Thus, where a person who was ultimately murdered had earlier seen the accused about 6 feet away and exclaimed: "Don't let him knife me", the Supreme Court of Canada held that the statement was admissible. The circumstances were such that the accused

> ...might have been reasonably expected to make some answer or remark in reply thereto or explaining that his proximity to deceased did not involve any such danger as he seemed to feel.[29]

Certainly, such a result is incompatible with a right against self-incrimination since it compels one to speak or suffer adverse consequences from a failure to speak.

What is the nature of the rule? It is submitted that it is no more than common human experience determining the probative effect to be given to certain types of evidence. A person who has no intention of stabbing anyone ordinarily does not remain silent when the suggestion is made that he is, in fact, about to commit a stabbing. Therefore, in the absence of some explanation for his silence, one would ordinarily infer that he did have such an intention. On the other hand, if a general right against self-incrimination existed, one would expect the evidence to be excluded in spite of its probative value, simply out of deference to the right itself.

Complications arise, however, in situations where a police officer is investigating an offence or where a person is informed that he is a suspect or when he is arrested and charged. Ordinarily, one would expect a denial from an innocent person who is told that he is suspected of having committed an offence, particularly if it is a serious one. Nevertheless, in these situations the accused's silence is ignored, i.e., it cannot be used as evidence against him. Is the limitation upon the evidentiary rule, then, the result of the operation of a transcending "right against self-incrimination"?

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[28] A. F. Sheppard, *R.* v. *Eden,* [1970] 3 C.C.C. 280 (Note), (1970-71) 13 Crim. L.Q. 299, at p. 302. See also the classic statement in *R.* v. *Christie,* [1914] A.C. 545 (H.L.E.), esp. Lord Atkinson, at p. 554.

[29] *Gilbert* v. *The King,* (1907) 38 S.C.R. 284, *per* Fitzpatrick, C.J., at p. 300. Quoted by Sheppard, *op. cit.,* at p. 301. The person making the statement need not be the victim. The relationship to the accused of the person making the statement is immaterial: *R.* v. *Hammond,* (1969) 9 C.R.N.S. 123 (Ont. C.A.).

It is submitted that it is not. First of all, if a right against self-incrimination were operative, one might expect that the same considerations would apply with respect to statements made by other persons as well as by police officers. There would appear to be no basis for a distinction within the concept of self-incrimination itself.

However, a more conclusive reason is to be found in a consideration of the common law evidentiary rule with respect to adoptive admissions together with another common law evidentiary rule, i.e., the voluntariness rule. Because the latter rule seeks to avoid inducements or threats, it encourages warnings to be given to an accused that he need not make a statement and has nothing to gain by doing so. Furthermore, since in fact he usually has nothing to gain, the first advice by defence counsel will inevitably be not to say anything to anyone.

In these circumstances, it can hardly be said that "the ouly reasonable inference to be drawn from the party's silence must be" that he acknowledged the suggestion, allegation or accusation to be true. Thus, the reason why silence in this situation should not bring the rule into operation is not because of the existence of a general right against self-incrimination. Rather, it is because the prerequisites of the rule do not exist. Due to the operation of the voluntariness rule, the circumstances are not such that silence is probative of guilt.

Thus, for example, in *R.* v. *Eden,* it was said:

> When the appellant was seated in the back seat of the police cruiser alongside his two co-accused he was undoubtedly under arrest; notwithstanding the fact that the customary warning had not been given to him *he was entirely within his rights in remaining silent and no imputation unfavourable to him should be placed upon his exercise of that right.* To assume from his silence that he had conceded the accuracy of the statement would be in effect to place upon a prisoner under arrest the obligation of making exculpatory statements. For these reasons the fact that the appellant failed to contest the statement made in his presence was not evidence from which an inference of guilt could be drawn.[30]

It is true that the italicized portion could be interpreted on its face as a reference to some general right. But the entire passage can hardly be taken to say anything more than that in all of the

[30] *R.* v. *Eden,* [1970] 3 C.C.C. 280 (Ont. C.A.), at p. 283, *per* Gale, C.J.O., delivering the judgment of the Court.

circumstances referred to above, no adverse inference should be drawn from silence.[31]

Thus, the use of the word "right" is probably not significant in this context. It is merely a way of describing what one is entitled to do because it has not been specifically prohibited in law.

Similarly, the Crown need not disclose, prior to the preliminary inquiry, the evidence it has against a particular accused. There is a right not to disclose that evidence in the sense that the accused has no legal remedy by which he can compel disclosure. However, there is little value in speaking of the Crown's "right of non-disclosure" or suggesting that immunity from compulsion to disclose indicates a "right to remain silent" on the part of the Crown. The point is simply that it is perfectly natural to say that one has a right to do something or not to do it. But such usage should not be interpreted as having any greater significance.[32]

There is another evidentiary rule which might impose pressure upon a suspect or an accused to break his silence at the pre-trial stage. It is the rule that an alibi may be given less weight if it is

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[31] This conclusion is even more apparent from the paragraph in the judgment which immediately precedes the one quoted above. It reads:

> The right of a trial Court to conclude that an accused adopted an inculpatory statement made in his presence rests upon the assumption that the natural reaction of one falsely accused is promptly to deny or assert his innocence. It follows that before such an assumption can be acted upon the circumstances surrounding the making of the statement must be such that it would be normal conduct for the person involved by the statement to deny it. When the circumstances are such that the failure to protest can be attributed to some circumstances justifying such failure, the probative value of the failure to protest is lessened and may be entirely negatived: [1970] 3 C.C.C. 280 (Ont. C.A.), at p. 283.

[32] See also: *R.* v. *Cripps*, (1968) 3 C.R.N.S. 367 (B.C.C.A.); and, *R.* v. *Itwaru*, (1969) 10 C.R.N.S. 184 (N.S.C.A.), both of which review the English authorities and quote the following passage from *R.* v. *Ryan*, (1964) 50 Cr. App. Rep. 144 (Ct.Cr.A.), at p. 148, *per* Melford Stevenson, J.:

> ...it is wrong to say to a jury 'Because the accused exercised what is undoubtedly his right, the privilege of remaining silent, you may draw an inference of guilt'...

In the most recent English decision in this area, Lord Diplock, delivering the advice of the Board said:

> It is a clear and widely known principle of the common law in Jamaica, as in England, that a person is entitled to refrain from answering a question put to him for the purpose of discovering whether he has committed a criminal offence: *Hall* v. *The Queen*, (1970) 55 Cr. App. Rep. 108 (P.C.), at pp. 111-12.

It is submitted that all of the above comments are equally applicable to these cases.

not put forward at the first reasonable opportunity.[33] While the rule seems to have originally applied to preliminary inquiries, it probably extends to the time of police investigation. The rule raises a number of problems when considered in relation to other procedural provisions but is practical in recognizing the difficulty of police officers "checking out" an alibi if it is raised for the first time at the trial. The existence of this rule also suggests an absence of any overriding principle against self-incrimination at the pre-trial stage.[34]

III. Penal Consequences of Pre-Trial Silence

In *R.* v. *Patrick*,[35] it was alleged that the accused's refusal to respond to police questioning amounted to the offence of obstruction of a police officer in the course of his duty, contrary to section 110 of the Criminal Code. An automobile collision had occurred at an intersection. One of the vehicles involved sped off and disappeared from view. The investigating police officer subsequently discovered a damaged car, which was linked with the collision by strong circumstantial evidence.

The owner agreed to attend at the police station and was accompanied by his solicitor. Upon request, he produced his motor vehicle permit. However, when asked by the constable when he had last seen his motor vehicle, his solicitor replied: "We are not prepared to discuss that." His solicitor answered in a similar manner to further questions. The owner was charged and convicted of "obstruction".

The conviction was reversed by the Ontario Court of Appeal. In delivering the judgment of the Court, Mr. Justice Schroeder said:

> In short, it is urged that his refusal to incriminate himself constituted a wilful obstruction of a peace officer in the execution of his duty. I am bound to say that in my view the proposition upon which the conviction against the appellant is based possesses all the elements of a novelty. Striking as it does at the very root of a fundamental and characteristic principle of our law embodied in the maxim *nemo tenetur seipsum accusare*, the proposition is calculated to fill one with amazement.[36]

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[33] *R.* v. *Howarth*, (1970-71) 13 Crim. L.Q. 109 (Ont. C.A.), at p. 110. The rule seems to have developed in England. See: *R.* v. *Hoare*, (1966) 50 Crim. App. Rep. 166 (Ct. Cr. A.); *R.* v. *Littleboy*, (1934) 24 Crim. App. Rep. 192 (Ct.Cr.A.). The English position is now governed by statute: *Criminal Justice Act 1967*, c. 80, s. 11.

[34] See: J. de N. Kennedy, *Alibi Evidence*, (1967) 15 Chitty's L.J. 193.

[35] (1960) 128 C.C.C. 263 (Ont. C.A.).

[36] *Ibid.*, at p. 266. No authority is cited on this aspect.

The passage is merely another illustration of the references to the maxim already described. Another portion of his judgment comes closer to the "Rule of Law" [37] argument made earlier. In the penultimate paragraph, he says:

> Counsel for the appellant submitted that to sustain a charge of obstructing a peace officer in the execution of his duty, it was necessary for the Crown to prove either a positive act of interference, or a refusal to perform some act required to be done by a statute... It not having been shown that the appellant was under any duty or obligation to communicate to the peace officer the information required of him under the provisions of either s. 221(2) of the *Criminal Code*, or s. 110(1) of the *Highway Traffic Act*, the Crown has failed to bring home to the appellant the commission of a criminal offence. This is sufficient to dispose of the appeal...[38]

Thus, the reference to *nemo tenetur*... really adds nothing.

However, another decision which refers to the maxim cannot be dealt with so summarily. In *R.* v. *Balsdon*,[39] police officers attempted to execute a warrant of committal for failure to pay a fine. When they called at the bookstore where the accused was known to work, he repeatedly and successfully told them that the person named in the warrants (in fact, himself), was not present. He was charged with wilfully attempting to obstruct the course of justice.

Waisberg, Co. Ct. J. acquitted the accused and made it clear that a right against self-incrimination formed the basis of his decision. He bluntly stated: "Were it not for the principle of *nemo tenetur seipsum accusare*, I would have no difficulty in finding the accused guilty as charged." [40]

The relevant Criminal Code section (now section 127(1)) was as follows:

> Section 119(1): Everyone who wilfully attempts in any manner to obstruct, pervert or defeat the course of justice is guilty of an indictable offence...

After reviewing a number of decisions, Judge Waisberg concluded:

> The principle to be gleaned from the cases is that while a third party may commit an offence by lying on behalf of an offender, the offender himself has no obligation to be truthful about his own criminal conduct. The doctrines *nemo tenetur seipsum accusare* — no man can be compelled to criminate himself — and *nemo tenetur prodere seipsum* — no

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[37] Or *nulla poena sine lege*, if you prefer Latin phrases (as so many judges apparently do). *Nulla crimen sine lege* might also be used.

[38] (1960) 128 C.C.C. 263, at p. 267. The sections referred to are discussed *infra*, at pp. 20 *et seq.*

[39] [1968] 2 C.C.C. 164 (Ont. Co. Ct.).

[40] *Ibid.*, at p. 167.

> one is bound to betray himself — have been carefully safeguarded and preserved.[41]

The Code section obviously makes no distinction between an accused and "a third party", so that we have a clear example of a general common law principle against self-incrimination being invoked and applied, in effect, to overrule a statutory provision.

None of the authorities cited in the decision dealt with a situation where an offender lied to a police officer.[42] The reasoning of the judgment is that in a number of analogous situations the conduct was not punishable. As a result, the conclusion is drawn that there is an operative general principle against self-incrimination. The principle is then applied to the case under consideration to achieve the same result. With greatest respect, the treatment of the authorities cited is less than satisfactory.

The three most recent cases are illustrations of the "Rule of Law" concept discussed earlier. In *R.* v. *Semeniuk*,[43] the refusal of the accused to open his glove compartment during a lawful search for liquor was held not to constitute obstruction of a police officer. Nor was the accused's refusal to identify himself in *R.* v. *Carroll*.[44] In *Koechlin* v. *Waugh and Hamilton*,[45] the accused's refusal to identify himself did not justify the use of force by police officers. The basis upon which these cases were decided is perhaps best summarized in the following passage from *Semeniuk*:

> ...the accused should not be convicted of obstructing simply because he had refused to carry out the command of an officer who had no legal right to insist upon it being obeyed. I have never understood that, in the absence of statutory provisions, there was any legal duty on the part of citizens generally, let alone suspected persons, to assist police officers...[46]

The strongest authority in support of the *Balsdon* decision is the Australian decision of *R.* v. *Kataja*.[47] The accused had taken his

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[41] *Ibid.*, at p. 169.

[42] It might be argued that that situation did not even exist in the *Balsdon* case. Balsdon was not an offender who did not wish to incriminate himself. Rather, he had already been convicted. When the police officer called upon him, he was not in any jeopardy of being accused of a different offence unless he engaged in further conduct, e.g., lying to a police officer. However, my analysis of *Balsdon* proceeds on the basis that the Balsdon situation is identical to one where a person has committed an offence and lies to a police officer who is investigating that offence in order to avoid detection.

[43] (1955) 111 C.C.C. 370 (Alta. Dist. Ct.).

[44] (1959) 126 C.C.C. 19 (Ont. C.A.).

[45] (1957) 118 C.C.C. 24 (Ont. C.A.).

[46] (1955) 111 C.C.C. 370, at p. 373, *per* Edwards, D.C.J.

[47] [1943] V.L.R. 145 (Sup. Ct.).

employer's truck without permission and had been involved in an accident damaging it. He told both the employer and the police that the truck had been stolen by some unknown person, thus causing the time of police officers to be expended and suspicion to fall on other people. He was charged and acquitted of the common law offence of doing public mischief.

The basis of the decision seems to have been that the accused's story was not a *mischievous* fabrication, but was substantially true. The judgment also pays heed to English authority warning against the grave danger of enlarging the ambit of such common law offences as "public mischief". The decision should be distinguished on the basis of the much narrower offence involved there.[48]

In only two of the decisions[49] cited in *Balsdon* is any reference made to the concept of self-incrimination. They both deal with the issue of privilege with regard to compulsory statements under the Ontario *Highway Traffic Act*, and are referred to merely as being "in the same spirit" as the *Kataja* decision. They provide little more than an opportunity to cite the *nemo tenetur*... maxim from case authority. The reference to *R.* v. *Hoggarth*[50] is equally unsatisfactory.

One might well ask whether the concept of a right against self-incrimination can be related at all to the facts of the *Balsdon* case. It is usually thought of as a right to remain silent. Both the *Turner* and *Newcastle* cases speak of it as "the common law right of a subject to remain silent lest he incriminate himself". What application can it have to misleading a police officer by lying to him?

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[48] Indeed, the facts of the *Kataja* case would fall squarely within section 128(b) of our Criminal Code, headed "Public Mischief":

Section 128: Every one who, with intent to mislead, causes a peace officer to enter upon an investigation by ...

(b) doing anything that is intended to cause some other person to be suspected of having committed an offence that he has not committed, or [doing anything] *to divert suspicion from himself*... [Emphasis added].

[49] *Peters* v. *Turner*, [1948] 2 D.L.R. 591, [1948] 1 W.W.R. 412 (Alta. Sup. Ct., App. Div.); and *Greathead and Stait* v. *Village of Newcastle*, [1954] O.W.N. 160, 107 C.C.C. 363 (Ont. H.C.); discussed *infra*, at pp. 25 *et seq.*

[50] (1956) 119 C.C.C. 234, 25 C.R. 174 (B.C.C.A.). The learned judge in *Balsdon* found it "significant ... that the accused there was able to tell police that the car had burned as the result of an accident whereas he himself had deliberately set fire and yet was not guilty of an offence: [1968] 2 C.C.C. 164, at p. 167. However, the reports of the *Hoggarth* case in both the *Criminal Reports* and the *Canadian Criminal Cases* indicate that it was the owner of the car, and not the accused (a female companion of the owner), who had set fire to the car.

The *Balsdon* decision does not deal with that issue. It does, however, quote without comment, a lengthy passage from *R.* v. *Robinson,*[51] which includes the following rather questionable suggestion:

> If the accused were not bound to answer, then it followed they were not under a duty to tell the truth if they were asked questions.

It is submitted that a more recent statement by the Lord Chief Justice of England is preferable.

In *Rice* v. *Connolly,*[52] the accused was questioned in highly suspicious circumstances by police officers investigating "breaking" offences. When questioned, the accused refused to give his full name and address and was charged with obstructing a police officer in the execution of his duty. Lord Parker clearly distinguished between the two situations:

> In my judgment there is all the difference in the world between deliberately telling a false story, something which on no view a citizen has a right to do, and preserving silence or refusing to answer, something which he has every right to do.[53]

The accused was found to have fallen within the second situation and was acquitted.

Indeed, the *Balsdon* decision seems to accept the distinction between silence and positive conduct (i.e., lies, if lying can be called "positive" conduct), where a person other than an offender wishing to escape punishment is involved.[54] The key issue then, is why lying to a police officer by an offender should be treated differently *under the Criminal Code provision*[55] than the lies of a "third party". The reason, it is said, is *nemo tenetur seipsum prodere.* But that involves citing the maxim as authority for extending it. The suggestion is untenable.[56]

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[51] (1938) 2 J. Crim. L. 62, at pp. 64-65.

[52] [1966] 2 All E.R. 649 (Q.B.D.).

[53] *Ibid.,* at p. 652. Adopted in: *R.* v. *Martin,* (1969-70) 12 Crim. L.Q. 201 (B.C. Prov. Ct., Dec. 5, 1969, *per* Ostler, Prov. Ct. J.).

[54] See the passage cited *supra,* n. 41.

[55] The policy reasons for differential treatment are discussed below.

[56] All sorts of practical complications are imaginable as well. Suppose the accused in the *Rice* case had lied rather than merely refusing to answer. If the police had decided that he had in fact committed the "breakings", could they merely delay charging him with the breakings to charge him first with obstructing justice under section 127(1)? If he is convicted under section 127(1) and subsequently convicted of "breaking", are there inconsistent verdicts in law? If the police, on the other hand, decided that he was a "third party" and charged him under section 127(1), could he take the protection of the

The following passage from Glanville Williams is also quoted in *Balsdon*:

> It would accord better with the spirit of the law to hold that nothing said by the accused in answer to the charge is regarded as public mischief, obstructing the police or delaying justice.[57]

However, it is clear from examining the context of that statement that Williams is speaking of the propriety of the law and not its actual state. While he cites *nemo tenetur* . . . in justification of silence, he does not suggest that it extends to protect a person who actually lies to the police, even if he is an offender.[58]

It is submitted that what is really involved is a strong policy basis for not punishing a suspect or an accused person for lying to the police. Strong elements of (perhaps instinctive) self-preservation are involved. It does not accord with our sense of fairness to punish a person once for committing an offence and then once more for denying to the police that he had done it. The unfairness is accentuated against the backdrop of a process where a person is entitled to make a general denial of guilt and thereby require the State to prove every element of its allegation against him.

However, section 127 of the Criminal Code does not embody that policy. It draws no distinction between a suspect or an accused and other persons. The *Balsdon* decision involves a creative attempt

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Canada Evidence Act and admit the "breaking", thereby escaping conviction on the charge of obstructing justice?

