

CANADA / JUDGMENT

O'Hara v. British Columbia

[1987] 2 SCR 591

COURT

Supreme Court of Canada

DECIDED

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O'Hara v. British Columbia

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Report

[1987] 2 SCR 591

Case number

20260

Judges

Dickson, Robert George Brian; Beetz, Jean; Estey, Willard Zebedee; McIntyre, William Rogers; Lamer, Antonio; Wilson, Bertha; Le Dain, Gerald Eric; La Forest, Gérard V.; L'Heureux-Dubé, Claire

On appeal from

British Columbia

Subjects

Constitutional law

Notes

SCC Case Information: 20260

Decision Content

O'Hara v. British Columbia, [1987] 2 S.C.R. 591

Terrance Patrick O'Hara and John Earl Kirkbride Appellants

v.

Her Majesty The Queen in Right of the province of British Columbia, the Attorney General of the province of British Columbia, Malcolm A. Matheson, Mary Saunders and Richard M. MacIntosh
Respondents

and

The Attorney General for Ontario, the Attorney General of Quebec, the Attorney General for New Brunswick and the Attorney General for Alberta Interveners

indexed as: o'hara v. british columbia

File No.: 20260.

1987: June 2; 1987: November 19.

Present: Dickson C.J. and Beetz, Estey, McIntyre, Lamer, Wilson, Le Dain, La Forest and L'Heureux-Dubé JJ.

on appeal from the court of appeal for british columbia

Constitutional law -- Distribution of legislative powers -- Administration of justice and criminal law -- Provincial inquiry commission -- Inquiry into alleged wrongdoing of provincial police officers -- Commission empowered to conduct compulsory examinations of witnesses under oath -- Validity of Order in Council establishing commission -- Constitution Act, 1867, ss. 91(27) , 92(6) , (14) , (16) .

Pursuant to the British Columbia Inquiry Act, the Lieutenant-Governor in Council promulgated Order in Council No. 590 which appointed three commissioners to inquire into and report on all matters associated with alleged injuries sustained by a prisoner while in custody at a police station. The prisoner complained that he had been assaulted by police officers during his detention and that his injury was a result of that assault. The appellants and the other police officers on duty the night of the incident were summoned to appear before the Commission. The officers thereupon petitioned the British Columbia Supreme Court for an order declaring the Order in Council ultra vires of the province. They contended that the Commission's terms of reference set out in the Order in Council invaded the exclusive legislative authority of the Parliament under s. 91(27) of the Constitution Act, 1867 because the primary purpose of the Commission was to investigate whether particular offences occurred and, if so, who was responsible. The petitions were dismissed and the judgment affirmed by the Court of Appeal.

Held (Estey J. dissenting): The appeal should be dismissed.

Per Dickson C.J. and Beetz, McIntyre, Lamer, Wilson, Le Dain, La Forest and L'Heureux-Dubé JJ.: Section 92(14) of the Constitution Act, 1867 authorizes a province to establish an inquiry to investigate and report on alleged wrongdoings committed by members of a police force under its

jurisdiction and to enable such an inquiry to conduct compulsory examinations of witnesses. But there are limits to a province's jurisdiction to establish an inquiry and equip it with coercive investigatory authority. First, a province must respect federal jurisdiction over criminal law and criminal procedure. For example, an inquiry enacted solely to determine criminal liability and to bypass the protection accorded to an accused by the Criminal Code would be ultra vires of a province, being a matter relating to criminal law and criminal procedure. Secondly, a province may not rely on its jurisdiction under s. 92(14) to intrude into the management of a federal organization. Thirdly, a province --as well as Parliament -- may not infringe the rights of Canadian citizens in establishing inquiries of this kind.

In the present case, the Order in Council was within the legislative jurisdiction of the province. The inquiry was mandated to investigate alleged acts of wrongdoing for purposes different from those which underlie criminal law and criminal procedure. The purpose of the inquiry was not to determine criminal responsibility but was aimed at getting to the bottom of an incident of police misconduct which had undermined the proper administration of justice. The federal authorities had no jurisdiction over the discipline of the police officers who were the subject of the inquiry.