Again, if being an offender is a defence to lying under section 127(1), is it also a defence under section 128(b) (*supra*, n. 47)? If so, what does the second part of section 128(b) mean? Finally, what other conduct might an accused indulge in to avoid being convicted? May he offer remuneration to a police officer? No, according to *R.* v. *Morin*, (1968) 5 C.R.N.S. 297 (Que. C.A.) overruling *Robitaille* v. *The Queen*, (1965) 48 C.R. 7 (Que. C.A.). The latter decision was based entirely upon a narrow interpretation of "course of justice" in section 126(1).

[57] *Criminal Law: The General Part*, 2nd ed., at p. 417.

[58] Williams points out that the report of the *Robinson* case (*supra*, n. 51) is not altogether clear, but that it seems that the driver was himself convicted for his false statement.

The more recent decision of *R.* v. *Field*, (1964) 48 Cr. App. Rep. 335 (Ct. Cr. App.) might also be of interest here. The accused, Leonard Field, had participated in the "Great Train Robbery". He had also purchased the farm which was the robbers' lair. He, along with the other defendants, were convicted of conspiracy to obstruct the course of justice, because of false statements by the others to conceal Leonard Field's identity as owner of the property. The inferences to be drawn from the case are perhaps complicated by the element of conspiracy, but it does seem that the lies by suspects to the police were treated as acts which were unlawful as obstructing the course of justice.

to achieve a wise policy decision through the resurrection of a "dead horse", in a form it did not even possess when it lived, if it ever did. While section 127 can be criticized as having been drawn too broadly and should be amended, the *Balsdon* decision is, with greatest respect, bad law in our legal tradition. It is difficult to see it being accepted by a higher court.[59]

There are also a number of explicit statutory provisions which impose a duty upon a person to speak in certain situations at the pre-trial stage. For example, the Criminal Code provides:

> Section 233(2): Every one who, having the care, charge or control of a vehicle that is involved in an accident with a person, vehicle or cattle in the charge of a person, with intent to escape civil or criminal liability fails to stop his vehicle, *give his name and address* and, where any person has been injured, offer assistance, is guilty... [of an offence].

The section has been applied numerous times since its origin.[60] However, *R.* v. *Patrick*[61] appears to be the only reported decision which deals with an attempt to limit the operation of the italicized portion by invoking a right against self-incrimination.[62]

In essence, the Ontario Court of Appeal there held that the statutory duty in question only applied to a person who had the care, charge or control of a vehicle "a fact of which there is a complete lack of proof in the present case".[63] That interpretation of the statutory provision seems reasonably clear from a reading of it. It hardly seems necessary to invoke extrinsic limitations to achieve the result. It has already been argued that the reference to *nemo tentetur*... in the decision is entirely gratuitous.[64]

Section 233(2) imposes a duty upon the accused to speak or to suffer penal consequences. The requirement of making a statement is clear. But what is the extent of the harm the accused will suffer from complying with the duty?

If the accused identifies himself in accordance with the duty imposed upon him by section 233(2) of the Criminal Code, can his statement be used against him, for example, on a charge of "criminal

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[59] It is also difficult to envision the Crown charging in those "unfair" situations.

[60] Emphasis added. Substantially the same offence was first created by S.C. 1910, c. 13, s. 2.

[61] (1960) 128 C.C.C. 263 (Ont. C.A.).

[62] A challenge to the constitutional validity of a similar section was recently decided by the United States Supreme Court. In *California* v. *Byers*, 91 S. Ct. 1535 (1971), the majority of the Court held the legislation not to violate the Fifth Amendment of the United States Constitution.

[63] (1960) 128 C.C.C. 263, at p. 267.

[64] *Supra*, at p. 16.

negligence"? Or is the statement simply required to assist the police in their investigation of the accident, or for some other purpose?

The Supreme Court of Canada in *Walker* v. *The King*[65] held that a statement made in accordance with the statutory requirement was to be treated as any other statement:

> ...there is no rule of law that statements made by an accused under compulsion of statute are, because of such compulsion alone, inadmissible against him in criminal proceedings. Generally speaking, such statements are admissible unless they fall within the scope of some specific enactment or rule excluding them...[66]

If there were an operative principle against self-incrimination at this stage, one might have expected the opposite. In other words, the approach in that context should be that such statements are inadmissible unless there is some specific authorization for admissibility.[67]

Moreover, there is authority that to the extent a statement is compelled by statute even the voluntariness requirements need not be satisfied.[68]

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[65] [1939] S.C.R. 214.

[66] *Ibid.*, at p. 217, *per* Duff, C.J. (Rinfret, Kerwin, and Hudson, JJ. concurring, and Crocket, J. delivering a concurring judgment).

[67] Duff, C.J. later spoke of

> ...the rule of law by which, in the absence of some provision to the contrary, statements made in execution of the duty imposed by this section would (as explained above) be admissible in evidence against the person making them: *Ibid.*, at p. 219.

However, he also added:

> It seems clear enough that the enactment is a measure for securing information which may be employed for the purposes of legal proceedings, instituted either privately or *ad vindicatum publicam: Ibid.*, at p. 219.

The latter approach is more in accord with the recent decision of the House of Lords in *Commissioners of Customs and Excise* v. *Harz*, [1967] 1 All E.R. 177, at p. 181.

[68] *R.* v. *Barnett*, [1963] 3 C.C.C. 51 (B.C. Sup. Ct.); *R.* v. *Pedersen*, (1956) 114 C.C.C. 366 (Ont. H.C.); *R.* v. *Keen*, [1967] 2 C.C.C. 261 (B.C. Sup. Ct.). See also: *R.* v. *Oldham*, (1970) 11 C.R.N.S. 204 (B.C.C.A., overruling *Keen*, but not on this point) and the "Annotation" to the lower court decision: *Statements Under Statutory Compulsion and Under the Influence of Alcohol*, 10 C.R.N.S. 135. It is submitted that the better view is that it would take specific language to eliminate the voluntariness rule. See: *R.* v. *Cleaveley*, (1966) 49 C.R. 326 (Sask. Q.B.), at p. 329, *per* Johnson, J.:

> I am of the opinion a statement given by an accused under the compulsion of statute is admissible in evidence in a proceeding under the Criminal Code of Canada unless specifically excluded by proper enactment or exclusionary rule. But before being admitted such statement must otherwise

Most of the provinces have very similar provisions[69] and, in addition, provisions which go considerably further. An example of the latter is section 139 of the Ontario *Highway Traffic Act*,[70] which provides:

> (1) Every person in charge of a motor vehicle who is directly involved in an accident shall, if the accident results in personal injuries or in damage to property apparently exceeding $200, report the accident forthwith to the nearest... police officer and furnish him with such information concerning the accident as may be required by the officer under subsection (3).
>
> ...
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> (3) A police officer receiving a report of an accident, as required by this section, shall secure from the person making the report... such particulars of the accident, the persons involved, the extent of the personal injuries or property damage, if any, and such other information as may be necessary to complete a written report concerning the accident and shall forward such report to the Registrar within ten days of the accident.

It has been said that the primary purpose of such a provision was "... manifestly, to make provision for procuring information for record with the Registrar which may be useful for statistical and rating purposes and other purposes of general public interest in relation to motor traffic".[71] That view received some support from the existence of accompanying provisions, which purported to render such statements privileged, in the sense of being inadmissible in civil or criminal proceedings arising out of a motor vehicle accident.[72]

In *Marshall* v. *The Queen*,[73] it was held that the privilege did not extend to criminal proceedings. Indeed a provincial legislature does

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be shown to have been made voluntarily in the sense in which that term is used in connection with admissions, confessions and statements of accused persons.

[69] E.g., *Highway Traffic Act*, R.S.O. 1970, c. 202, s. 140.

[70] R.S.O. 1970, c. 202.

[71] *Walker* v. *The King*, [1939] S.C.R. 214, at p. 220, *per* Duff, C.J.

[72] E.g., *Highway Traffic Act*, R.S.O. 1937, c. 288:

> Section 94(5): Any written reports or statements made or furnished under this section shall be without prejudice, shall be for the information of the Registrar, and shall not be open to public inspection, and the fact that such reports and statements have been so made or furnished shall be admissible in evidence solely to prove compliance with this section, and no such reports or statements, or any parts thereof or statement contained therein, shall be admissible in evidence for any other purpose in any trial, civil or criminal arising out of a motor vehicle accident.

The words "civil or criminal" in the last line were removed by S.O. 1938, c. 17, s. 20. The privilege was repealed completely in Ontario by S.O. 1968-69, c. 45, s. 69(2).

[73] [1961] S.C.R. 123.

not have the authority, under the *British North America Act,* to legislate with respect to criminal law and procedure. That authority is expressly given to the Parliament of Canada.[74]

Is a statement given under a provision such as section 139 of the Ontario *Highway Traffic Act* admissible in criminal proceedings on the same basis as a statement under section 233(2) was treated to be admissible in *R.* v. *Walker?* There is a significant difference between the two situations. In *Walker,* it could be said that it seemed clear that section 233(2) was intended to provide information to be used in either private or public legal proceedings.[75] In other words, the admissibility of the statement in evidence was implicit in the section itself. That can hardly be said of section 139 of the Ontario statute, in view of the purpose ascribed to it. It is even more difficult to suggest, where the legislature clearly expressed its wish that it *not* be admissible, even though that expression might be *ultra vires.*

However, the Supreme Court of Canada in *Marshall* adopted the more prominent statement in *Walker* with respect to statements made under statutory compulsion that: "Generally speaking, such statements are admissible unless they fall within the scope of some specific enactment or rule excluding them . . ." [76]

In other words, although the Supreme Court in *Marshall* might have had even more scope than it did in *Walker* to limit the adverse consequences which might befall an accused who complied with the statute, it did nothing to limit those consequences.

The judgment of Cartwright, J. (Judson and Locke, JJ. concurring) contains the only reference to a concept of self-incrimination. He said:

> If a person in charge of a motor vehicle is involved in an accident causing personal injuries under such circumstances that he may well be guilty of criminal negligence and is confronted immediately thereafter by a police officer he is entitled, under the maxim *nemo tenetur seipsum accusare,* to remain silent... on the other hand it is his duty under... [s. 139 *supra*]... to furnish the officer with such information concerning the accident as the officer may require, and the information which he gives in fulfilment of this duty can be used against him if he is tried for criminal negligence. If it is thought undesirable that such anomalies should exist, they can be removed only by legislative action.[77]

Thus, the maxim is used only in the passive sense of describing the situation as it existed prior to the statutory provision. It des-

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[74] 30 & 31 Vict., c. 3, s. 91(27); R.S.C. 1970, App. II.
[75] *Supra,* n. 67.
[76] *Supra,* n. 66.
[77] [1961] S.C.R. 123, at p. 131.

cribes no more than the right to do or not to do anything, unless there is a valid law to the contrary.

In *R.* v. *Marshall,* Cartwright, J. also said that the words in the section granting the evidentiary privilege[78] limit it to trials in which the legislature has jurisdiction. Thus, it clearly applies to render a statutory statement inadmissible in a trial, on a charge of driving without due care and attention, under the province's vehicles act.[79] It also applies to civil actions arising out of the accident which resulted in the statement. Two decisions which fall into this latter category might be interpreted as providing some evidence of a principle against self-incrimination having an influence upon the interpretation of the statutory provisions under discussion.

In *Peters* v. *Turner,*[80] the issue was whether the privilege[81] extended to verbal statements made to a constable or answers to questions asked by him in the course of the preparation of his report. The Alberta Appellate Division held that the verbal statements were privileged even though the section spoke of a "written statement". However, while the reasons given do include a reference to "the common law right of the subject to remain silent", it is not stated to have any effect upon the decision. Furthermore, a number of other reasons are given for the decision, which are related to the general policy of the provision and anomalies which would otherwise result.[82]

The decision in *Greathead and Stait* v. *Village of Newcastle*[83] is very similar except that it contains a more dramatic reference to the concept.

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[78] *Supra,* n. 72.

[79] *R. ex rel. Lyall* v. *Tunall,* (1964) 44 C.R. 300 (Sask. Q.B.).

[80] [1948] 2 D.L.R. 591 (Alta. Sup. Ct., App. Div.).

[81] Similar to section 94(5), *supra,* n. 72.

[82] O'Connor, J.A., delivering the judgment of the Court, gave the following reasons:

> ... s. 58 which requires a driver to make a written statement is an invasion of the common law right of the subject to remain silent lest he incriminate himself. The purpose of s.-s. (3a) [which contains the privilege referred to in n. 81, *supra*] is to induce the driver to make a frank written statement of the cause of the accident and this purpose would be defeated if verbal statements made in preparing the written statement are admissible. If the privilege does not include words dictated to an investigating constable then an illiterate driver would be at a disadvantage since he must make a verbal statement. If counsel can elicit the verbal statements made in preparing the written statement this would destroy the privilege of the written statement and the Legislature cannot be taken to have intended this: [1948] 2 D.L.R. 591, at p. 594.

[83] (1954) 107 C.C.C. 363 (Ont. H.C.).

There, the driver of a motor vehicle involved in an accident remained at the scene giving assistance. A police officer arrived and asked the driver what had happened. He gave the police officer all the information requested. The issue was whether the driver could rely upon the privilege in view of the following circumstances: he did not claim the privilege; he gave the information upon solicitation; he did not seek out the nearest police officer, but came in contact with him when the latter arrived at the scene.

Mr. Justice Stewart, of the Ontario High Court, cited the *Turner* case for the proposition that: "Section 110 is clearly an invasion of the common law right of a subject to remain silent lest he incriminate himself." [84] However, in spite of the additional tributes paid to the "right" by Stewart, J., the basis of the judgment is the same as that in the *Turner* case. It is based upon statutory interpretation,[85] and invokes the usual techniques of examining the general purpose of the statutory provision,[86] the anomalous results which would flow from a different approach [87] or the impossibility of compliance with a different interpretation.[88]

Nevertheless, in the last paragraph of the judgment, the candles are lit and the incense is burned once more:

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[84] *Ibid.*, at p. 366. Section 110 contains the equivalent of the present section 139: *supra*, at p. 23.

[85] (1954) 107 C.C.C. 363, at p. 365:

> In interpreting a dynamic statute such as the *Highway Traffic Act*, while the canons of interpretation must, of course, be strictly followed, yet it is to be remembered that we are dealing with circumstances subject to change and that the immediate realities of the situation should always be considered.

[86] *Ibid.*, at pp. 366-67:

> Most persons involved refuse to discuss the accident between themselves but make full disclosure of the facts to the investigating officer, knowing the duties imposed and the protection afforded by s. 110. Thus is fulfilled the intent of the enactment 'that the apprehension of people of whom such information must be obtained should be allayed and that frank statements of even incriminating facts should be freely given for the purpose of the Registrar'.

[87] *Ibid.*, at p. 365:

> ...if a person involved in an accident suffers a concussion and wakens in a hospital with a constable beside his bed seeking information, it seems to me that to hold admissible any statement then given for the Registrar would be to flout the clear intention of s-s. (5)...

[88] *Ibid.*, at p. 365:

> ...if a party must not await a police officer but seek him out without delay, it would be difficult to comply with s. 48...

> Section 110 is, I repeat, an invasion of a common law right, and the maxim of our law *nemo tenetur seipsum accusare*, as has been said, is as settled, as important and as wise as any other in it. It should not be lightly disturbed, nor should the privilege given by s-s. (5), so necessary for its preservation, be denied anyone unless he has, by his own deliberate act, placed himself beyond the pale of its protection.[89]

While the reference might be taken as indicating that the maxim was influential in the interpretation reached, it is submitted that the better view is, once more, that it is *obiter* and adds nothing of substance.

Prior to its partial repeal, the "vagrancy" section of the Criminal Code contained further examples of situations where one was required to speak or suffer penal consequences. Section 175(1) made guilty of the offence of vagrancy everyone who:

> *(a)* not having any apparent means of support is found wandering abroad or trespassing and does not, when required, justify his presence in the place where he is found;
>
> ...
>
> *(c)* being a common prostitute or night walker is found in a public place and does not, when required, give a good account of herself;
>
> ...

Numerous decisions have considered the interpretation and scope of the phrases "justify his presence" and "give a good account of herself". The concept of a principle against self-incrimination does not seem to have ever been mentioned.[90]

Perhaps sufficient examples have been given to suggest that there cannot be said to exist in Canada a functional principle against self-incrimination at the pre-trial stage. It does not form the basis of the voluntariness rule. Nor has it limited the adverse consequences which may result from an accused's silence, whether through the

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[89] *Ibid.*, at p. 368.

[90] See, e.g.: *R.* v. *Heffer*, (1969) 10 C.R.N.S. 103 (Man. C.A.); *R.* v. *Petryshen*, (1969) 8 C.R.N.S. 224 (B.C. Sup. Ct.); *R.* v. *Shrimpton*, (1961) 37 C.R. 18 (Van. Mag. Ct.); *R.* v. *Archibald*, (1956) 24 C.R. 50 (Que. Super. Ct.); *R.* v. *Dubois*, (1953) 17 C.R. 56 (Tor. Mag. Ct.); *R.* v. *Konkin*, [1949] 2 W.W.R. 1225 (B.C.C.A.); *R.* v. *Levine*, (1919) 30 C.C.C. 305 (Alta. Sup. Ct.); *R.* v. *Jackson*, (1917) 29 C.C.C. 352; *R.* v. *Campbell*, (1916) 26 C.C.C. 196 (B.C. Sup. Ct.); *R.* v. *Brady*, (1913) 21 C.C.C. 123 (Alta. Sup. Ct.); *R.* v. *Pepper*, (1909) 15 C.C.C. 314 (Man. Q.B.); *R.* v. *Regan*, (1908) 14 C.C.C. 106 (B.C. Sup. Ct.); *R.* v. *Harris*, (1908) 13 C.C.C. 393 (Yuk. Terr. Ct.). The annotation to *R.* v. *Petryshen*, 8 C.R.N.S. 229, by Kenneth Chasse, does raise the suggestion that a "right to remain silent" is involved. But Mr. Chasse obviously does not subscribe to the suggestion he raises. Indeed, such an interpretation involves "drawing a rather long bow". If the *Petryshen* decision is correct, it is best explained as recognizing the voluntariness rule coming into play after arrest.

See also *The Customs Act*, R.S.C. 1970, c. C-40, s. 239.

operation of evidentiary principles, or general or specific statutory provisions.

Thus, the cases support the statement of the Supreme Court of Canada in *A.-G. Que.* v. *Begin* that the privilege against self-incrimination does not apply to pre-trial statements. However, the Court there also suggested that such a privilege did apply to allow an accused not to testify at all and to allow a witness to render his testimony inadmissible against him in future proceedings.[91] In other words, the suggestion is that a general principle against self-incrimination is related to the giving of testimony.

IV. Self-incrimination by the Accused at his Trial Generally: Non-compellability

The *Canada Evidence Act*[92] contains a number of sections which are related to the concept of self-incrimination. The Act applies to all criminal proceedings, civil proceedings and other matters over which the federal government has jurisdiction.[93] The provisions are generally applicable, and have not been specifically displaced by other federal legislation, although there have been subtle legislative encroachments.[94]

The constitutional validity of the *Canada Evidence Act* has not been questioned. As a result, our examination will be concerned with the extent to which the provisions in question, taken together, represent a general right against self-incrimination and the extent to which such a right is operative *in addition to* the specific Evidence Act provisions.

At common law, two separate principles seem to have been related to the failure of the accused to testify. The rather unusual factual situation in *Worrall* v. *Jones*[95] provides a good illustration of these principles, even though it involved a civil action. There, the plaintiff sought to call one of the defendants to prove a tenancy. His testimony was objected to by the other defendants, on the basis that he was a party to the action.

Tindal, C. J. pointed out:

> The exclusion on the ground of interest is a known principle of the law of evidence.[96]

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[91] *Supra,* at p. 8.
[92] R.S.C. 1970, c. E-10.
[93] *Ibid.,* s. 2.
[94] *Infra,* n. 201, at p. 49.
[95] (1831) 7 Bing. 395, 131 E.R. 153.
[96] (1831) 7 Bing. 395, at p. 398; 131 E.R. 153, at p. 154.

He also referred to an early textbook on evidence which stated the rationale for the rule:

> ... the plaintiff or defendant cannot be a witness in his own cause; for these are the persons who have a most immediate interest, and it is not to be presumed that a man who complains without cause, or defends without justice, should have honesty enough to confess it.[97]

Since the real danger was thought to be not the fact of being a party, but of having an interest, the Chief Justice held that the defendant could testify in this case. Here, he was being called *against* his own interest.

However, before the defendant's testimony could be accepted a further hurdle had to be met. The second principle involved was that a party could not be compelled to testify:

> That a party to the record should not be compelled against his consent to become a witness in a court of law, is a rule founded in good sense and sound policy.[98]

In this case, the defendant had consented so that his testimony was accepted.

Similarly, in criminal proceedings, an accused was not competent to testify for the defence because his self-interest was thought to render his testimony untrustworthy. Nor could he be required to testify for the Crown. The second principle clearly reflects a privilege against self-incrimination.

The *Canada Evidence Act* of 1893 [99] modified the situation by providing:

> Every person charged with an offence, and the wife or husband, as the case may be, of the person so charged, shall be a competent witness, whether the person so charged is charged solely or jointly with any other person.

The intention of the section seemed to be to modify the first principle (with respect to competence), but not the second (with respect to compellability).

However, in *Gosselin* v. *The King*,[100] the Supreme Court of Canada held that the effect of section 4 was to render such persons not only competent, but also compellable. One might well have expected at least the suggestion that if the legislature were to be interpreted

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[97] (1831) 7 Bing. 395, at p. 399; 131 E.R. 153, at pp. 154-55, quoting *Gilbert's Law of Evidence*, 4th ed., at p. 130.

[98] (1831) 7 Bing. 395, at p. 399; 131 E.R. 153, at p. 155, citing on this point *R.* v. *Wooburn*, (1823) 10 East. 395, 103 E.R. 825. (Ed. note: The correct name and spelling of the case is *R.* v. *Inhabitants of Woburn*).

[99] The common law position was embodied in the *Criminal Procedure Act*, R.S.C. 1886, c. 174, s. 217, which was repealed by 56 Vict., S.C. 1893, c. 31, s. 4.

[100] (1903) 33 S.C.R. 255.

as having eliminated the common law right not to testify against oneself, it would have to do so specifically rather than obliquely. However, no reference is made to a right against self-incrimination by either the majority [101] or the dissenters.[102]

The majority seemed to be greatly influenced by the corresponding section of the English Act of 1898,[103] which provided that the accused and the spouse of the accused were competent witnesses "for the defence". The absence from the Canadian statute of those limiting words was said to be conspicuous.[104] In 1906, the *Canada Evidence Act* was amended [105] to insert those words. The result is that, since 1906, the accused has been competent but not compellable as a witness.[106]

Thus, while it may sound contradictory, it can properly be said that the non-compellability of an accused was *specifically* adopted in Canada by the *implied* incorporation of a common law principle. What then is the scope of the principle as defined by the other

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[101] Davies, J. (Sedgewick, J. concurring) and Taschereau, C.J. delivering a separate concurring judgment.

[102] Girouard and Mills, JJ. Mills, J. does comment that:

> Our legislation has gone a long way in many things, but it has not yet gone so far as to compel the prisoner to testify against himself...: (1903) 33 S.C.R. 255, at p. 289.

[103] *Criminal Evidence Act*, 61 & 62 Vict., c. 36, s. 1 (Imp.).

[104] (1903) 33 S.C.R. 255, at p. 273, *per* Davies, J.

[105] *An Act further to amend the Canada Evidence Act*, 6 Edw. VII, S.C. 1906, c. 10, s. 6. The present section 4 is almost identical:

> Section 4(1): Every person charged with an offence, and, except as otherwise provided in this section, 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: R.S.C. 1970, c. E-10.

[106] The following discussion focuses on the accused rather than on spouses. There have been a number of recent decisions on the definition of "wife" under section 4: *Ex parte Coté*, (1972) 5 C.C.C. (2d) 49 (Sask. C.A.); *R.* v. *Mann*, [1971] 5 W.W.R. 84 (B.C. Sup. Ct.); *R.* v. *Amar*, (1969) 7 C.R.N.S. 258 (B.C.C.A.); *R.* v. *Kanester*, (1966) 48 C.R. 352 (B.C.C.A.), rev'd (1966) 49 C.R. 402 (S.C.C.). There have also been a number of recent decisions dealing with the issue of whether an officer of a corporation is to be considered as an accused for the purposes of section 4 of the *Canada Evidence Act*, or whether he is compellable to give evidence against the corporation. The most recent and authoritative decision seems to be *R.* v. *Corning Glass Works of Can. Ltd.*, [1971] 2 O.R. 3, (1970) 16 C.R.N.S. 329 (Ont. C.A.), where it was held that such officers were compellable. Leave to appeal to the Supreme Court of Canada was refused on January 26, 1971: [1971] S.C.R. viii.

provisions in the *Canada Evidence Act*, and the cases interpreting them?

An important feature of the approach which was taken to make an accused competent was that, if he decided to take the stand on his own behalf, he could also be required to testify against himself. No attempt was made in the Act to protect him against cross-examination which might incriminate him at the trial at which he testified. Thus, an accused who testifies is treated much like any other witness:

> When a person on trial claims the right to give evidence on his own behalf, he comes under the ordinary rule as to cross-examination in criminal cases. He may be asked all questions pertinent to the issue, and cannot refuse to answer those which may implicate him... he may be convicted out of his own mouth. He cannot be compelled to testify, but when he offers and gives his evidence he has to take the consequences.[107]

Another consequence is that he is subject to cross-examination as to previous convictions on the issue of credibility.[108]

What relevance, then, does the principle against self-incrimination have for an accused with respect to the charge which he faces at his trial? Does it mean no more than that he cannot be called as a witness by the Crown?

The opportunity to give the rule against non-compellability a scope consistent with a more general principle against self-incrimination arose in *DeClercq* v. *The Queen*.[109] The only issue was whether

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[107] *R.* v. *Connors*, (1893) 5 C.C.C. 70, at p. 72, *per* Wurtele, J. (Que. C.A.). See also: *R.* v. *Whittaker*, [1924] 3 D.L.R. 63, 42 C.C.C. 162 (Alta. Sup. Ct.), *per* Walsh, J., at p. 68 (D.L.R.) and pp. 167-68 (C.C.C.); *Maxwell* v. *D.P.P.*, (1934) 24 Cr. App. Rep. 152 (H.L.).

[108] *R.* v. *D'Aoust*, (1902) 5 C.C.C. 407 (Ont. C.A.); *R.* v. *Mulvihill*, (1914) 22 C.C.C. 354 (B.C.C.A.); *R.* v. *Cipola*, (1928) 49 C.C.C. 129 (Ont. S.C.); *R.* v. *Dalton*, (1935) 64 C.C.C. 140 (N.B.S.C.); *R.* v. *Miller*, (1940) 74 C.C.C. 270 (B.C.C.A.).

The *Canada Evidence Act*, R.S.C. 1970, c. E-10, section 12(1) provides:

> A witness may be questioned as to whether he has been convicted of any offence, and upon being so questioned, if he either denies the fact or refuses to answer, the opposite party may prove such conviction.

But the accused may not be questioned about past criminal conduct for which he has not been convicted. See: E.J. Ratushny, *Unravelling Confessions*, (1970-71) 13 Crim. L.Q. 453, at pp. 485-487. The consequences of section 12(1) upon the accused have been discussed by Professor M.L. Friedland in a recent note: *Criminal Law — Evidence — Cross-Examination on Previous Convictions in Canada — Section 12 of the Canada Evidence Act*, (1969) 47 Can. Bar Rev. 656. Professor Friedland also refers to some of the other issues discussed below. A similar view was presented in a paper prepared for the Criminal Justice Section of the Canadian Bar Association, by Eric L. Teed, (August, 1970).

[109] [1968] S.C.R. 902.

or not an accused, who chose to testify on a *voir dire* to determine the voluntariness of his confession, could be asked whether his confession was true. It was argued that to allow such a question might compel him to admit guilt, even though he may have decided not to testify on the trial. Even though evidence on the *voir dire* is not evidence on the trial,[110] the submission was that the accused would be prejudiced on his trial by the admission, so that his privilege of not testifying would be violated.

The majority [111] of the Supreme Court of Canada decided that the question was quite proper, without any consideration of the concept of self-incrimination. The majority judgment seems to hold [112] that the question was relevant to the issue of credibility and, *ergo*, was permissible.

Chief Justice Cartwright agreed in the result, although he thought that if he had been the trial judge, he would have exercised his discretion to exclude the question because of its prejudicial nature.[113] Mr. Justice Spence dissented on the basis that the question was not relevant to the issue of credibility. Neither referred to any general principle against self-incrimination.

However, Mr. Justice Pigeon, who also dissented, did refer specifically to "self-incrimination". His view was that the question was not relevant to credibility, but really went to the main issue of guilt or innocence. He said:

> Because the rule against compulsory self-incrimination is the root of the objection, I cannot agree that this is a matter of judicial discretion respecting the extent of cross-examination on credibility.[114]

It is difficult to determine from his judgment exactly what he means by "the rule against compulsory self-incrimination". However, he also expressed his agreement with what his brother Hall had said.

Mr. Justice Hall pointed out that the very purpose of the *voir dire* was to allow an accused to testify on the issue of voluntariness, without requiring him to testify on the issue of guilt. He argued that the truth of the incriminating statement was "but theoretically distinguishable from his guilt", and added:

> If an accused cannot testify on the *voir dire* without being liable to be asked questions bearing directly on his guilt or innocence, he is put in

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110 *Cf. R.* v. *Oldham,* (1970) 11 C.R.N.S. 204 (B.C.C.A.).

111 Martland, J. (Fauteux, Abbott, Judson, and Ritchie, JJ. concurring).

112 Wrongly, it is submitted. For a detailed analysis, see: E.J. Ratushny, *Unravelling Confessions,* (1970-71) 13 Crim. L.Q. 453, at pp. 479-496.

113 [1958] S.C.R. 902, at p. 909.

114 *Ibid.*, at p. 930.

> a situation where he cannot do so without in effect being deprived from the benefit of the rule against compulsory self-incrimination.[115]

He also quoted extensively from the judgment of Laskin, J.A., as he then was, in the Court below,[116] including the following passage:

> If an accused must expose himself on a *voir dire* to an incriminating inquiry when he finds it necessary to give evidence to resist the reception of an inculpatory statement, the relation with the privilege against self-crimination is more pronounced and the privilege is prejudiced, especially on a trial by a Judge alone. Indeed, on such a trial, the distinction, between a *voir dire* and the trial proper becomes blurred if the accused, who is not then testifying in defense, may be compelled on the *voir dire* to answer an incriminating question. Moreover there is prejudice to the principle that an accused is not a compellable witness.[117]

Thus, both Hall[118] and Pigeon, JJ. as well as Laskin, J.A., viewed the non-compellability of an accused as something more than merely a prohibition against the Crown calling him as a witness. In their view, it would be a reflection of a more dynamic principle which valued and protected an accused's right not to give evidence which would be prejudicial to him. That approach was clearly not accepted by the majority.

The privilege of not testifying is not very helpful to an accused, of course, if his failure to testify would result in his conviction. If the privilege were truly to reflect a general principle against self-incrimination, then it should also prohibit adverse inferences being drawn from an accused's decision not to testify. A corollary of that result would be a prohibition against counsel suggesting to a judge or jury, or a judge suggesting to a jury, that an accused's failure to testify should be considered in determining guilt. The *Canada Evidence Act*[119] says nothing about the drawing of inferences but does provide as follows:

> Section 4(5): The failure of the person charged, or of the wife or husband of such person, to testify, shall not be the subject of comment by the judge, or by counsel for the prosecution.

Our courts have not only given their blessings to the drawing of adverse inferences from an accused's failure to testify but have also treated rather loosely the express statutory prohibition against comment.

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[115] *Ibid.*, at p. 923.

[116] *Supra*, n. 16, at p. 7.

[117] [1958] S.C.R. 902, at p. 917.

[118] Hall, J. also relied upon *Batary* v. *A.-G. Sask.*, [1965] S.C.R. 465, [1966] 3 C.C.C. 152. That decision is discussed *infra*, at pp. 56 *et seq.*

[119] *Supra*, n. 92, at p. 28.

In *R.* v. *Binder*,[120] the Ontario Court of Appeal interpreted section 4(5) as being applicable only to jury trials.[121] Although the section on the face of it does not support such an interpretation, Roach, J.A., delivering the judgment of the Court, examined its legislative history and "the evil aimed at in the section". He concluded that the purpose of the section was to avoid the double-barrelled consequences an accused might otherwise suffer, of giving up his right to testify in order to avoid cross-examination on previous convictions, and then being berated for not testifying.

He added: "It is impossible to think of any other reason or purpose for prohibiting such a comment than its improper effect upon a jury."[122] Presumably, a judge sitting alone will be cognizant of the possibility that the accused has not testified because of his past convictions, so that the "improper effect" is diminished. Perhaps, in addition, a judge is presumed not to weigh those convictions against him as a jury would. In any event, the decision does not recognize the section as being related to a general principle against self-incrimination. The *Binder* case was recently followed by the Courts of Appeal of Quebec[123] and New Brunswick.[124]

The word "comment" in section 4(5) was at first given a broad meaning by the Supreme Court of Canada. In *Bigaouette* v. *The King*,[125] Duff, J., delivering the judgment of the Court, adopted the following passage as a correct statement of the law:

> ... Even if the matter were evenly balanced, which I think it is not, and the language used were merely just as capable of the one meaning as the other, the position would be that the jury would be as likely to take the words in the sense in which it was forbidden to use them as in the innocuous sense and in such circumstances I think the error would be fatal.[126]

However, in *Wright* v. *The King*,[127] the Supreme Court of Canada considered a jury charge which included a statement that the complainant's evidence "was not denied". It also spoke of "the only

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[120] (1948) 6 C.R. 83 (Ont. C.A.).

[121] By analogy to *R.* v. *Binder*, the section should not apply to a *voir dire*, even on a jury trial. See also the *obiter* statement in *R.* v. *McDonald*, (1948) 5 C.R. 375, at p. 382 (Alta. Sup. Ct.).

[122] (1948) 6 C.R. 83, at p. 88.

[123] *Pratte* v. *Maher and the Queen*, (1963) 43 C.R. 214, at p. 225.

[124] *R.* v. *Bouchard*, [1970] 5 C.C.C. 95, at pp. 106, 107 (N.B.S.C.).

[125] [1927] S.C.R. 112.

[126] *Ibid.*, at p. 114, adopting the statement of Mr. Justice Stuart in *R.* v. *Gallagher*, (1922) 37 C.C.C. 83, at p. 84 (Alta. Sup. Ct.). Applied in *R.* v. *Arneson*, (1930) 54 C.C.C. 330 (Alta. Sup. Ct.).

[127] [1945] S.C.R. 319.

evidence we have". The Court [128] held that the phrases did not constitute a "comment" under section 4(5) and added that "... the *Bigaouette* case certainly goes as far on that subject as this Court would care to go".

The *Wright* decision was soon applied by the British Columbia Court of Appeal. In *R.* v. *Dawley,*[129] the Crown called a witness who swore that the accused had made a statement to him. The defence called two witnesses to show that no conversation took place between the Crown witness and the accused. In his address to the jury, Crown counsel said that if the jury members did not believe the defence witnesses, they had "the uncontradicted evidence of [the Crown witness] that the conversation between him and Dawley took place... and what that conversation was stands uncontradicted". The comment was held not to be a breach of section 4(5).

In *McConnell and Beer* v. *The Queen,*[130] the Supreme Court of Canada considered another kind of comment. There, the trial Judge told the jury:

> There is no such onus on these or any accused persons in any criminal trial of proving their innocence by going into the witness box and testifying in their own defence. You are not to be influenced in your decision by either of the accused not going into the witness box and testifying...[131]

Mr. Justice Ritchie, delivering the judgment of the majority,[132] held that the comment was not a breach of section 4(5):

> Here the language used by the trial judge to which objection is taken was not so much a "comment" on the failure of the persons charged to testify as a statement of their right to refrain from doing so...[133]

He also quoted at length from the judgment of Evans, J.A., in the Ontario Court of Appeal, who would have read "possibly prejudicial" into the word "comment" in section 4(5).

Mr. Justice Hall, dissenting, pointed out that the wording of the section was clear and unambiguous. He rejected the notion that the purpose of the section was to protect an accused and that if a comment, such as the one in question, were made for that purpose, it would be acceptable. He said:

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[128] Rinfret, C.J. (Kerwin and Hudson, JJ. concurring); Rand, J. concurring in the result; and Taschereau, J. dissenting.

[129] (1946) 89 C.C.C. 134. *R.* v. *Bigaouette* was applied by the Ontario Court of Appeal in the later case of *R.* v. *Groulx and Nevers,* (1953) 16 C.R. 145. However, *Wright* v. *The King* is not mentioned in the judgment and was likely not brought to the attention of the Court.

[130] [1968] S.C.R. 802.

[131] *Ibid.,* at p. 806, as quoted by Ritchie, J.

[132] Fauteux and Judson, JJ. concurring.

[133] [1968] S.C.R. 802, at p. 809.

> The protection which an accused is entitled to under s. 4(5) is compliance with the positive injunction not to *comment* imposed upon the judge and counsel for the prosecution, in other words, no *comment* on the subject from either of them.[134]

Furthermore, it seems completely unrealistic to draw to the jury's attention the accused's right not to testify and then to expect them to ignore it. In most cases, this type of comment will, in fact, have a prejudicial effect in spite of the actual words used.[135]

There is another important aspect of the majority suggestion that the trial judge should not be hampered in commenting in this way to the jury "in order to protect the rights of the accused". It ignores the role of defence counsel in our adversary system. Section 4(5) applies only to the judge and the Crown. There is nothing to prevent defence counsel from commenting on the accused's right to stay out of the witness box if he thinks it necessary to protect the accused. As Professor Molot has put it:

> It is with some irony that one perceives that with an apparent disregard for the function of the accused's own counsel to decide how to conduct the defence and, more specifically, whether or not to refer to this right, the Supreme Court has turned the "fight" theory or adversary system on its head.[136]

Surely, within the framework of our system, and in view of the clear wording of section 4(5), the comment in *McConnell and Beer* is unsupportable.

A similar comment was considered by the Supreme Court of Canada in the more recent case of *Avon* v. *The Queen*.[137] There, the trial judge combined a comment that the accused need not testify with a comment that the only evidence before the jury was that of the Crown. Chief Justice Fauteux, delivering the judgment of the majority,[138] adopted "the concise and accurate distinction made by Ritchie, J. in *McConnell and Beer*", and said that the trial judge's comment was "a 'statement' of an accused's right not to testify, rather than a 'comment' on his failure to do so".[139] Both Hall and Spence, JJ. dissented once more.