Further, because the alleged wrongdoing occurred in a jail, s. 92(6) of the Constitution Act, 1867 provides a constitutional anchor independent of s. 92(14) by which provincial jurisdiction over the inquiry can be secured. Reference might also be had to s. 92(16) .

Per Estey J. (dissenting): Criminal procedure as well as criminal law may not be circumvented by provincial action under general inquiry legislation. In this case, the main and apparently only object of the inquiry was to isolate and identify the actual wrongdoers with a view to prosecution. This circumstance provides an unsound basis upon which to expand the comments of this Court in *Faber v. The Queen*, [1976] 2 S.C.R. 9. Admittedly, it is a very thin line whether the use of a coercive provincial inquiry, overrunning as it does the rights of the citizen under our criminal laws, falls across the federal jurisdiction. Because of the gravity of the potential consequences to the individual resulting from a provincial encroachment on the criminal process, the courts should be very cautious in extending criminal related inquiries which the provinces may from time to time mount.

Cases Cited

By Dickson C.J.

Applied: *Faber v. The Queen*, [1976] 2 S.C.R. 9; *Attorney General of Quebec and Keable v. Attorney General of Canada*, [1979] 1 S.C.R. 218; *Di Iorio v. Warden of the Montreal Jail*, [1978] 1 S.C.R. 152; *Bisaillon v. Keable*, [1983] 2 S.C.R. 60; *Attorney General of Alberta v. Putnam*, [1981] 2 S.C.R. 267; referred to: *Re Nelles and Grange* (1984), 9 D.L.R. (4th) 79; *R. v. Hoffmann-La Roche Ltd.* (Nos. 1 & 2) (1981), 33 O.R. (2d) 694; *Attorney General of Canada v. Canadian National Transportation, Ltd.*, [1983] 2 S.C.R. 206; *Re Public Inquiries Act* (1919), 48 D.L.R. 237; *Reference Re the Adoption Act*, [1938] S.C.R. 398; *Kelly & Sons v. Mathers* (1915), 23 D.L.R. 225; *Batary v. Attorney General for Saskatchewan*, [1965] S.C.R. 465.

By Estey J. (dissenting)

Faber v. The Queen, [1976] 2 S.C.R. 9; Batary v. Attorney General for Saskatchewan, [1965] S.C.R. 465; Attorney General of Quebec and Keable v. Attorney General of Canada, [1979] 1 S.C.R. 218; Bisailon v. Keable, [1983] 2 S.C.R. 60.

Statutes and Regulations Cited

Canada Evidence Act, R.S.C. 1970, c. E-10.

Canadian Charter of Rights and Freedoms, ss. 7, 11 (h), 13.

Constitution Act, 1867, ss. 91(27), 92(6), (14), (16).

Inquiry Act, R.S.B.C. 1979, c. 198, s. 8; Police Act, R.S.B.C. 1979, c. 331, s. 40.

APPEAL from a judgment of the British Columbia Court of Appeal (1987), 36 D.L.R. (4th) 308, 33 C.C.C. (3d) 90, [1987] 3 W.W.R. 362 (sub nom. Robinson v. B.C. (Govt.)), affirming a judgment of Legg J. (1986), 3 B.C.L.R. (2d) 77, 28 C.C.C. (3d) 489, [1986] 4 W.W.R. 729, dismissing appellants' claim that Order in Council No. 590 was ultra vires of the province. Appeal dismissed, Estey J. dissenting.

Richard R. Sugden and George Sourisseau, for the appellant O'Hara.

A. G. Henderson, for the appellant Kirkbride.

Brian R. D. Smith, Q.C., and E. Robert A. Edwards, Q.C., for the respondents Her Majesty the Queen and the Attorney General of British Columbia.

Lucy Cecchetto, for the intervener the Attorney General for Ontario.

Yves de Montigny, for the intervener the Attorney General of Quebec.

Grant S. Garneau, for the intervener the Attorney General for New Brunswick.

William Henkel, Q.C., for the intervener the Attorney General for Alberta.