A further limitation upon section 4(5) was established by the Supreme Court's interpretation of the former section 592(1)(b)

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[134] *Ibid.*, at p. 818.

[135] See also: Clare E. Lewis, *Annotation*, (1968) 4 C.R.N.S. 288, pointing out the likely harmful consequences of telling the jury that an accused need not testify.

[136] H.L. Molot, *Non-Disclosure of Evidence, Adverse Inferences and the Court's Search for Truth*, (1972) 10 Alta. L.R. 45, at p. 66.

[137] [1971] S.C.R. 650.

[138] Martland, Judson, Ritchie and Pigeon, JJ. concurring.

[139] [1971] S.C.R. 650, at p. 655.

(iii) of the Criminal Code.[140] The provision allows a court of appeal to dismiss an appeal, even though there has been an error of law, provided "it is of the opinion that no substantial wrong or miscarriage of justice has occurred".

In *McConnell and Beer*, the Court also considered the question of whether section 592(1)(b)(iii) could be invoked, even if the comment had been found to be in breach of section 4(5) of the *Canada Evidence Act*. Mr. Justice Ritchie pointed out that the Ontario Court of Appeal[141] had decided that the provisions of section 4(5) were absolute so that any breach of the section would be fatal to the proceedings. On the other hand he pointed out that the provinces of British Columbia,[142] New Brunswick[143] and Quebec[144] had all adopted the contrary view. Ritchie, J. preferred the latter view and stated that if the trial judge's comments in *McConnell and Beer* could have been construed as a comment under section 4(5), section 592(1)(b)(iii) could have applied to them.

In *Avon* v. *The Queen*,[145] the majority judgment did not treat Mr. Justice Ritchie's remarks with respect to section 592(1)(b)(iii) as *obiter dicta*. Rather, the appeal was interpreted as having been dismissed on *both* grounds.[146] Thus, in an approach similar to that followed by Ritchie, J. in *McConnell and Beer*, Chief Justice Fauteux in the *Avon* case added:

> Even if the remarks complained of by appellant may be construed in a manner contrary to the provisions of section 4(5) of the Canada Evidence Act, I would say that no substantial wrong or miscarriage of justice occurred, and that the verdict would necessarily have been the same had the judge not made them.[147]

Thus, it is conceivable now to have a situation where a comment will be ignored, even if it criticizes the accused for not testifying and invites adverse inferences to be drawn from his failure to testify,

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[140] Am., 17-18 Eliz. II, S.C. 1968-69, c. 38, s. 60(1); now: R.S.C. 1970, c. C-34, s. 613(1)(b)(iii).

[141] *R.* v. *McNulty and Courtney*, [1948] O.W.N. 827 (Ont. C.A.); *R.* v. *Groulx and Nevers*, (1953) 16 C.R. 145 (Ont. C.A.); *R.* v. *Lizotte and Durham*, [1955] O.W.N. 593 (Ont. C.A.).

[142] *R.* v. *Darlyn (No. 2)*, (1947) 4 C.R. 366 (B.C.C.A.).

[143] *R* v. *MacDonald*, (1948) 8 C.R. 182 (N.B.C.A.); *Ayles* v. *The Queen*, (1956) 119 C.C.C. 38 (N.B. Sup. Ct.).

[144] *Molleur* v. *The King*, (1948) 6 C.R. 375 (Que. Q.B.).

[145] [1971] S.C.R. 650.

[146] *Ibid.*, at p. 656, *per* Fauteux, C.J.C.

[147] *Ibid.*, at pp. 655-66.

provided the court of appeal considers the other evidence to be overwhelming.[148]

In sum, neither the rationale ascribed to section 4(5), nor the manner in which it has been interpreted, indicates any relation to a general principle against self-incrimination. Except for the dissenters in *DeClercq*, not one of the cases discussed in this section makes reference to such a concept. The absence of any relationship between the non-compellability rule and a general principle against self-incrimination is also evident from the adverse consequences an accused faces if he chooses to exercise his privilege of not testifying.

It has been stated on numerous occasions that where a *prima facie* case has been made out against an accused, his failure to testify may be considered as a factor sufficient to convert that *prima facie* case into proof beyond a reasonable doubt.[149] It is said to affect the weight to be given to the Crown's evidence, but not to be a substitute for such evidence. Thus, it can have no effect where there is no *prima facie* case.

The principle was recently applied by the Quebec Court of Appeal in *R.* v. *Vezeau*.[150] The accused had not testified and the trial judge, in his address to the jury, said that it could not "draw from this fact any conclusion unfavourable to the accused". Chief Justice Tremblay, delivering the judgment of the Court, said that the direction constituted an error of law:

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[148] *R.* v. *Lee*, [1970] 5 C.C.C. 183 (Ont. C.A.), is a recent example of a comment which clearly contravened section 4(5) and which was *not* saved by the "no substantial miscarriage of justice" provision.

[149] See e.g.: *Cross on Evidence*, 3rd ed., (Butterworth & Co., London: 1967), at pp. 40-41; A.E. Popple, *Annotation: Failure to Testify*, (1947-1948) 4 C.R. 374; R.J. Carter, *Annotation: The Evidentiary Effect of the Silence of an Accused*, (1970) 10 C.R.N.S. 223, at pp. 226-28; H.L. Molot, *Non-Disclosure of Evidence, Adverse Inferences and the Court's Search for Truth*, (1972) 10 Alta. L.R. 45, at pp. 66-67. See also: *R.* v. *Kavanagh*, (Ont. C.A.), unreported but summarized at: [1972] 2 O.R. 236 (blue pages). In *R.* v. *McConnell and Beer*, [1968] S.C.R. 802, Ritchie, J. agreed that it would be most naive to ignore the fact that many jurors will draw adverse inferences from an accused's failure to testify. In his *Annotation*, Mr. Carter interprets acknowledgment of that fact as approval of it. It is submitted, to the contrary, that disapproval of that eventuality was the basis upon which the trial judge's comments in that case were justified.

It also seems to be clearly established that the defence of alibi is not to be given much weight if the accused does not go into the witness box: *R.* v. *Reeves*, (1954) 20 C.R. 192 (Sask. C.A.); *Catellier* v. *The King*, (1948) 6 C.R. 466 (Que. C.A.); *R.* v. *Cancilla*, [1928] 1 W.W.R. 852 (Man. C.A.); *R.* v. *Hutton*, (1953) 7 W.W.R. 702 (B.C. Sup. Ct.). The comments below are equally applicable to this rule.

[150] (1971) 15 C.R.N.S. 336 (Que. C.A.).

> It is clear that the jury had the right to consider the failure of the accused to testify and to draw therefrom any logical conclusion.[151]

Perhaps the proposition is stated too broadly in this passage, but even applying the principle as stated earlier, the trial judge's direction would constitute an error in law. A number of other cases have taken a similar approach.[152]

It is submitted that the better view is that the accused's failure to testify should not be considered.[153] Many of the cases deal with situations of circumstantial evidence where the courts speak of conviction in the absence of an explanation by the accused. That, of course, is a proper application of the circumstantial evidence rule, if the evidence, apart from an explanation, points to no other reasonable conclusion. But "reasonable conclusion" does not mean conjecture.[154] Thus, if the reasonable conclusion from the facts is guilt, then the accused obviously must offer an explanation, if he is to be acquitted. However, his failure to explain should add nothing to the case against him. He is being convicted because the proper conclusion on the circumstantial evidence alone is that he is guilty.

It also seems clearly established that a court of appeal may take into account the accused's failure to testify in determining whether or not there has been "a substantial wrong or miscarriage of justice". That proposition seems to have been established by two independent lines of development.

In British Columbia, the key case was *R.* v. *Schwartzenhauer*.[155] There, Martin, J.A., of the British Columbia Court of Appeal, said:

> ... the fact that the accused "did not avail himself of the opportunity which the law affords him of going into the witness-box" (*Reg.* v. *Woods* (1897), 5 B.C.R. 585, at p. 588-9) has always been a circumstance that the Courts of Criminal Appeal of this Province have properly taken into con-

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[151] *Ibid.*, at p. 338.

[152] See also: *R.* v. *MacLeod*, (1967) 2 C.R.N.S. 342 (P.E.I. Sup. Ct.); *Re A.-G. Ont. and Clark; Tilco Plastics Ltd.* v. *Skurjat*, (1966) 49 C.R. 99 (Ont. H.C.); *Pratte* v. *Maher and the Queen*, (1963) 43 C.R. 214 (Que. C.A.); *Coffin* v. *The Queen*, (1955) 21 C.R. 333 (Que. C.A.); *R.* v. *Comba*, (1938) 70 C.C.C. 205 (Ont. C.A.) and 237 (S.C.C.); *R.* v. *Steinberg*, (1931) 56 C.C.C. 9 (Ont. C.A.) and 45 (S.C.C.).

[153] It is submitted that that view forms part of the *ratio decidendi* of the decision of the Supreme Court of Canada in *Kolnberger* v. *The Queen*, [1969] S.C.R. 213.

[154] *Wild* v. *The Queen*, [1971] S.C.R. 101; *The Queen* v. *Mitchell*, [1964] S.C.R. 471; *R.* v. *Gardiner*, [1971] 2 W.W.R. 728 (Alta. Sup. Ct.); *R.* v. *Coote*, [1970] 3 C.C.C. 248 (Sask. C.A.); *Boucher* v. *The Queen*, (1963) 42 C.R. 101 (Que. C.A.); *R.* v. *Jacquard*, (1950) 10 C.R. 155 (N.S. Sup. Ct.).

[155] (1935) 63 C.C.C. 269 (B.C.C.A.).

> sideration in deciding the... question... as to whether or not a "substantial wrong or miscarriage of justice has actually occurred"...[156]

An examination of *R.* v. *Woods* indicates that no reference is made to the propriety of an appeal court considering an accused's failure to give evidence. The passage quoted merely appears in the statement of facts at the beginning of one of the judgments (in the *Woods* case).

Thus, unless that mere statement is considered as authority for the proposition (which would be drawing a rather long bow), it must be considered as merely acknowledgment of the choice of words used in *Woods* to describe an accused's failure to testify. We are left, then, with the unsupported suggestion that it is proper because it has always been done by the British Columbia Court of Appeal. None of the other three justices sitting made any reference to the accused's failure to testify.

However, a few years later in *R.* v. *Bush*,[157] the British Columbia Court of Appeal had an opportunity to reconsider the matter. The judgment of the Court was delivered by the same Martin, J.A., who had since become Martin, C.J.B.C. The learned Chief Justice took the opportunity to "adopt what was said by myself in *R.* v. *Schwartzenhauer...*" and quoted the passage above.[158] The case has since been adopted without question on numerous occasions, either directly or indirectly (by citing more recent cases which adopted it), for the proposition that an accused's failure to testify may be weighed against him on appeal.[159]

The second line of development appears to have originated with the following statement of Middleton, J.A. in *Steinberg* v. *The King*.

> The accused gave no evidence; and, while this cannot be commented upon to the jury, it is a factor which must be considered by the Appellate Court. His failure to testify does not prove his guilt, but when the Court is by

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[156] *Ibid.*, at p. 277.

[157] (1938) 71 C.C.C. 269 (B.C.C.A.).

[158] *Ibid.*, at p. 271.

[159] See, e.g.: *R.* v. *Hall (No. 1)*, (1943) 81 C.C.C. 31 (B.C.C.A.); *R.* v. *Dawley*, (1946) 89 C.C.C. 134 (B.C.C.A.); *R.* v. *Pavlukoff*, (1953) 17 C.R. 215 (B.C.C.A.); *R.* v. *Hoodley*, (1955) 21 C.R. 281 (B.C.C.A.); *R.* v. *Tremblay*, (1956) 115 C.C.C. 281 (B.C.C.A.); *R.* v. *Boucher*, (1962) 39 C.R. 242 (B.C.C.A.).

See also: *R.* v. *Zamal*, [1964] 1 C.C.C. 12 (Ont. C.A.); *R.* v. *Cipolla*, (1965) 46 C.R. 78 (Ont. C.A.); *R.* v. *Rosik*, (1970) 13 C.R.N.S. 129 (Ont. C.A.); *R.* v. *Greenlaw (No. 1)*, [1968] 3 C.C.C. 200 (N.B.C.A.); *R.* v. *Joseph*, (1939) 72 C.C.C. 28 (Alta. C.A.). See also: *R.* v. *McCallum*, [1971] 4 W.W.R. 391 (B.C.C.A.), at p. 391, where McFarlane, J.A., delivering the judgment of the Court, says:

> The failure of an accused to testify in support of his alibi, while not conclusive, is a very important factor to be considered by an appellate court which is asked to set aside a verdict of the jury.

No authority is cited.

> the statute required to dismiss an appeal unless it is satisfied that there was a miscarriage of justice, the failure of the accused to explain in any way facts which place a very heavy onus upon him cannot be ignored.[160]

It might be argued that this statement is properly interpreted along the lines suggested above, with respect to inferences to be drawn from circumstantial evidence, whether the accused testifies or not.[161] However, in view of the numerous decisions adopting *R.* v. *Bush,* our courts of appeal are likely to continue to weigh a failure to testify against an accused.

Thus, there is a clear tendency on the part of the courts to "chip away" at the non-compellability of the accused. That tendency is, perhaps, significant enough in the light of the weakness of the authority from which it proceeds. However, it is even more significant in view of the more fundamental principles it overrides.

The case of *R.* v. *Burns* [162] provides a useful contrast. There, the accused refused to provide a blood sample to the police and the Crown sought to introduce evidence of his refusal. Chief Justice Gale of the Ontario High Court, as he then was, held that the evidence should be excluded:

> The accused was acting within his common law legal rights in refusing to provide a sample of his blood to the police. To admit evidence at this stage that he declined to do so would, in my view, be most unfair. The only purpose for which this evidence is put forward is to suggest the inference that the accused felt he had something to hide. The accused had a right to refuse, and I do not think that the jury should be invited to draw an inference prejudicial to him because of his exercise of that right.[163]

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[160] (1931) 56 C.C.C. 9 (Ont. C.A.), at p. 36. A similar statement was made by Middleton, J.A., in the earlier case of *R.* v. *Hamilton,* (1931) 55 C.C.C. 85 (Ont. C.A.), at pp. 97-98. See also: *R.* v. *Starr,* (1972) 7 C.C.C. (2d) 519 (N.B.C.A.).

[161] See, e.g.: *MacLeod* v. *The Queen,* (1968) 2 C.R.N.S. 342, at pp. 345-46, where Campbell, C.J., Prince Edward Island Supreme Court *en banco,* adopted the above statement from *Steinberg* v. *The King,* and said:

> I cannot conceive the possibility of an innocent man failing to explain the circumstances under which this fire broke out in his presence, and in his presence alone. I consider that *the learned trial Judge rightly excluded all other hypotheses as not leading to a rational conclusion, and properly arrived at the inference of the appellant's guilt.* [Emphasis added].

[162] [1965] 4 C.C.C. 298 (Ont. H.C.). See also: *R.* v. *Shaw,* [1965] 1 C.C.C. 130 (B.C.C.A.).

[163] *Ibid.,* at pp. 299, 300. *Cf.* the specific statutory provision now embodied in section 237(3) of the Criminal Code with respect to breath samples:

> ... evidence that the accused, without reasonable excuse, failed or refused to comply with a demand made to him by a peace officer ... is admissible and the court may draw an inference therefrom adverse to the accused.

Such a provision does not modify the principle. However, in the application of the principle where such a provision exists, one can no longer say that the accused has an unqualified "right to refuse".

If one is not required to testify by law, then those general principles related to Rule of Law should, in themselves, be sufficient to preclude comment upon a failure to testify, or adverse inferences being drawn therefrom.

Thus, in spite of obvious opportunities for the invocation of a general principle against self-incrimination in this area, one has not been applied by our courts. Of all the cases discussed in this section, references to such a concept are only to be found amongst the dissenters in the *DeClercq* case.

It is submitted that the only conclusion to be drawn from these authorities is that an accused does not have the protection of any general principle against self-incrimination in relation to his trial. The rule that he is not a compellable witness must be interpreted literally. It prevents the accused from being called as a witness, but goes no further in protecting him. In fact, he may incriminate himself by taking advantage of that rule. Even the express statutory attempt to limit the adverse consequences of a failure to testify has been applied more narrowly than its wording warrants.

The non-compellability of an accused cannot properly be said to reflect a more general principle against self-incrimination in Canada.

V. Non-compellability with Respect to Provincial Offences

A consequence of the limited jurisdiction of the Parliament of Canada with respect to the law of evidence [164] is that the provincial legislatures have the power to regulate procedure in prosecutions for offences against provincial statutes. This area is significant, since often conviction can result in consequences as severe as those provided for many offences under the Criminal Code. A variety of approaches has been taken by the provinces to the question of the compellability of the accused.

Quebec has specifically incorporated the provisions of the *Canada Evidence Act*. The *Quebec Summary Convictions Act* provides:

> Section 41. Part 1 of the Canada Evidence Act (R.S.C., 1952, Chap. 307) shall apply to every proceeding under this act relating to the prosecution of any offence upon information.[165]

Thus, the common law principle of the non-compellability of the accused is adopted, either as an integral part of the federal statute, or as directly applicable to provincial prosecutions as suggested below with respect to British Columbia.

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[164] Expressly acknowledged by the *Canada Evidence Act, supra*, n. 92.
[165] R.S.Q. 1970, c. 35.

The British Columbia *Evidence Act* provides:

> Section 8(1). The parties to any action, suit, petition, or other matter of a civil nature in any of the Courts of the Province, and their wives or husbands, are, except as hereinafter excepted, competent as witnesses, and compellable to attend and give evidence in like manner as they would be if not parties to the proceedings...[166]

The immediate question that arises is whether a prosecution under a provincial statute is "of a civil nature". It is submitted that in the light of the early Ontario cases discussed below,[167] provincial offences are essentially criminal in nature. As a result, section 8(1) would not apply to them. Since they are essentially criminal, and in the absence of an express statutory provision, the non-compellability of the defendant is operative in the same manner as with respect to Criminal Code offences.

A number of provinces have express references to the non-compellability of the defendant in their legislation. Some are expressed negatively, to provide that the Act is not to be interpreted as rendering the defendant compellable.[168] As a result, the common law provision is also still in force in Alberta, Nova Scotia and Newfoundland. The New Brunswick *Evidence Act* more specifically provides with respect to a defendant that "... neither such person nor the wife or husband of such person shall be compellable to testify...".[169]

However, a number of other jurisdictions have expressly departed from the common law position. The Evidence Acts of Manitoba, Ontario and Prince Edward Island, provide,[170] in effect, that a defendant may be called as a witness to testify against himself in a prosecution under a provincial statute. The Ontario provisions have received the most judicial attention.

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[166] R.S.B.C. 1960, c. 134. The "except as hereinafter excepted" provision is found in most of the provincial legislation, and usually refers to provisions dealing with communications during marriage and evidence of adultery.

[167] *Infra*, at p. 44. See also: *Re Maddess*, [1967] 3 C.C.C. 284; also reported as *Re Nelson and Jacobson*, (1967) 1 C.R.N.S. 235.