The judgment of Dickson C.J. and Beetz, McIntyre, Lamer, Wilson, Le Dain, La Forest and L'Heureux-Dubé was delivered by

1. The Chief Justice--This appeal raises the question whether the Constitution Act, 1867 authorizes a province to establish a commission to inquire into and report on an alleged wrongdoing by members of its own police forces, and equip such a commission with the power to conduct compulsory examinations of witnesses under oath.

I

Facts

2. Michael Jacobsen (who is not party to these proceedings) was arrested by police in a state of intoxication and incarcerated in a jail operated by the Vancouver City Police in Vancouver, British Columbia. The appellants O'Hara and Kirkbride are Vancouver City police officers who, along with four other officers, were on duty at the City Jail that night. Approximately five hours after his incarceration, Jacobsen was released and immediately sought medical assistance at a local hospital for a serious injury to his knee. Jacobsen complained that he had been assaulted by an officer or officers during his detention and that his injury was a result of that assault.
3. Following his complaint, the Vancouver City Police conducted an extensive internal investigation. The results of that investigation were forwarded to Regional Crown Counsel who determined that the evidence would not support criminal charges because of a lack of evidence identifying the assailant or assailants. The police authorities decided that no further action would be taken. Pursuant to s. 40 of the Police Act, R.S.B.C. 1979, c. 331, however, Jacobsen requested a public inquiry into the conduct of Corporal Nixon, who was the senior non-commissioned officer on duty in the City Jail at the time Jacobsen was detained. Jacobsen alleged that Nixon was the person who assaulted him. Moreover, Jacobsen commenced an action against the city of Vancouver, Chief Constable Stewart, the Vancouver Police Board and the police officers who were on duty that night, claiming damages for personal injuries arising out of the alleged assault.
4. An inquiry pursuant to s. 40 of the Police Act was established. After hearing evidence from Jacobsen, the police officers in question and twelve other witnesses, the Inquiry Panel of the Vancouver Police Board gave written reasons dismissing the complaint against Nixon, finding that there was no reliable evidence of identification against any individual officer. The Board concluded, however, that Jacobsen's injuries had been caused by an assault perpetrated by two or more of the police officers on duty that night and that some or all were involved in "covering up" the events. The Board asked that the Chief Constable, or alternatively the British Columbia Police Commission, undertake a review of the matter to ascertain what actually happened to Jacobsen on the night in question.
5. The civil action by Jacobsen against Chief Constable Stewart, Sergeant Cox, and the Vancouver Police Board was subsequently dismissed. The civil action against the other police officers was settled; the city paid.
6. The Lieutenant-Governor in Council, pursuant to the Inquiry Act, R.S.B.C. 1979, c. 198, promulgated Order in Council No. 590. The Order in Council appointed the respondents Matheson, Saunders and MacIntosh (who take no position in this appeal), members of the British Columbia Police Commission, as commissioners to inquire into and report on all matters associated with alleged injuries sustained by Jacobsen. The terms of the Order in Council are as follows:

1. A Commission be issued appointing Malcolm A. Matheson, chairman of the British Columbia Police Commission and Mary Saunders and Richard M. MacIntosh, both members of that Commission, to be commissioners under Part 2 of the Inquiry Act, to enquire into and report on all matters associated with the alleged injuries sustained by Michael Albert Jacobsen on September 30, 1983, and which were stated by him to have been caused during his detention in a Vancouver Police Station on that date; And upon results of the internal police inquiry, investigations and hearings following complaint by Mr. Jacobsen under the Police Act, and whether all relevant evidence was properly adduced and truthfully given at these inquiries and hearings. In particular the Commission is directed to enquire, investigate and report on
 - (a) all factors surrounding the detention of Jacobsen at the Vancouver Police Station on September 30, 1983, particularly, the reason for and the period of detention,
 - (b) whether Jacobsen sustained injuries while detained in Police custody and if so, the extent thereof, the person or persons who inflicted them, the reason for so inflicting them and the time and place the injuries were sustained,
 - (c) whether any member of staff of the Vancouver Police Force or any other person contributed to, or had or acquired knowledge of, Jacobsen's injuries, and if so, who were they, and where and to what extent did each contribute to the injuries, or have or acquire such knowledge,
 - (d) whether any police officer who had knowledge of the perpetration of assault (if any) on Jacobsen took steps to protect him from injury, and if not, why not, and
 - (e) all records of internal disciplinary investigations, legal proceedings and other inquiries which took place as a consequence of complaints by Jacobsen under the Police Act or by civil action against the Vancouver Police Force, and whether in the opinion of the commissioners evidence was falsified, not adduced or suppressed at any of these investigations, proceedings and inquiries, and if so, to what extent and, where appropriate, by whom . . .