[168] E.g., the *Alberta Evidence Act*, R.S.A. 1970, c. 127, s. 5(3):

> Nothing in this subsection shall be deemed to make the defendant in a prosecution under an Act of Alberta compellable to give evidence for or against himself.

See also, the Nova Scotia *Evidence Act*, R.S.N.S. 1967, c. 94, s. 45.

[169] R.S.N.B. 1952, c. 74, s. 5. See also, the *Newfoundland (Amendment) Act*, S. Nfld. 1971, No. 48, s. 3. The *Saskatchewan Evidence Act*, which contains a similar provision, is discussed *infra*, at p. 48.

[170] R.S.M. 1970, c. E150, s. 5; R.S.O. 1970, c. 151, s. 8(1); R.S.P.E.I. 1951, c. 52, s. 4.

The original attempt in Ontario to alter the common law position seems to have been the 1873 *Evidence Act*[171] which provided:

> Section 4. On the trial of any proceeding, matter or question, under any of the Acts of the Province of Ontario ... or on the trial of any proceeding, matter or question, before any justice or justices of the peace, mayor, or police magistrate, in any matter cognizable by such justice or justices, mayor, or police magistrate, *not being a crime*, the party opposing or defending ... shall be competent and compellable to give evidence in such proceeding, matter or question.

The issue was soon tested as to whether the phrase "not being a crime" merely referred to those offences over which only the Parliament of Canada had jurisdiction, or whether it was intended to apply to offences under provincial statutes as well.

In *R.* v. *Roddy*,[172] the defendant was charged with selling intoxicating liquors on Sunday, contrary to the Ontario *Tavern and Shop Licenses Act*. The Ontario Court of Appeal held that the offence was a "crime" for the purposes of section 4. Section 4 did not, therefore, apply to provincial prosecutions and the common law principle of non-compellability still applied.[173]

However, the consequences of that approach were not only to render an accused non-compellable, but also to make him incompe-

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[171] 36 Vict., S.O. 1873, c. 10. (emphasis added). The *Evidence Act* of 1869 had expressly provided:

> 5(d.). Nothing herein contained shall render any person compellable to answer any question tending to criminate himself or to subject him to prosecution for any penalty: 33 Vict., S.O. 1869, c. 13.

This provision was not repealed until 1896, but was not interpreted as being a restriction on section 4 or its successors. By 59 Vict., S.O. 1896, c. 18, s. 6, it was repealed and replaced by a similar provision, but which was expressly stated to be "subject to" the successor of section 4.

[172] (1877) 41 U.C.Q.B. 291. Applied in *R.* v. *Lackie*, (1885) 7 O.R. 431. See also: *R.* v. *McNicol*, (1886) 11 O.R. 659, where Wilson, C.J. simply states:

> The defendant should not have been obliged to give evidence against himself: (1886) 11 O.R. 659, at p. 664.

[173] Chief Justice Harrison, with whom the other two members of the Court concurred, referred to the common law position in the following manner:

> The general policy of the law is, that no man can be compelled to criminate himself, *nemo tenetur seipsum accusare*: Consol. Stat. U.C., ch. 32, sec. 18; 33 Vict., ch. 13, sec. 5, sub-sec. 4, O.; *Taylor* on Evidence, sec. 1223; *Powell's* Principles of Evidence, 4th ed., at p. 40; *Paley* on Summary Convictions, 5th ed., at p. 109. An individual charged with the commission of a criminal act cannot conformably to the course of justice in our tribunals be interrogated by the Court with a view to eliciting the truth, nor is he a competent witness in the case: *Broom's* Legal Maxims, 4th ed., at p. 931: (1877) 41 U.C.Q.B. 291, at p. 295.

tent. A number of decisions so held.[174] In 1892, the *Evidence Act* was amended to remove the words, "not being a crime".[175]

The new provision was considered in *The Queen* v. *Nurse*.[176] The accused, a hotelkeeper, was charged with selling liquor during the hours prohibited under the *Liquor License Act* of Ontario. The witness for the prosecution was unable to establish any sale of liquor. The accused was then called as a witness. The magistrate overruled objections by defence counsel, and permitted the defendant to be asked whether he had sold any liquor on the day in question. He admitted that he had and was convicted.

The conviction was upheld by McDougall, Co. Ct. J., who said:

> The Evidence Act (Ont.), as framed, making a person charged a competent and compellable witness, regardless of the criminating effect of answering, has no doubt invaded a most vital principle of procedure in the trial of criminal cases. The Legislature has, however, chosen to sweep away the ancient and supposed sacred right of a British defendant to remain silent and to demand that the charge should be proven against him. He may now be both a witness and a defendant, and in the former capacity is liable to be interrogated to the same extent as any other witness called, and if he admits facts which establish the offence charged, may be duly convicted upon his own admissions.[177]

The decision was approved by Falconbridge, J., of the Ontario High Court, in *Re Askwith*.[178]

The provision in the *Ontario Evidence Act* has been carried through to the most recent Act.[179] However, rather surprisingly, the section is seldom invoked to compel the accused to testify, as was done in the *Nurse* case. There are few examples of it in the cases, and it is clearly not the general practice of Crown Attorneys in Ontario. Nevertheless, the decision in the *Nurse* case has recently been affirm-

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[174] *R.* v. *Hart*, (1891) 20 O.R. 611; *R.* v. *Bittle*, (1892) 21 O.R. 605; *R.* v. *Fearman*, (1892) 22 O.R. 456.

[175] 55 Vict., S.O. 1892, c. 14, s. 1.

[176] (1898) 2 C.C.C. 57.

[177] *Ibid.*, at p. 62.

[178] (1900) 31 O.R. 150.

[179] R.S.O. 1970, c. 151, s. 8(1):

> The parties to an action and the persons on whose behalf it 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, and the husbands and wives of such parties and person are, except as hereinafter otherwise provided, competent and compellable to give evidence on behalf of any of the parties. Section 1.(a) of the Act defines "action" as including "a prosecution for an offence committed against a statute of Ontario..."

ed by the Ontario High Court, in *R.* v. *Greenspoon Bros. Ltd.*[180] It seems clearly open to the Crown, in Ontario, to compel the defendant to testify in a prosecution under a provincial statute.

The provision rendering the accused compellable also seems to have fallen into disuse in Manitoba. In *R.* v. *Ettenhofer Painting & Decorating Ltd.*,[181] the defendant company was charged with failing to pay wages to an employee, contrary to the *Construction Industry Wages Act* of Manitoba. The Police Magistrate allowed the Crown to call the president of the company as a witness. The Manitoba Court of Appeal quashed the conviction, and held that the common law principle of non-compellability extended to companies and to their officers. As the *Editorial Note* to the report indicates, the judgment makes absolutely no reference to the provision in the *Manitoba Evidence Act* expressly rendering the defendant compellable.

It may be significant that in both the *Ettenhofer* and *Greenspoon* cases, the compellability issue arose with respect to officers of corporations. It is difficult to find a recent example of its invocation with respect to natural persons, in either of these provinces.[182] If one discards the highly implausible suggestion that the Crown is not using the full extent of its powers out of a sense of fairness towards the defendant, one might be forgiven for wondering whether most Crown Attorneys are aware of the provision.[183]

The Saskatchewan experience has been particularly interesting. A provision similar to that of Ontario was introduced in 1907,[184] and considered in the Saskatchewan Court of King's Bench in *R.* v. *Saunderson.*[185] The defendant was convicted of making an illegal sale of intoxicating liquor, contrary to the *Saskatchewan Temperance Act.* He was called as a witness. Taylor, J. commented:

> I have never before seen counsel for a prosecutor avail himself of this statutory rule and compel an accused person to take the witness stand to

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[180] [1967] 3 C.C.C. 308, at p. 311, *per* Stark, J.:

> ...the common law rule has been clearly abrogated by the Ontario *Evidence Act* in so far as offences under provincial statutes are concerned.

[181] [1967] 1 C.C.C. 386.

[182] Nor do there appear to be examples of its application in Prince Edward Island. On the issue of whether an officer of a corporation is an accused for the purpose of section 4 of the *Canada Evidence Act*, see *supra*, n. 106, at p. 30.

[183] There are other possible considerations, of course. For example, if the Crown calls the defendant, he probably gives up his right to impeach his credibility, unless the defendant can be shown to be adverse: R.S.O. 1970, c. 151, s. 24. Furthermore, in Ontario at least, most provincial offences are prosecuted by police officers rather than Crown Attorneys.

[184] S.S. 1907, c. 12, s. 24.

[185] (1920) 24 C.C.C. 81.

> be questioned as to the facts shewing his guilt, and where this course is followed I feel that I ought to hold the prosecution strictly to the usual procedure and grant no indulgences by way of amendment.[186]

An amendment was refused and the conviction was quashed.

Some forty years later, in *Ayotte* v. *Wachowicz and Killam*,[187] a defendant was called as a witness by the Crown and convicted. Both Brownridge, J., in the Court of Queen's Bench, and the Saskatchewan Court of Appeal,[188] agreed as to the right of counsel for the Crown to call a defendant as a witness against himself. However Culliton, J.A. added:

> Nevertheless, the exercise of that right in a prosecution is most unusual and, fortunately, one which is very rarely used. Where, however, the prosecution insists upon the exercise of this right, it should be held strictly to the provisions of the legislation under which such an unusual course is taken. The calling of the accused to give evidence is, in my opinion, an exceptional circumstance...[189]

The appellant was, therefore, allowed to use *certiorari* to attack the conviction, in spite of the strong authority holding that *certiorari* should not be granted where there is a right of appeal.[190]

Perhaps the strong judicial attitude expressed in the Saskatchewan Court of Appeal in the *Ayotte* case, provides some insight into the tendency of the Crown not to invoke their power to call the defendant. The Saskatchewan Legislature also seems to have responded. In 1964, the *Saskatchewan Evidence Act* was amended to provide that "... no person is compellable, in a prosecution against him under any Act, to give evidence against himself...".[191]

The compellability of the accused in some of the provinces raises a very interesting possibility with respect to offences under the Criminal Code as well. Let us use the Ontario provision by way of example.

The *Ontario Evidence Act* provides that "parties to an action and the persons on whose behalf it is brought, instituted, opposed or

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[186] *Ibid.*, at p. 86.

[187] (1961) 35 C.R. 357.

[188] (1961) 37 C.R. 13.

[189] *Ibid.*, at p. 17.

[190] The conviction was quashed on another ground. The Saskatchewan provision with respect to compellability was coupled with another provision, prohibiting the imposition of a term of imprisonment following a conviction, where the accused had been compelled: R.S.S. 1953, c. 73, s. 31(3). Since the Magistrate had imposed a fine, or, in default, a term of imprisonment, the conviction was held to contain an error of law on its face and was quashed. None of the other provinces which allow the accused to be compelled appear to have a provision similar to the one referred to above.

[191] S.S. 1964, c. 44, s. 3. Now R.S.S. 1965, c. 80, s. 33(2).

defended are... compellable...".[192] "Action" is defined to include "... any other proceeding authorized or permitted to be tried, heard, had or taken by or before a court under the law of Ontario".[193] Thus, if procedure in a criminal trial were within the legislative jurisdiction of the province of Ontario, the accused would be compellable. But, of course, provincial governments do not have the power to legislate with respect to criminal procedure. That lies with the Parliament of Canada.[194]

On the other hand, there is nothing to prevent the Parliament of Canada from incorporating into its criminal procedure any provisions in force in any of the provinces.[195] Does not, then, section 37 of the *Canada Evidence Act*[196] operate to incorporate the compellability provision into the criminal procedure to be followed in Ontario? It provides:

> 37. 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 ... *subject to this and other Acts of the Parliament of Canada,* apply to such proceedings. [emphasis added]

It will be recalled that the non-compellability rule is applicable federally, not because of any statutory provision, but because of the operation of a common law principle which has never been repealed.[197] Clearly, the effect of section 37 is to make the provincial law applicable in all situations (including those formerly covered by the common law) except where there already exists a federal statutory provision. Therefore, an accused should be compellable at his criminal trial in Ontario.[198]

The proposition is, of course, rather shocking. In spite of the clear wording of the sections, it is difficult to see our courts interpreting them as suggested above. The matter of inconsistency from province to province should not be an inhibiting factor. There are

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[192] R.S.O. 1970, c. 151, s. 8(1).

[193] *Ibid.*, s. 1(a).

[194] *The British North America Act, 1867*, 30-31 Vict., c. 3, s. 91(27). R.S.C. 1970, App. II.

[195] See, e.g., section 554 of the *Criminal Code*:

> (1) A person who is qualified and summoned as a grand or petit juror according to the laws in force for the time being in a province is qualified to serve as a grand or petit juror, as the case may be, in criminal proceedings in that province.

[196] *Supra*, n. 92, at p. 28.

[197] *Supra*, at pp. 30-31.

[198] The Prince Edward Island provisions are so similar that the same argument is applicable to them. The position in Manitoba could possibly be distinguished on the basis of the definition of "legal proceeding" in R.S.M. 1970, c. E150, s. 2(f).

other examples of such variations in the Criminal Code.[199] The "failure of comment" provision [200] might be interpreted as indicating a clear intention not to make the accused compellable. However, it could still operate where the Crown decided not to call the accused. Nevertheless, if a Crown Attorney in Ontario is ever bold enough to attempt to call an accused, he is likely to be met with an interpretation of the *Canada Evidence Act*, based upon the intention of the legislators and maintaining the accused's non-compellability.

The non-compellability of an accused at his trial has long been considered basic to a fair trial in our system of criminal justice. In the last section, it was suggested that it is a narrow procedural rule, rather than a reflection of a more general right against self-incrimination operative in Canada. In this section, we have seen examples of legislators in Canada eliminating the procedural rule as well.[201] Their efforts have not been warmly received by the courts. But the courts have accepted the validity of the accused's compellability, as they are bound to do where the legislators have spoken clearly.

Perhaps the approach of the Saskatchewan Court of Appeal, in granting special indulgences to the appellant where he is the defendant,[202] or being more difficult where it is the Crown,[203] reflects a lingering functional self-incrimination principle. Or perhaps the courts are merely expressing their opinion that, in balancing fairness, the compellability of the defendant "tips the scales" too heavily in favour of the Crown.

It is submitted that the issue of whether or not an accused should be compellable as a witness really involves a value judgment as to the kind of criminal justice system we want. The issue is the extent to which we are prepared to allow individual freedom to be invaded, in

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[199] See, e.g., the provisions in Part XVII of the Criminal Code, particularly with respect to grand juries.

[200] *Canada Evidence Act*, s. 4(5), discussed *supra*, at pp. 33 *et seq.*

[201] There have also been more subtle legislative encroachments upon the rule, at both the federal and provincial levels, through the use of "reverse onus" and statutory "presumption" clauses. While such an onus may be discharged through cross-examination of Crown witnesses, or through calling other defence witnesses, the practical consequence is usually to apply considerable pressure upon the accused to testify. For references to such provisions and a discussion of "quantum of persuasion", see: Levy, *Reverse Onus Clauses in Canadian Criminal Law — An Overview*, (1970-1971) 35 Sask. Law Rev. 40. There appear to be no examples of the courts limiting such provisions in any way through the application of a general principle against self-incrimination. See also: *R.* v. *Appleway*, (1922) 3 C.C.C. (2d) 354.

[202] *Ayotte* v. *Washowicz and Killam*, *supra*, at p. 47.

[203] *R.* v. *Saunderson*, *supra*, at p. 46.

order to be more efficient in convicting offenders. To speak of every man's right against self-incrimination, or to repeat solemnly *nemo tenetur seipsum prodere,* is merely to introduce an emotional "red herring".

VI. Self-incrimination by Witnesses

At common law, a witness other than the accused was required to take the stand, but could refuse to answer a question when it would, in the judge's opinion, tend to expose him to a risk of a criminal prosecution, a penalty or a forfeiture.[204] This rule reflects the second aspect of the concept of self-incrimination as explained by the Supreme Court of Canada in *A.-G. Que.* v. *Begin.*[205]

However, there is a significant difference between the common law rule and the rule embodied in the *Canada Evidence Act.* At common law, the witness could refuse to answer. Under the *Canada Evidence Act,* the witness must answer but his testimony cannot be used against him in future proceedings.[206]

If an accused chooses to testify at his trial, he becomes a witness for the purposes of section 5, so that he is entitled to the same protection as any other witness with respect to future proceedings.[207]

Perhaps the most important case interpreting the statutory provision is the Supreme Court of Canada decision of *Tass* v. *The*

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[204] See generally: Heydon, *Statutory Restrictions on the Privilege Against Self-Incrimination,* 87 L.Q.R. 214; the *Ouimet Report, op. cit.,* at pp. 67-69.

[205] *Supra,* at pp. 8-9.

[206] R.S.C. 1970, c. E-10:

> s. 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.
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> (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.

Section 5(2) has been held not to extend to protect a witness who is compelled to produce, under statutory compulsion, incriminating documents: *R.* v. *Simpson and Simmons,* (1943) 79 C.C.C. 344 (B.C.C.A.).

[207] *R.* v. *Mottola and Valee,* (1959) 31 C.R. 4.

King.[208] Tass appeared as a witness at a preliminary inquiry and made certain admissions. In the course of his evidence, he raised no objection nor claim for protection under section 5 of the *Canada Evidence Act*. He was subsequently charged and convicted, largely on the basis of those admissions made while he was merely a witness.

The Court upheld his conviction on the basis that he had failed to claim the statutory privilege. Kerwin, J. pointed out that section 5:

> ... removes a safeguard a person had at common law to refuse to answer any questions that might criminate him ... objections have been raised from time to time as to the possibility of the evidence acquired under the Act being used to build up a case against a person who may be subsequently charged with an offence. However that may be, the matter seems quite clear that if the person testifying does not claim the exemption, the evidence so given may be later used against him, and this notwithstanding the fact that he may not [have] known about his rights. [209]

No mention was made of any more general operative principle against self-incrimination.

The specific wording of section 5 makes it very difficult to have excluded, at subsequent proceedings, testimony given without prior invocation of the section 5 protection. Nevertheless, a variety of attempts have been made.

In *R.* v. *Mazerall*,[210] it was argued that such testimony was improperly admitted, because the voluntariness rule had not been satisfied prior to its admission. In *Boyer* v. *The King*,[211] an argument was advanced that *nemo tenetur*... was operative, by virtue of its adoption through the provincial laws of evidence. In *R.* v. *Brown (No. 2)*,[212] the accused testified at his trial. A mistrial was subsequently declared, and he argued that to admit his testimony would violate his privilege of non-compellability at his new trial.

In every case, the arguments were rejected and the plain words of section 5 were applied. A number of references were made to *nemo tenetur*..., but only to point out that section 5 had narrowed the scope of the common law rule with respect to witnesses.

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208 [1947] S.C.R. 103.

209 *Ibid.*, at p. 105, delivering the judgment of himself and Taschereau, J.

210 [1946] 4 D.L.R. 791 (Ont. C.A.).

211 (1949) 7 C.R. 165 (Que. C.A.).

212 (1963) 42 W.W.R. 448 (S.C.C.), adopting the reasons of Johnson, J.A. in (1963) 41 W.W.R. 129, at p. 138. Applied in: *R.* v. *Bouffard*, [1964] 3 C.C.C. 14 (Ont. C.A); and *R* v. *Dietrich*, (1970) 11 C.R.N.S. 22 (Ont. C.A.). See also the decision of the English Court of Criminal Appeal in *R.* v. *McGregor*, [1968] 1 Q.B. 371.

In *Re Regan*,[213] it was held that if a party to an offence (even a conspiracy) is charged separately from other parties, he may be compelled to testify against them:

> A co-conspirator is in precisely the same position as any other accomplice insofar as evidence is concerned. If they (co-conspirators) are proceeded against separately, neither of them is a party to the proceedings instituted against the other. Regan is not an *accused person* in the proceeding against Tanner, and the provisions of the common law and statute rendering an accused person on his trial not compellable as a witness for the prosecution against himself are therefore not applicable to him. Insofar as any prosecution against Regan himself is concerned, he can avail himself of the Provisions of s. 5 of the *Canada Evidence Act*...[214]

The protection of section 5 in circumstances such as these is, thus, considerably less than that available at common law.

The *Ouimet Report* commented on this limited protection:

> A searching examination may ... elicit facts or clues which enable the case to be independently proved. *Thus the abolition of the privilege of a witness to refuse to answer on the ground that his answer may tend to incriminate him places an additional and powerful weapon in the hands of law enforcement.*[215]

However, the Ouimet proposal in this area went no further than to recommend that section 5(2) be amended to provide that any such answers be inadmissible, unless the witness is advised of his right to claim the exemption for future proceedings.

Even where the accused has not testified at an earlier trial, or where there are no other parties to the offence, there still may be ways for the Crown to take advantage of the "powerful weapon" referred to above. The *Mazerall* and *Boyer* cases, for example, involved testimony given prior to the criminal trial to a Royal Commission established under the federal *Inquiries Act*.[216] As the *Mazerall* decision points out: "The Commissioners were expressly empowered to summon before them any person or witness, and to require them to give evidence on oath or affirmation ...".[217] The *Ouimet Report*[218] points out that other examples of federal statutes which authorize the compulsory examination of witnesses are *The Excise Act, The Income Tax Act, The Combines Investigation Act* and the *Bankruptcy Act*.

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213 [1939] 2 D.L.R. 135.

214 *Ibid.*, at p. 144, *per* Archibald, J. of the Nova Scotia Supreme Court (Chisolm, C.J. and Doull and Smiley, JJ., concurring).

215 *Op cit.*, at p. 68.

216 R.S.C. 1927, c. 99.

217 [1946] 4 D.L.R. 791, at p. 794.

218 *Op. cit.*

The Manitoba Court of Appeal considered the relevant provisions of *The Excise Act*[219] in *R.* v. *Demark*.[220] A large commercial still was found on the farm of the accused. He and two others found sleeping on the premises were charged separately with conspiracy to breach the *Excise Act*. The Act provides, in part, that any officer designated by the Minister may conduct:

> ...any inquiry or investigation in matters relating to the excise, and may summon before him any person and may examine him and require him to give evidence on oath ... on any matter pertinent to such inquiry or investigation...[221]

Prior to his trial, Demark was summoned:

> ...to testify the truth in all matters within your knowledge relative to the subject matters of a certain investigation or enquiry relative to the Excise Act now pending before me concerning the dealings and affairs of Paul Demark... [concerning] ... violations of the Excise Act.[222]

The Court held by a majority of three to two that the accused could not be compelled.

There are three different judgments, but it is submitted that the best approach is that taken by Prendergast, C.J.M. He first considered the decision in *Re Regan*, and concluded that the reason for holding Regan a compellable witness was that the proceeding was not against him. He then considered Demark's position and concluded that "... the case here is altogether different. The proceeding in which the accused was called upon to testify, is, as stated in the summons itself, an investigation concerning his own violations of the Act."[223] Thus, the common law provision with respect to the non-compellability of the accused was applicable to Demark.

It might be argued that the provisions of section 67, and in particular the words "any person", operate to override the common law position and render an accused compellable in proceedings under the *Excise Act*. However, that argument was rejected in *R.* v. *Hicks*.[224] Furthermore, the Criminal Code provisions dealing with the compellability of witnesses also speak in general terms,[225] and they have

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219 S.C. 1934, c. 52, s. 67; now R.S.C. 1970, c. E-12, s. 66.
220 [1939] 3 D.L.R. 386.
221 R.S.C. 1970, c. E-12, s. 66.
222 [1939] 3 D.L.R. 386, at p. 387.
223 *Ibid.*, at p. 389.
224 [1946] 1 D.L.R. 796, esp. at pp. 807-808, *per* Taylor, J. (Sask. Q.B.).
225 Section 626(1):

> Where a person is likely to give material evidence in a proceeding to which this Act applies, a subpoena may be issued in accordance with this part requiring that person to attend to give evidence.

always been read as subject to the non-compellability of the accused.[226]

But what if Demark had been summoned for the purpose of giving testimony with respect to the others, and not his own offence? On the authority of *Re Regan,* he should be compellable. The dissenting judgment [227] accepted that, in spite of the wording of the summons, that was what the Crown intended in summoning Demark, and that, therefore, he was compellable. Chief Justice Prendergast clearly indicated that he would take a similar approach in such circumstances. He pointed out that his view did not in any way curtail the powers of the Excise Officers under section 67:

> ... there should be no difficulty in drafting a summons in such form that would compel one who is in all respects in the accused's position to appear and testify conformably with section 5 of the *Evidence Act.*[228]

Thus, the decision is consistent with the authorities referred to above.[229]

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[226] See: *R.* v. *Bank of Montreal,* (1962) 36 D.L.R. (2d) 45, at p. 49, *per* Hutcheson, J. (B.C. Sup. Ct.).

[227] Robson, J.A. (Dennistown, J.A., concurring). See also the somewhat analagous approach taken in *Re Sommervill,* (1962) 37 C.R. 400 with respect to s. 171 (now 183) of the *Criminal Code* which provides for the examination before a justice of persons found in a gaming house, betting house, common bawdy house ... Disbery, J. of the Saskatchewan Queen's Bench said of the provision that its object and purpose "is to enable the Crown to compel persons found in such premises at the time of the raid to give information under oath with respect to two matters, *and to two matters only,* namely, the purposes for which the premises were used, and any matter relating to the execution of the warrant; for example, obstruction or resistance offered to the police officers seeking to execute the warrant: (1962) 37 C.R. 400, at p. 403.

[228] [1939] 3 D.L.R. 386, at p. 389.

[229] The remaining judgment is that of Trueman, J.A. He seems to proceed on the basis that the accused was protected by the voluntariness rule with respect to pre-trial police interrogation. That approach might find some support in the Supreme Court of Canada decision in *Guay* v. *Lafleur,* [1965] S.C.R. 12, which held that a similar investigation under the *Income Tax Act,* R.S.C. 1952, c. 148, ss. 126(4), (8), now R.S.C. 1970, c. I-5, ss. 186 (4), (8), was "a purely administrative matter which can neither decide nor adjudicate upon anything... [It was] ... but a private investigation...", *per* Abbott, J. at p. 16, delivering the judgment of Taschereau, C.J. and Fauteux, Martland, Judson and Ritchie, JJ., as well as himself.

However, it seems clearly established that the confessions rule has no application to the compellability of witnesses: *supra,* at pp. 9-10.

The exclusion allowed by section 5(2) expressly extends to statements made under the compulsion of provincial statutes.[230] There are a great number of provincial statutes under which witnesses may be compulsorily examined.[231] Although the federal government has legislative jurisdiction over Criminal Law and Procedure,[232] under our distribution of powers, the legislatures have exclusive jurisdiction over the Administration of Justice[233] in their respective provinces. As a result, the same persons are often involved in dealing with both criminal matters and matters arising under provincial legislation. The opportunity therefore arises for a provincial statute authorizing the examination of witnesses, to be used to advance an investigation with respect to a criminal offence.

The incriminating consequences to an accused of such a procedure are obvious, even if the testimony itself cannot be used at the criminal trial. The matter has received considerable judicial attention with respect to coroners' inquests.

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[230] *Supra*, n. 206, at p. 50. The Evidence Acts of all of the common law provinces have corresponding provisions: e.g., *Ontario Evidence Act*, R.S.O. 1970, c. 151:

> S. 9(1) A witness shall not be excused from answering any question upon the ground that the 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 or to a prosecution under any Act of the Legislature.
>
> (2) If, with respect to a question, a witness objects to answer upon any of the grounds mentioned in subsection 1 and if, but for this section or any Act of the Parliament of Canada, he would therefore be excused from answering such question, then, although he is by reason of this section or by reason of any Act of the Parliament of Canada compelled to answer, the answer so given shall not be used or receivable in evidence against him in any civil proceeding or in any proceeding under any Act of the Legislature.

See also: R.S.A. 1970, c. 127, s. 7; R.S.B.C. 1960, c. 134, s. 5; R.S.M. 1970, c. 75, s. 7; R.S.N.B. 1952, c. 74, s. 7; S.N. 1971, No. 48, s. 4; R.S.N.S. 1967, c. 94, s. 56; S.P.E.I. 1955, c. 12, s. 1; R.S.S. 1965, c. 80, s. 35. The British Columbia, Manitoba and Nova Scotia provisions contain specific references to documents. See *supra*, n. 65, at p. 22. A similar position exists in Quebec, through the operation of specific provisions such as section 11 of *The Public Inquiry Commission Act*, R.S.Q. 1970, c. 11.

[231] The *McRuer Report (Royal Commission Inquiry Into Civil Rights)*, vol. 1, (Ontario: 1968), chapters 32-36, exhaustively surveys the relevant Ontario statutory provisions, the powers by which such wituesses may be required to attend to give evidence and the sanctions authorized for a refusal to be sworn or to answer questions.

[232] *British North America Act, 1867*, 30-31 Vict., c. 3, s. 91(27).

[233] *Ibid.*, s. 92(14).

The key case is *Batary* v. *A.-G. Sask.*[234] There, the Crown sought to compel Batary to testify at a coroner's inquest, after he had been charged with non-capital murder in connection with the same death. The Supreme Court of Canada granted an order prohibiting any coroner in Saskatchewan from requiring Batary to attend as a witness, or give evidence at an inquest.

Mr. Justice Cartwright, delivering the judgment of the majority,[235] held that at common law, a person charged with the murder of a person into whose death an inquest was being held, could not be compelled to testify at such inquest. The issue, therefore, was whether the common law position had been competently altered.

On that question, he held that since the compellability of a person charged with a crime was involved, the subject matter was criminal law, within the legislative jurisdiction of the federal government. Therefore, the Saskatchewan *Coroner's Act* provision,[236] which purported to alter the common law, was *ultra vires* the Saskatchewan Legislature. In this connection he said:

> Such legislation trenches upon the rule expressed in the maxim *nemo tenetur seipsum accusare* which has been described (by Coleridge, J. in *R.* v. *Scott*) as 'a maxim of our law as settled, as important and as wise as almost any other in it'.[237]

It is interesting to note that even that often-quoted passage from Coleridge, J. was taken from a dissenting judgment, and that the maxim played no role whatsoever in the decision of the Court.

Finally, Cartwright, J. held that section 5 of the *Canada Evidence Act* could not be interpreted to render such an accused person compellable. The wording of the section was such that that interpretation could only be reached by implication, and clear words would be required to effect so fundamental a change.

The whole foundation of Mr. Justice Cartwright's decision is the assumption that because a person has been charged with murder, his status as a witness at an inquest is altered. Fauteux, J., dissenting, disagreed with that assumption and relied upon the rule "that the competency and compellability of a person to be called as a witness must be determined with reference to the particular proceeding in which it is proposed to call the person as a witness, and not with reference to some other proceeding . . .[238]

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[234] [1965] S.C.R. 465.

[235] Taschereau, C.J.C., and Martland, Judson, Ritchie and Spence, JJ. concurring.

[236] R.S.S. 1965, c. 106, s. 15; am. 1960, c. 14, ss. 2 and 3.

[237] [1965] S.C.R. 465, at p. 478.

[238] *Ibid.*, at p. 481.

He cited as authority for that rule, *Re Regan*[239] (where persons jointly indicted were tried separately and one was called as a witness against the other). He pointed out that in such cases, "it is settled law that neither one is regarded as an accused person or a party in the trial against the others."[240] In other words, the fact of having been charged with an offence, even the same offence, is irrelevant to a person's status as a witness in proceedings against another.

Mr. Justice Cartwright made reference to the rule in *Re Regan* as being clearly established. Yet, no attempt was made to distinguish it. He does not seem to have considered it as any kind of impediment to the opposite conclusion which he reached in *Batary*. It is submitted that the two decisions are incompatible, and that acceptance of the *Regan* rule destroys the assumption upon which the majority judgment in *Batary* is based.

In *Batary*, Cartwright, J. said:

> It would be a strange inconsistency if the law which carefully protects an accused from being compelled to make any statement at a preliminary inquiry should permit that inquiry to be adjourned in order that the prosecution be permitted to take the accused before a coroner and submit him against his will to examination and cross-examination as to his supposed guilt.[241]

Yet, the rule applied in *Regan*, and readily accepted by Cartwright, J., permits that same accused, in the same circumstances, to be called as a witness at the trial of his co-accused and, thus, to be submitted against his will to questioning about his guilt.

It could be argued that the trial of the co-accused does not deal with the guilt of the witness. But nor does the coroner's inquest. Mr. Justice Fauteux made that clear in his adoption of the following passage from the judgment of Chief Justice Culliton in the Saskatchewan Court of Appeal:

> While the Coroner's Court is a criminal Court of record, it is a court of inquiry, not of accusation, and the verdict of a coroner's jury does not bind any person whose conduct may be involved in its findings and does not, in any way, constitute any adjudication of rights affecting either person or property. There is no accused and there are no parties. *Wolfe* v. *Robinson*...[242]

Mr. Justice Cartwright made no attempt to argue otherwise. In fact, he concedes that it does not, but draws an analogy to the preliminary

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[239] *Supra*, at pp. 51-52.

[240] [1965] S.C.R. 465, at p. 481. He also cited the recent decision of the English Court of Appeal in *R.* v. *Boal, R.* v. *Cordrey*, (1964) 48 Cr. App. Rep. 342, to the same effect.

[241] [1965] S.C.R. 465, at p. 476.

[242] [1964] 2 C.C.C. 211, at pp. 215-216. Adopted by Fauteux, J., at p. 486.

inquiry situation. His analogy is far from complete when it is considered against the above passage.

Thus, it is respectfully submitted that the basic assumption of Cartwright, J. is incorrect in law. There is no authority supporting the view that because a person has been charged with murder, his status as a witness at another proceeding is altered. There is strong authority to the contrary.

It could be argued that Cartwright, J. really made no such assumption. The judgment might be interpreted as having accepted the *Regan* rule as being generally applicable. The situation at a coroner's inquest would merely be explained as an historical exception to it. The problem with this interpretation is that the historical conclusion was only reached by making the assumption in the first place. In other words, one is led to the historical exception only by starting with an assumption contrary to the rule in *Regan*, i.e., by assuming that there *is* some relevance to the fact that the witness is also an accused.

On the historical aspect of the judgment, it is perhaps significant that no authority was cited indicating that the accused could *not* be called as a witness at an inquest. Rather, the negative approach was taken, that no case had been cited in which that had happened. But if the person's status as an accused is irrelevant, there would be no reason to mention it.

Perhaps what is more important in this context, is the state of the law with respect to witnesses historically. It will be recalled that at common law, a witness did not merely have protection against his testimony being used at a future proceeding. He could *refuse to answer*.[243] In these circumstances, there would be little point in calling an accused, or even a suspect, as a witness. It is submitted that this is the true significance of the passage quoted by Cartwright, J. from *Jervis on Coroners*,[244] to the effect that an order to compel a person to attend before a coroner and jury:

> ...will generally be made if the prisoner is not the party under accusation; *or, if he is accused or suspected, then when he is desirous of making a statement,* and perhaps also when his presence is requisite for the purpose of identification.[245]

The passage recognizes that an accused can be compelled, but also recognizes the futility of calling him, unless there is an indication that he will waive his right to refuse to answer.

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[243] *Supra,* at p. 50.

[244] 4th ed. Adopted by Cartwright, J., at p. 474.

[245] At p. 214, emphasis added.

However, even if the conclusion were correct that at common law an accused could not be compelled to testify at an inquest, still, the elimination of the assumption destroys the constitutional argument. If the witness is not an accused at the proceeding in question, i.e., the inquest, then the provincial legislation compelling him to testify is compelling him *qua* witness rather than *qua* accused. Therefore, the province has the same legislative power with respect to him, as to any other witness at a coroner's inquest, and cannot be said to be purporting to legislate with respect to criminal procedure.

Finally, if the *Canada Evidence Act* were applicable, he would be a witness within the terms of section 5(1), just as the co-accused was in *R.* v. *Regan.* He would be required to testify, but would have the privilege under section 5(2) of rendering his testimony inadmissible against him at his own subsequent criminal trial.

What is the significance of the majority decision in *Batary?* Is it the harbinger of a revitalized right against self-incrimination? Or is it merely to be recognized as representing an incongruous rule, based upon the historical practice with respect to coroners' inquests? Is it possible that on a future occasion the Supreme Court of Canada will agree that it proceeded upon an erroneous assumption and reverse it completely?

The comment by Cartwright, J. about the inconsistency that would result from requiring an accused to testify at an inquest[246] suggests the importance of the *policy* of non-compellability with respect to an accused. The suggestion is that since he is protected against being compelled at his preliminary inquiry, the same policy should be extended to the coroner's inquest.

If the significance of the decision is to be related to a general policy against compellability (or self-incrimination, if you prefer) rather than historical anomaly, a number of consequences should follow. The *Regan* rule should be abolished, since the inconsistency with respect to a co-accused's trial is as great as (if not greater than) the inconsistency would be at a coroner's inquest.[247] In addition, the policy should be applied where the person has not yet been charged, but is a suspect. Otherwise, the Crown could circumvent the policy by the mere expedient of delaying the laying of charges.

That, of course, leads to complications in determining whether or not a person is a suspect. What is the effect, for example, of finding that a witness is not a suspect and compelling him to testify? Is he then immune from being charged? Would his testimony be

[246] *Supra,* n. 241, at p. 57.
[247] *Supra,* at p. 57.

excluded at his trial even if he had not taken the protection of section 5(2)? The existing authority suggests otherwise, but if the general policy is functional, it should override specific rules which are inconsistent with it. Decisions such as *Tass* v. *The King*[248] and *R.* v. *Mazerall*[249] would also have to be reversed.

Two British Columbia decisions raised some early promise of a re-birth of the self-incrimination concept as a result of the *Batary* decision. In *Re Nelson and Jacobson,*[250] it was held that a person charged with an offence under the provincial Motor-vehicle Act, could not be compelled to testify at an inquest arising out of the same accident as did the alleged offence. McIntyre, J. of the British Columbia Supreme Court interpreted *Batary* as being based upon broad policy considerations. He said: "The maxim *nemo tenetur seipsum accusare* is not confined to cases involving death and is the basis for the immunity which Cartwright J. found."[251]

A similar approach was taken in *Re Wilson Inquest.*[252] There, the same Court applied *Re Nelson and Jacobson,* and extended the *Batary* prohibition to a witness who had not yet been charged of any offence, but who might reasonably be charged. Munroe, J. said:

> I hold that where, as here, the evidence of witnesses given at an inquest indicates to one having knowledge of the law that a person may reasonably be charged with an offence under the *Criminal Code* or under the *Motor-vehicle Act* arising out of such death, such person cannot be compelled in British Columbia to testify at an inquest inquiring into the death. I paraphrase the language of Cartwright, J. ... when I say, it would be a strange inconsistency...[253]

He also spoke of the "privilege against self-incrimination" as including "an option not to disclose self-incriminating knowledge or evidence". He cites no authority for that proposition and clearly the contrary is embodied in section 5 of the *Canada Evidence Act.*

He pointed out that to hold otherwise would allow the Crown to defer the laying of a charge, and allow the Crown to obtain information from a witness which would not otherwise be available to the Crown authorities, and added:

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[248] *Supra,* at p. 50-51.