The promulgation of Order in Council No. 590 was accompanied by a news release from the Ministry of the Attorney General of British Columbia which stated that the commissioners would hold a public hearing into the circumstances surrounding the alleged infliction of injuries "including the time, place, and by whom". The news release stated that the Commission would have "similar authority that normally rests with a judicial tribunal hearing a matter under the Criminal Code".

7. The appellants and the other police officers were summoned to appear before the Commission. The officers thereupon petitioned the British Columbia Supreme Court for an order declaring the Order in Council ultra vires of the province, an injunction restraining the inquiry commissioners from proceeding, and an order quashing the summonses as directed to them. Legg J. dismissed the petitions: (1986), 28 C.C.C. (3d) 489. An appeal to the British Columbia Court of Appeal was dismissed: (1987), 33 C.C.C. (3d) 90. Leave to appeal

the judgment of the Court of Appeal was granted by this Court.

II

Judgments

Report of the Public Inquiry Panel of the Vancouver Police Board

8. Ms. Kathleen Keating, Chairperson of the Public Inquiry Panel established under s. 40 of the Police Act on the complaint of Jacobsen, commented in her Report:

This is the most disturbing case that has come before this panel. It involves a young man who was arrested and taken to jail because he was considered to be too drunk to take care of himself after the driver of the car in which he was riding was arrested for impaired driving.

He arrived at the jail about 5 a.m. on September 30, 1983, a healthy 25-year-old, albeit intoxicated. Five hours later he was sent away with a smashed kneecap and the advice that he should "have that looked at right away". Although he was unable to bear weight on the leg, he managed to get himself to the hospital where he was operated upon that day and several times subsequently. It is unlikely that he will ever regain full movement in the knee.

In spite of the occurrence of what must be an unusual event -- however the broken kneecap might have occurred -- none of the seven officers and custodial guards who testified that they were on duty at the time, could recall anything at all out of the ordinary happening that morning.

The report concludes with the following passages:

This case is disturbing to the Board for a number of reasons. First and foremost: it is clear that between the time he arrived in the jail at about 5:00 a.m. on Sept. 30, 1983, and a time about half an hour later, Mr. Jacobsen suffered a severe injury. Despite some suggestions by several witnesses that it may have been incurred as a result of a fight in the cell or a fall while shuffling with his pants around his knees, there is nothing to corroborate either of these theories and no reason to disbelieve the testimony of Mr. Rice [who had been in the holding cell with Jacobsen]. The Board therefore is of the view that the injury was caused to Mr. Jacobsen by the actions of one or more of the persons on duty in the jail that night. However, it is quite true as submitted by Mr. Hall [counsel for Corporal Nixon], that there is no reliable evidence of identification on which to base a finding of guilt against any individual officer.

That leads to the second area of concern. It may be that no better identification could have been obtained in any event. But it is possible that proper identification evidence could have been obtained had another lineup procedure been used and used early in the investigation. The photo lineup that was introduced in evidence seemed very unsatisfactory, given the quality and age of some of the photos. The practice of having a group of officers attend in the courtroom and requiring the witness to inspect them there also is inappropriate. There are good reasons for conducting lineups in a proper setting under controlled circumstances and those reasons do not cease to apply when police officers are the accused.

Thirdly, there was on the night in question a breakdown in the record keeping procedures which ought to have been in effect in the jail. Corporal Nixon stated to the Investigating Officer that the nursing staff mentioned that they would be bringing up an icepack for a prisoner with a swollen knee. Yet he did not ensure that an appropriate notation was made in the logbook. Guard O'Hara passed the ice pack to the prisoner but did not ensure that a logbook entry was made. Notes that should have alerted jail staff, if they had been previously unaware of any incident, were made by the nurse doing rounds at 5:30 a.m. and by the second nurse five hours later. Those notes, or the observations contained in them, were never communicated to jail staff.