[249] *Supra,* at p. 51.

[250] (1967) 1 C.R.N.S. 235; reported also as *Re Maddess,* [1967] 3 C.C.C. 284.

[251] (1967) 1 C.R.N.S. 235, at p. 238; [1967] 3 C.C.C. 284, at p. 286.

[252] (1968) 63 W.W.R. 108; reported also as *R.* v. *Coroner of Municipality of Langley, Ex parte Whitelaw,* [1968] 4 C.C.C. 49.

[253] (1968) 63 W.W.R. 108, at p. 111; [1968] 4 C.C.C. 49, at p. 53.

> If that is the law, the well-established privilege against self-crimination of a person suspected of a crime rests upon a tenuous foundation — the whim of a prosecutor.[254]

Of course, the same could be said with respect to a prosecutor's decision to try a co-accused separately. Presumably, Mr. Justice Munro considered *Batary* to have overruled *Regan* as well as *Tass* v. *The King* and *R.* v. *Mazerall.*

The problem with the approach taken in these decisions is that they draw a great deal more from *Batary* than is warranted by Mr. Justice Cartwright's judgment.[255] The decision in *Re Wilson Inquest* was soon reversed by the British Columbia Court of Appeal,[256] and leave to appeal to the Supreme Court of Canada was refused.[257]

The Court of Appeal did not analyse in any detail the reasoning of Cartwright, J. in *Batary.* Rather, the majority judgments simply

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[254] (1968) 63 W.W.R. 108, at p. 110; [1968] 4 C.C.C. 49, at p. 52.

[255] *Re Nelson and Jacobson* also seems to wander astray in its handling of the constitutional issue. The reasoning is that since the Motor vehicle Act offence was a crime, therefore, the power to compel the accused to testify belonged to the federal government. But, with respect, that fails to take account of the constitutional fact that there are crimes over which the federal government has jurisdiction and essentially "crimes" over which the provinces have jurisdiction. Otherwise, it would be *ultra vires* the provinces to create offences under their Motor-vehicle Acts at all. If the provinces can create offences, there is no basis upon which they can be prevented from creating the procedure to be followed with respect to such offences. In other words, the compellability of a person charged with a "criminal" offence is neither a federal nor a provincial power absolutely. It depends upon whether the offence in question is within the federal or provincial sphere. *Batary* does not decide otherwise. The witness was not compellable at the provincial proceedings because he was accused of a *federal* crime, i.e., non-capital murder. The assumption that that status was relevant at the inquest led to the conclusion that the inquest was compelling him to give evidence which would help to convict him at his criminal trial. Thus, it was an interference with his criminal trial. The same can hardly be said of the *Nelson and Jacobson* situation, where only a provincial offence, albeit a provincial "crime", was involved. Sirois, J. seems to have fallen into the same error in holding that because the Coroner's Court is a criminal Court, the *Canada Evidence Act* applies to its proceedings: *Re Wyshynski,* [1966] 2 C.C.C. 199, at p. 204. (Although it would, of course, apply to provide protection at a subsequent trial under the Criminal Code).

If my submission is incorrect, the provincial Evidence Act provisions rendering a defendant compellable (discussed in the previous section) would be *ultra vires* the provinces as well. But see: *R.* v. *Greenspoon Bros. Ltd.,* [1967] 3 C.C.C. 308 (Ont. H.C.). See also: *Faber* v. *The Queen,* (1969) 6 C.R.N.S. 388 (Que. C.A.).

[256] *Re Wilson Inquest, Whitelaw* v. *McDonald and A.-G. B.C.,* (1968) 66 W.W.R. 522.

[257] *Memoranda,* [1969] S.C.R. xii.

accepted *Re Regan* as being a correct general statement of the law. The general approach taken is reflected in the following passage from the judgment of McFarlane, J.A.:

> I can find no reason to hold that the law as decided in *Re Regan* and approved in *Batary* v. *Attorney-General for Saskatchewan, supra,* is inapplicable in British Columbia. No authority, binding or persuasive, has been produced in which it has been decided judicially that the principle expressed in the maxim *nemo tenetur seipsum accusare* applies so as to exempt a person not charged with any offence from being compellable as a witness at a coroner's inquest.[258]

Thus, *Batary* is restricted to its specific factual situation and is, perhaps, explainable as an exception to the general rule based upon a historical anomaly, rather than upon a general principle against self-incrimination.

The illogic of that approach has already been suggested,[259] but *Batary* is a recent Supreme Court of Canada decision, and it is likely to be some time before the Court will be prepared to reverse itself. In any event, if the historical exception is mentioned often enough, it will eventually become "fact", so that the erroneous assumption that led to it can easily be ignored. After all, what is "the life of the law"?

This narrow interpretation of *Batary* had also been taken in an earlier decision of the Saskatchewan Court of Queen's Bench in *Re Wyshynski.*[260] The driver of a vehicle involved in a fatal accident was called as a witness at the inquest. No charge had been laid. However, from the course of the evidence which had been presented prior to Wyshynski having been called, it was clear that he was the driver of one of the vehicles and that the collision occurred as a result of his vehicle leaving his right side of the road, crossing over the centre line and coming into contact with the deceased's vehicle on the opposite side of the road. Mr. Justice Sirois distinguished the *Batary* decision:

> The applicant was not charged with any offence at any time since the accident; he was summoned as were the other witnesses to come and testify at the inquest for the purposes of that Court. His position is very much different from that dealt with in the recent case of *Batary* v. *A.-G. Saskatchewan*...[261]

He held that the accused was compellable.

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[258] (1968) 66 W.W.R. 522, at pp. 537-38. Davey, C.J.B.C. and Bull, J.A. agreed with McFarlane, J.A. on this point, and Branca, J.A. gave similar reasons. Nemetz, J.A. dissented.

[259] *Supra,* at p. 58.

[260] [1966] 2 C.C.C. 199.

[261] *Ibid.,* at p. 203.

A similar approach was also taken recently by the Quebec Court of Appeal in *R.* v. *Quebec Municipal Commission, Ex parte Longpre.*[262] The accused had been charged under the Criminal Code with being involved in a system of bribes to members of municipal councils. He was committed to trial following a preliminary inquiry. Subsequently, an inquiry was ordered under the *Public Inquiry Commission Act*,[263] and the accused was subpoenaed as a witness.

Brossard, J.A., delivering the deciding judgment,[264] isolated the issue as being whether:

> ...a person against whom criminal proceedings are pending [can] be compelled to testify at any trial, inquiry, or proceeding other than one whose outcome may involve his conviction, where such testimony concerns facts relating to the criminal offences with which he has been charged, and where the answer which he might give to the questions which might be put to him for these purposes could, in his opinion, constitute a confession of his guilt with respect to the offences with which he has been charged.[265]

He answered in the affirmative, and distinguished the majority decision in *Batary* on the basis that, in *Longpre*, a coroner's inquest was not involved, and the preliminary inquiry had been completed. Thus confining the majority judgment, he relied upon the dissenting judgment in *Batary* (together with the *Regan* and *Barnes* decisions) as a correct statement of the general rule.

Of course, if the earlier submissions are correct with respect to the erroneous assumption upon which *Batary* may have proceeded, the best approach simply would be to overrule *Batary* and adopt the dissenting judgment of Mr. Justice Fauteux, now Fauteux, C.J. That result may not be an impossibility in view of the changed constitution of the Court, the subsequent cases interpreting *Batary* and the rather short shrift that has been given lately, by the Supreme Court of Canada, to any suggestions of a general principle against self-incrimination. Nevertheless, in the context of past experience, at least, it would probably be considered more discrete simply to treat the decision as a narrow historical exception.

No comment has yet been made with respect to policy considerations in this area. Is it not, in fact, unfair to compel a person to testify in the various circumstances just discussed, when he is facing a criminal charge? But even if it is, isn't that precisely the effect of the specific wording of provisions such as section 5 of the

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262 [1970] 4 C.C.C. 133.
263 R.S.Q. 1964, c. 11.
264 Montgomery and Rivard, JJ., concurring.
265 [1970] 4 C.C.C. 133, at p. 137.

Canada Evidence Act? Even if it were never contemplated that such sections would be used to advance a criminal investigation, under our distribution of powers, isn't that for the respective provincial administrations to decide?

A number of these and related questions arose out of the recent violence in Quebec. The *Quebec Fire Investigations Act* [266] was used as an investigatory technique, following the rash of bombings which occurred in Quebec in 1968. Considerable publicity also surrounded the 6 month jail sentence for contempt of court which Lise Rose received for her refusal to testify at the inquest into the death of Pierre Laporte.[267] At the time, her brothers Paul and Jacques Rose were fugitive kidnapping suspects.

However, it is beyond the scope of this article to discuss these questions. The inquiry here is to determine whether there is a right against self-incrimination in Canada, in any practical sense.

It is submitted that this examination of the authorities with respect to the compellability of witnesses is consistent with the other areas examined, in yielding little evidence of a general common law right against self-incrimination operative in Canada today. Section 5 has eliminated the common law privilege of witnesses to refuse to testify in certain circumstances. It also allows the Crown to compel the accused to assist in advancing the prosecution against himself in a number of situations. From the very introduction of these legislative restrictions, our courts have tended almost uniformly to accept them without any reservations based upon any general principle against self-incrimination.

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[266] See also: *The Queen* v. *Coote*, (1873) 4 L.R.P.C.A. 599, an early Privy Council decision interpreting the compellability powers of Fire Commissioners under Quebec Statutes, 31 Vict., c. 31; and 32 Vict., c. 29.

[267] See, e.g., Toronto *Globe and Mail*, Dec. 2, 1970, at p. 9.

More recently, the testimony of Giles Eccles at the Coroner's Inquest into the death of Linda Livingstone (arising out of the fire at Montreal's Blue Bird Club on Sept. 1, 1972) indicated that he could well be indicted in the matter. See, e.g., the report in the Toronto *Globe and Mail*, Sept. 14, 1972. The testimony of Jean-Marc Boutin at the same Inquest amounted to a clear confession of guilt: Toronto *Globe and Mail*, Sept. 21, 1972. [More recently, Boutin and James O'Brien pleaded guilty to non-capital murder and Eccles pleaded guilty to manslaughter charges arising out of the incident]. Finally, the Quebec Police Commission hearings on organized crime and the Ontario royal commission hearings investigating crime in the construction industry will undoubtedly raise the same questions.

VII Constitutional Questions and the Canadian Bill of Rights

Perhaps it is not surprising, in the context of our constitutional framework, that any concept of a general right against self-incrimination which might be said to exist has had few practical consequences. Specific consequences in our legal system tend to flow from legislation rather than directly from constitutional principles. It is true that in the area of criminal law, common law rules and principles are expressly recognized [268] as being applicable in Canada. But in practice, as we have seen, that has tended to mean well-crystallized rules [269] rather than dynamic principles.

Because of the federal nature of our country the courts are often in the position of limiting the legislative power of one level of government in a particular area. But that is in no way an absolute limitation upon such a power. Rather it is, in effect, a declaration that the other level of government has the power to legislate in that area.

The other main approach which has been used by our courts to limit legislative power has been a limitation upon the scope or operation of legislation. As Dean Tarnopolsky recently stated:

> The restrictive interpretation technique arises out of the relationship between Parliament and the judiciary which we inherited from Great Britain whereby, because of the doctrine of Parliamentary supremacy, the courts do not have the right to invalidate an Act of Parliament on the ground of its arbitrariness, or its alleged contravention of civil liberties. Nevertheless, the courts have used a principle of statutory interpretation whereby the common law rights of the subject cannot be restricted by ambiguous statutes. The presumption is against the imposition of taxation, or the imposition of penal sanctions, or the taking away of common law rights, unless the words of the statute are clear. Thus, if the courts have any choice in interpreting a statute which is not clearly and precisely drawn, the ordinary rules of statutory interpretation urge them to protect civil liberties.[270]

Of course, there is nothing legally to prevent a legislature from subsequently enacting explicit legislation to override a restrictive interpretation by the courts.

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[268] *Criminal Code,* section 7(3):

Every rule and principle of the common law that renders any circumstance a justification or excuse for an act or a defence to a charge continues in force and applies in respect of proceedings for an offence nnder this Act or any other Act of the Parliament of Canada, except in so far as they are altered by or are inconsistent with this Act or any other Act of the Parliament of Canada.

[269] E.g., the non-compellability of the accused: *supra,* at p. 42.

[270] Tarnopolsky, *The Canadian Bill of Rights from Diefenbaker to Drybones,* (1971) 17 McGill L.J. 437, at pp. 438-39.

There may be some question as to whether, in applying the "restrictive interpretation technique", the courts have as yet reached the stage at which they are governed by as broad a principle as that stated by Dean Tarnopolsky. Certainly the common law development has tended to be along the lines of specific "cubby-holes", such as the imposition of taxation or the imposition of penal sanctions, as he has suggested. It may well be preferable for the courts to be governed by a more general principle,[271] and it may even be that they are so governed, albeit tacitly.

Nevertheless, the "restrictive interpretation" approach has achieved few practical consequences in maintaining a general common law right against self-incrimination.

It is true that there are clear examples of its application in this area. For example, where statutes have purported to make "any person" compellable, the courts have interpreted the phrase as not including a person whose guilt is the subject matter of the proceedings.[272]

But, in most cases, the courts have not presumed in favour of a right against self-incrimination. There are significant examples of a movement in the *opposite* direction. In *Gosselin* v. *The King*, the Supreme Court of Canada interpreted the non-compellability of the accused as having been eliminated by implication. Parliament had to enact specific legislation to re-institute the common law protection which the courts had eliminated.[273] The courts have also greatly weakened the protection offered by section 4(5) of the *Canada Evidence Act*, again, indicating a tendency in the opposite direction with respect to the common law right against self-incrimination.[274]

The performance of the English Courts has recently been assessed with respect to situations where, in Canada, section 5(2)

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[271] *Cf.* Friedman, *Statute Law and Its Interpretation in the Modern State*, (1948) 26 Can. Bar Rev. 1277, at p. 1298:

> The presumption [with respect to penal statutes] is probably still applicable in the case of common law crimes, whether consolidated by statute or not, but it should be discarded in the case of modern statutory offences which are a special type of 'social purpose' statute.

Thus, to take an extreme example, the presumption should not apply to protect the rights of an individual against whom a complaint has been made under the *Ontario Human Rights Code:* R.S.O. 1970, c. 318.

[272] *R.* v. *Hicks, supra,* at pp. 53-54. There is also a reference to this approach by Cartwright, J. in *Batary* v. *A.-G. Sask,* but it does not seem to be the basis upon which the decision was made: *supra,* at p. 56.

[273] *Supra,* at p. 30.

[274] *Supra,* at pp. 30 *et seq.*

of the *Canada Evidence Act,* or the corresponding provincial provisions, would be applicable.[275] In the absence of such a general provision in England, it has fallen to the courts to determine the extent to which the testimony of a witness can be used against him at a subsequent proceeding. As the author states:

> Briefly, the problem is that the statutes which make compulsory the giving of information are seldom precise as to the admissibility of the information in subsequent proceedings.[276]

He concludes:

> So whenever the courts have to consider the meaning of a vague statute in connection with this problem, no general rule can be deduced from the wording of the statutes which expressly save something of the privilege against self-incrimination to prove that the privilege has been abrogated by the vague statute: there are examples on which converse reasoning could be based. And the examples are sufficiently numerous on either side to prevent either view prevailing.[277]

The author cites section 5(2) of our *Canada Evidence Act* as "a good example" of a situation in which "the express words of the statute make the parliamentary intention quite plain".[278] Thus, in this area at least, our courts have had considerably less room within which to manoeuver than have the English Courts.

This leads us to a consideration of the extent to which the *Canadian Bill of Rights*[279] has given our courts the power to apply a general right against self-incrimination. At first there was some debate on the question of whether or not a "mere statute" could operate to override or restrict the operation of other legislation. However, the "believers" seem to have been vindicated by the Supreme Court of Canada in *R.* v. *Drybones.*[280]

The section in the *Bill of Rights* which deals with self-incrimination provides:

> s. 2. Every law of Canada shall, unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the Canadian Bill of Rights, be so construed and applied as not to abrogate, abridge or infringe or to authorize the abrogation, abridgment or infringement of any of the rights and freedoms herein recognized and declared,

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[275] Heydon, *Statutory Restrictions on the Privilege Against Self-Incrimination,* (1971) 87 L.Q.R. 214.

[276] *Ibid.,* at p. 215.

[277] *Ibid.,* at pp. 227-28.

[278] *Ibid.,* at p. 229.

[279] 8-9 Eliz. II, S.C. 1960, c. 44; now R.S.C. 1970, App. III.

[280] [1970] S.C.R. 282. See generally, Tarnopolsky, *The Canadian Bill of Rights,* (Toronto: 1966); and his more recent article, *The Canadian Bill of Rights from Diefenbaker to Drybones,* (1971) 17 McGill L.J. 437, in which most of the Canadian articles dealing with *Drybones* are cited.

> and in particular, no law of Canada shall be construed or applied so as to ... (d) authorize a court, tribunal, commission, board or other authority to compel a person to give evidence if he is denied counsel, protection against self-crimination or other constitutional safeguards.

It must, of course, be kept in mind that since the *Canadian Bill of Rights* is a federal statute it can have no application to provincial legislation.[281]

Prior to the "breathalyzer" cases, there had been numerous attempts by counsel to have the courts apply section 2(d) in a variety of situations.[282] All were unsuccessful.

However, the only decision which in any way attempted to analyze the section was *R.* v. *Lavoie.*[283] In that case, Schultz, Co. Ct. J. concluded that the words "or other authority" in section 2(d) were *ejusdem generis* "a court, tribunal, commission, board" and, therefore, did not include a police officer. He also decided that "evidence" might be defined "as the testimony of witnesses for the purpose of proving or disproving facts in legal proceedings"[284] so that statements made by an individual, to a detective on a street, would not constitute "evidence" under the section. The British Columbia Court of Appeal[285] agreed with his reasons and, in particular, with his interpretation of the words "give evidence".

The Supreme Court of Canada had its first real opportunity to consider section 2(d) in *Reference Re Proclamation of Section 16 of the Criminal Law Amendment Act, 1968-69.*[286] The constitutional reference involved the new "breathalyzer" legislation under which peace officers were given the right, in certain circumstances, to demand that drivers submit to a breathalyzer test. It became an offence to fail or refuse to comply with such a demand or to drive or have the care or control of a motor vehicle, after having consumed alcohol in such a quantity that the proportion of it in the

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[281] *Canadian Bill of Rights,* section 5(2); *R.* v. *Drybones,* [1970] S.C.R. 282, at p. 297. Thus, it can have no application to the provincial Evidence Act provisions discussed *supra,* at pp. 42 *et seq.*

[282] *R.* v. *Steinberg,* [1967] 3 C.C.C. 48 (Ont. C.A.); *R.* v. *Pearson,* (1968) 66 W.W.R. 380 (B.C.S.C.), re. "wiretap" evidence; *R.* v. *Corning Glass Works of Canada Ltd.,* (1972) 16 C.R.N.S. 329 (Ont. C.A.), re. the compellability of an officer of an accused corporation; *R.* v. *Lavoie,* (1972) 5 C.C.C. (2d) 368 (B.C. C.A.), re. the requirement to "give a good account" under section 175(1)(c) of the *Criminal Code.* See generally, Tarnopolsky, *op. cit.,* for decisions with respect to related *Bill of Rights* provisions, such as 2(c)(ii) — right to counsel, 2(e) — right to fair hearing, and 2(f) — presumption of innocence.

[283] (1971) 2 C.C.C. (2d) 185.

[284] *Ibid.,* at p. 195.

[285] (1972) 5 C.C.C. (2d) 368.

[286] [1970] 3 C.C.C. 320.

blood exceeds a prescribed limit. A number of evidentiary presumptions were also created, including the presumption that, if certain conditions were satisfied, evidence of the results of a chemical analysis of a sample of the accused's breath, taken with the breathalyzer, is proof of the proportion of alcohol in the accused's blood at the time the offence is alleged to have been committed.[287]

The main issue in the reference was whether or not the provisions had been validly proclaimed. Argument with respect to section 2(d) seems to have been limited to an objection to the presumptive provisions. Only Mr. Justice Laskin referred to the argument with respect to section 2(d), and said of it that:

> ...if it is not premature [it] suggests that a person accused under the newly proclaimed ss. 222 or 224 of the *Criminal Code* may be compelled to criminate himself. That is simply not so. There is no compellability of an accused to self-crimination by reason only of the statutory prescriptions for presumptive proof of facts in issue.[288]

In his detailed analysis of the decision, Phillip Stenning expressed some surprise that potential attacks upon the legislation under section 2(d) were not considered more fully. He suggested that:

> Indeed, if a legal duty to provide a sample, which can be later used against one in criminal proceedings, backed by the threat of a fine of up to one thousand dollars or imprisonment for up to six months, or both, for failure or refusal to provide such sample does not amount to compellability, it is difficult to see what could.[289]

With the increased application of the breathalyzer provisions defence counsel increasingly resorted to the *Canadian Bill of Rights* and section 2(d), in particular, was thrust into prominence.[290]

Within a period of a few months in 1971 the Courts of Appeal of at least four provinces handed down decisions in which section 2(d) was considered.[291] All of them rejected the arguments that the

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[287] *Criminal Code*, ss. 222 to 224 (now ss. 235-237). See generally, Stenning, *The Breathalyzer Reference*, (1969-70) 12 Crim. L.Q. 394.

[288] [1970] 3 C.C.C. 320, at p. 340.

[289] (1969-70) 12 Crim. L.Q. 394, at p. 412.

[290] For more general comments upon section 2(d) in this context, see: McIntosh, *Self-Incrimination and the Breathalyzer*, (1971-72) 36 Sask. Law Rev. 22.

[291] *R.* v. *Curr*, (1971) 4 C.C.C. (2d) 24, *per* Fraser, J. (appeal to the Ontario Court of Appeal dismissed without recorded reasons on May 21, 1971), whose reasons were adopted by the latter court in *R.* v. *Brownridge*, (1971) 4 C.C.C. (2d) 462, at p. 475; *R.* v. *Ness*, (1971) 4 C.C.C. (2d) 42 (Sask. C.A.); *R.* v. *McKay*, (1971) 4 C.C.C. (2d) 45 (Man. C.A.); *R.* v. *Urchyshyn*, (1971) 4 C.C.C. (2d) 481 (Alta. C.A.). The legislation was also considered in relation to other provisions of the *Bill of Rights* in some of these decisions and in *R.* v. *Russell*, (1971) 4 C.C.C. (2d) 494 (N.S.C.A.) and *R.* v. *Duke*, (1971) 4 C.C.C. (2d) 504.

section limited the operation of the legislation. Various reasons were stated in the various judgments but the approach taken in the *Lavoie* case was generally adopted with respect to the phrases "other authority" and "give evidence".

In addition to arguments based upon the specific wording of section 2(d), argument was also advanced that at the time the *Bill of Rights* was enacted, a person could not be compelled to give a sample of his breath. Therefore, this non-compellability with respect to breath samples was to be included in the definition of self-incrimination under section 2(d) or was a right recognized and protected by section 5(1) of the Bill. It provides:

> 5(1) Nothing in Part I shall be construed to abrogate or infringe any human right or fundamental freedom not enumerated therein that may have existed in Canada at the commencement of this Act.

But this argument was also rejected, on the basis that the effect of the Bill is to protect the rights and freedoms enumerated and specified therein. It does not purport to protect every statutory right in existence at the time the Bill was passed, but which fell outside those enumerated freedoms.[292]

Relying largely upon *A.-G. Que.* v. *Begin*,[293] the conclusion was reached that the taking of physical evidence did not fall within the voluntariness rule. Nor did it fall within the definition of "self-crimination" according to the *Begin* case which included only the non-compellability of the accused and the *Canada Evidence Act*, section 5(2), protection. Thus, it could not be elevated to the status of a right protected under the Bill, merely because it was a statutory rule in existence at the time the Bill was enacted.

The *Curr* decision was appealed to the Supreme Court of Canada [294] which upheld the decision of the Ontario Court of Appeal and refused to "sterilize" the breathalyzer legislation through the application of section 2(d). The main judgment is that of Laskin, J. whose reasons were concurred in by 6 of the other 8 justices who sat.[295]

Mr. Justice Laskin did not consider section 5(1) of the *Bill of Rights* in any detail. His reference to it suggests that counsel did

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[292] See generally, *R.* v. *Curr*, (1971) 4 C.C.C. (2d) 24, on this argument.

[293] *Supra*, at p. 7.

[294] [1972] 7 C.C.C. (2d) 181.

[295] The Chief Justice adopted the narrower approach taken by Ritchie, J., while Abbott, Martland, Hall, Spence and Pigeon, JJ. concurred with Laskin, J.

not press argument on this aspect very strenuously.[296] However, he does make it clear that the Bill "did not freeze the federal statute book as of its effective date...",[297] so that the fact that some protection was embodied in a statute prior to the enactment of the Bill would not, of itself, render that protection a right which was also protected by the Bill.

It was argued before the Supreme Court that the legislation was rendered inoperative by virtue of the "due process" clause in section 1(a) of the Bill. However, after a brief romp through the more prominent U.S. decisions dealing with the "due process" provisions in its constitution, Mr. Justice Laskin concluded that section 1(a) could not "be taken to include in its protection an extension of the privilege beyond what is found in section 2(d)".[298]

It was also argued that the legislation was a denial of the "protection of the law" provision in section 1(b). But Laskin, J. found no merit in this position, "based as it is on the 'frozen statute book' theory".[299]

Focusing upon the specific wording of section 2(d), he concluded that the words "other authority" could not be interpreted to include a peace officer.[300] In the course of another excursion through the U.S. cases, this time with respect to the Fifth Amendment, he mentions that the protection in our section 2(d) relates to "the giving of evidence at the behest of a court or like tribunal" by the person entitled to the protection.[301] In effect, he has, thus, adopted the position taken by the provincial Courts of Appeal which dealt with these phrases and which, in turn, had adopted the decision of Schultz, Co. Ct. J. in the *Lavoie* case.

Either of those two conclusions with respect to the interpretation of section 2(d) would have been sufficient to dispose of the

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[296] [1972] 7 C.C.C. (2d) 181, at p. 188:

> The reference by counsel for the appellant to s. 5(1) was not amplified by any indication of a tenable ground thereunder for questioning the operative effect of ss. 223 and 224A(3) of the Criminal Code.

[297] *Ibid.*, at p. 187.

[298] *Ibid.*, at p. 202.

[299] *Ibid.*, at p. 194.

[300] *Ibid.*, at p. 197.

[301] *Ibid.*, at pp. 199-200. Later he comments:

> I leave for future consideration the scope of the term 'evidence' since this is not a matter that arises in the present case.

It is not clear what he is referring to here but from the passage quoted above and his reference to Rand, J. in *Reference re Validity of section 92(4) of the Vehicles Act, 1957 (Sask.)*, [1958] S.C.R. 608, at p. 618, he presumably accepts that "evidence" must at least bear a "testimonial character".

matter. However, Mr. Justice Laskin, very laudably, goes on to offer an explanation as to the scope of the provision:

> I cannot read s. 2(d) as going any farther than to render inoperative any statutory or non-statutory rule of federal law that would compel a person to criminate himself before a court or like tribunal through the giving of evidence, without concurrently protecting him against its use against him... This view of s. 2(d) means, in the case of an accused person, that he cannot be made a compellable witness unless the *Canadian Bill of Rights* is expressly by-passed for that purpose as provided in the opening words of s. 2 thereof.[302]

Thus, in effect, he ascribes to section 2(d) exactly the same meaning given to the privilege against self-incrimination in *A.-G. Que.* v. *Begin.*[303] In other words, it includes, first, the privilege of an ordinary witness not to have his testimony used against him at a future proceeding; and, secondly, the privilege of a person, whose guilt is being considered at a particular proceeding, not to be required to testify at that proceeding.

However, in giving that interpretation to section 2(d), a problem arises which is not discussed by Laskin, J.. It is that the wording of the section seems to be drawn more narrowly than the definition of self-incrimination in *Begin.* There is no problem with respect to the first aspect, i.e., the protection given by section 5(2) of the *Canada Evidence Act.* But can section 2(d) be interpreted as limiting legislation which would purport to render an accused compellable? The phrase "self-crimination" in section 2(d) cannot be considered in isolation but the questioned provision must be read "as a whole."[304]

In other words, can "protection against self-incrimination" in section 2(d) be interpreted as meaning "protection against being compelled to give evidence"? If so, one has the following provision that:

> ...no law...shall...authorize a court... to compel a person to give evidence if he is denied...protection against being compelled to give evidence...

It is submitted that such an interpretation is not only awkward but is self-contradictory to the extent that a meaning cannot be placed on it. The better view must be that the section in no way restricts legislation compelling any person (including an accused) to testify provided he is not "denied counsel, protection against self-crimination [i.e., provided the *Canada Evidence Act,* section 5(2) protection is not eliminated] or other constitutional safeguards".

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[302] *Ibid.,* at p. 201. The words of section 2 to which he refers are:

> ...unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the Canadian Bill of Rights...

[303] *Supra,* at pp. 7-9.

[304] *R.* v. *Curr,* [1972] 7 C.C.C. (2d) 181, at p. 195, *per* Laskin, J.

It might be argued that it would be meaningless from a policy viewpoint to give a person protection with respect to future proceedings but not with respect to the very proceedings at which he is testifying. But that is not necessarily the case, since the provision compelling him to testify could then only be used for the specific purpose authorized by the legislation embodying the compulsion, and not for any future purpose.

It might be possible that the non-compellability aspect could be protected through the "due process" provision in section 1(a) of the Bill. However, the comments of Laskin, J. with respect to section 1(a) suggest that it could not be used for that purpose. He said:

> I do not think that s. 1(a), where there is no reference to the privilege and whose words provide no historical warrant for embracing it can be taken to include in its protection an extension of the privilege beyond what is found in s. 2(d).[305]

While that statement was made on the basis that the non-compellability provision was contained in section 2(d), still, it is a comment upon the scope of the "due process" provision and it is difficult to see how that scope can be expanded, simply because another provision might turn out to be more narrow than might have originally been expected.

Perhaps section 5(1)[306] is more promising in this respect. Certainly the non-compellability of the accused has historical warrant to be classified as a fundamental right. But the survey in this article of its treatment by the courts and, indeed, some of the provincial legislatures, clearly suggests that its current status is somewhat less than the lip service paid to it.

Furthermore, section 5(1) refers to fundamental freedoms "not enumerated" in Part I. Since "self-crimination" is enumerated, that would seem to preclude it being incorporated through section 5(1). Moreover section 5(1) might be interpreted as merely preventing the Part I provisions from narrowing existing law rather than actually expanding those Part I provisions. On this interpretation, together with the one just suggested, section 5(1) would, for example, prevent section 2(d) of the Bill from being interpreted as actually abrogating the accused's privilege of not giving evidence.

If the non-compellability provision were incorporated through section 5(1), one might ask what other provisions would also be incorporated. Certainly the voluntariness rule with respect to admissions by an accused is a well established privilege historically. It

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[305] [1972] 7 C.C.C. (2d) 181, at p. 202.

[306] *Supra*, at pp. 70-71.

is true that it has not been considered as an aspect of the self-incrimination concept in Canada [307] but, under section 5(1), that is unnecessary. There are, in addition, many other well-established rules of criminal procedure that perhaps should also be incorporated through section 5(1) if the non-compellability of the accused is to receive such treatment.

Of course, it is always possible for the courts to interpret section 2(d) as protecting non-compellability in spite of the more specific language which appears in the section. Indeed, Laskin, J. might have been suggesting a broader scope for a more creative interpretation of section 2(d) at the trial or "proceedings" stage when he said:

> The point in the criminal process at which the privilege can be asserted is one thing; what the privilege embraces at that point is something else. It is my conclusion that the point of assertion has been fixed in s. 2(d)...[308]

However, even if Mr. Justice Laskin were to be prepared to broaden section 2(d) in this manner, it might be doubtful that a majority of the Court would agree.

Assuming, then, that the non-compellability of the accused is neither included in section 2(d) nor incorporated through another section of the *Bill of Rights*, what scope of operation can the provision have? Obviously, it can have no application where Parliament passes legislation which is expressly declared to "operate notwithstanding the Canadian Bill of Rights".[309]

A clear example of the section's application might be with respect to legislation which authorized the compelling of witnesses to give evidence at certain proceedings and provided that such evidence could be used for any purpose at any future proceedings. Such legislation would, in effect, override section 5(2) of the *Canada Evidence Act* with respect to the proceeding at which the evidence was taken. But section 2(d) of the *Bill of Rights* should render such legislation inoperative.

The remedy flowing to such a witness would likely depend upon whether or not the compellability provision were severable from the provision respecting use at future proceedings. If it were not severable, presumably, the witness could simply refuse to testify. If it were severable, presumably, he would have to testify but could simply claim the protection of section 5(2), in the usual manner, in spite of the provision with respect to use at future proceedings.

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[307] *A.-G. Que.* v. *Begin, supra,* at pp. 7-9.

[308] [1972] 7 C.C.C. (2d) 181, at p. 203.

[309] Section 2, *supra,* n. 302. The references to legislation in the examples below assume that the legislation does not have "notwithstanding" provisions.

What if a witness were simply to testify in accordance with such legislation without claiming section 5(2)? Could his testimony be used against him in future proceedings? In ordinary circumstances section 5(2) must be invoked if its protection is to be obtained and there is no requirement on the part of the court to bring it to the witness' attention.[310] But perhaps here it could be said that the testimony was compelled "unlawfully" so as to render it inadmissible under *R.* v. *Scott*.[311]

All of the same considerations should apply where the legislation compelled a witness and stated that he was not entitled to counsel at the proceeding in which the evidence was taken.

Does the protection of section 2(d) only apply to future legislation? Suppose for example that a witness is compelled under existing legislation to testify but nothing is said in the legislation about counsel. At the proceedings in question the witness appears with counsel but the judge or other person conducting the proceedings refuses to permit counsel to be present.[312] Perhaps this denial could also be considered to be an unlawful compulsion so as to permit the witness to refuse to testify or to render any testimony given inadmissible in future proceedings.

The same considerations probably do not apply to a situation where, under existing legislation, the person conducting the proceeding purports to refuse to grant the witness the protection of section 5(2) of the *Canada Evidence Act*. What that person does, or does not do, is irrelevant. The protection flows directly from section 5(2) and is operative if it is invoked. The bestowal of its protection does not depend upon the actions of the person conducting the proceedings.[313]

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[310] *Supra*, at pp. 50-51.

[311] (1856) Dears & Bell 47, at p. 59; 169 E.R. 909, at p. 914, *per* Lord Campbell, C.J.:

> If the party has been unlawfully compelled to answer the question, he shall be protected against any prejudice from the answer thus illegally extorted; but a similar protection cannot be demanded where the question was lawful and the party examined was bound by law to answer it.

Of course, the second part of that statement is not applicable in Canada because of the express provisions of section 5(2) of the *Canada Evidence Act*.

[312] See the similar factual situation in *Re Sommervill*, (1962) 37 C.R. 400 (Sask. Q.B.). The use of the word "denied" suggests that there must be a request and a refusal rather than a mere absence of counsel for the section to be applicable.

[313] *Baxter* v. *The King*, (1952) 15 C.R. 265 (Que. C.A.); *R.* v. *Prestyro*, (1950) 9 C.R. 276 (B.C.C.A.). *Cf. R.* v. *Hicks*, [1946] 1 D.L.R. 796 (Sask. K.B.).

The phrase "other constitutional safeguards" in section 2(d) is so broad that it would be futile to offer, here, a suggestion as to its meaning. It may be doubtful that any real meaning can be given to it at all, but that question must await judicial consideration.

Thus, it does not appear that the *Canadian Bill of Rights* will have the effect of creating a general right against self-incrimination in Canada. Its operation in this area seems generally limited to inhibiting future legislative encroachments upon section 5(2) of the *Canada Evidence Act*. It might also, through a stretched interpretation, have the same effect with respect to the compellability of an accused. But it does little to broaden the operation of those rules, as discussed earlier in this article. The one example given of section 2(d), having an operative effect other than with respect to future legislation, reflects more a right to counsel than a right against self-incrimination.

Conclusion

It is difficult to say that there exists in Canada today, a general right against self-incrimination in any functional sense. We do have a number of specific rules such as the voluntariness rule with respect to confessions, the non-compellability rule with respect to the accused and the rule embodied in section 5(2) of the *Canada Evidence Act*. But the courts have treated these as specific rules rather than as reflections of a more vigorous principle. Indeed, the courts seem to have bent over backwards in some situations to allow encroachments upon the rules.

R. v. *Balsdon* is an exception. Perhaps there are other similar decisions but, if so, they are rare. It is difficult to treat *Balsdon* as being very significant when it is considered in the context of the total performance of the courts in this whole area.

The actual decisions seem so overwhelmingly to reject any dynamic principle against self-incrimination in Canada that one might have thought it unnecessary to bother even considering whether it did exist. But we have seen enough examples of judicial tribute to the concept to make the inquiry necessary. Indeed, the conclusion that there is no such "right" in Canada may come as a surprise to some.

What, then, is the significance of these judicial references? Are they merely thrown in by counsel to "shore up" an argument in some vague way and then repeated in judgments for similar reasons? Perhaps it is useful to use the phrase, "right against self-incrimination", or the maxim, *nemo tenetur seipsum prodere*, as descriptive

of the totality of specific rules in this area. Perhaps they could be said, when taken together, to indicate a view which our system as a whole takes against self-incrimination. But if there is such a view, it is speckled to an extent that, to refer to it, is more likely to create confusion than to assist in any way. Furthermore, the phrases carry with them a high level of emotional content that can only confuse issues. It would be better to speak only in terms of the specific rules. The general description in section 2(d) of the *Bill of Rights* and the limited scope of operation which it represents warrants particular caution.

All of this is not to say that a general right against self-incrimination is not desirable. It may well be, but that is another question. For the time being, it is sufficient to submit that there is little point in speaking of an existing general right against self-incrimination in Canada.