Fourthly, it is unacceptable that a prisoner should be released from the jail in the condition that Mr. Jacobsen was without so much as an offer to telephone for a taxi to take him to hospital.

Given the circumstances outlined above, the Board approves the decision of the disciplinary authority to take no action against Corporal Nixon.

However, the matter cannot rest there. A serious injury has occurred and no plausible explanation has been given except one which involves two or more officers in serious breaches of the Discipline Code. That explanation also leads to the inescapable conclusion that at least some of those officers who testified are involved in "covering up" the events of that night. To leave it at that would seriously undermine the integrity of the department in the eyes of the public which it serves and, we believe, in the eyes of its own members.

Therefore, the Board would ask the Chief Constable to undertake a review of this matter for the purpose of concluding: first, what actually happened to Mr. Jacob- sen on the night in question; and secondly, who was involved in that incident and in the subsequent cover up. Alternatively, it may be that the Chief Constable may prefer such a review to be undertaken by the British Columbia Police Commission and this would be satisfactory to the Board.

British Columbia Supreme Court

9. Before the Chambers Judge, Legg J., the six petitioning police officers claimed that the primary purpose of the Commission appointed under the Order in Council was to investigate whether particular offences occurred and if so, who was responsible; they submitted that the Order in Council required the commissioners to investigate whether the petitioners assaulted Jacobsen, whether they aided and abetted in his assault and whether they committed perjury when giving evidence at the Vancouver Police Board Inquiry; they said the Commission's terms of reference set out in the Order in Council exceeded the province's jurisdiction under s. 92(14) and (16) of the Constitution Act, 1867 and invaded the exclusive legislative authority of the Parliament of Canada under s. 91(27) of that Act. In support of the petitioners' position, counsel relied upon the decisions of the Ontario Court of Appeal in *Re Nelles and Grange* (1984), 9 D.L.R. (4th) 79, and *R. v. Hoffmann-La Roche Ltd.* (Nos. 1 & 2) (1981), 33 O.R. (2d) 694, and the decision of this Court in *Attorney General of Canada v. Canadian National Transportation, Ltd.*, [1983] 2 S.C.R. 206.

10. Counsel for the Attorney General of British Columbia acknowledged that the purpose of the Commission was to investigate allegations of unlawful behaviour and the identity of those who inflicted the injuries but contended that this was within the province's legislative authority under s. 92(14) and (16) of the Constitution Act, 1867. He submitted that the Order in Council was authorized by the British Columbia Inquiry Act. Section 8 of that Act authorizes the holding of an inquiry into "the administration of justice". He argued that there could be no doubt that the inquiry, aimed at determining the circumstances surrounding the treatment of a prisoner in the hands of the provincially constituted police force governed by the Police Act, was one involving the "administration of justice". The conduct of provincial police in the exercise of their duties was clearly a matter within s. 92(14) of the Constitution Act, 1867 and "the Administration of Justice in the Province". Counsel for the Attorney General further submitted that the passage from the reasons in *Nelles* relied upon by counsel for the petitioners was obiter dicta and not binding, and that the Court was bound by the decision of the Court of Appeal of British Columbia in *Re Public Inquiries Act* (1919), 48 D.L.R. 237 to hold that it is open to the province to establish a commission to report on specific activity which may impose criminal or civil liability on the part of a named person. Counsel argued that the constitutional restraint suggested by the Ontario Court of Appeal in *Nelles* was wrong and that there was no constitutional impediment to a province's authorizing an inquiry into the commission of crimes and to name names of offenders. Counsel relied as well on *Faber v. The Queen*, [1976] 2 S.C.R. 9; *Attorney General of Quebec and Keable v. Attorney General of Canada*, [1979] 1 S.C.R. 218 ("Keable No. 1"); *Di Iorio v. Warden of the Montreal Jail*, [1978] 1 S.C.R. 152; and *Bisaillon v. Keable*, [1983] 2 S.C.R. 60 ("Keable No. 2"), for the proposition that the inquiry was within the constitutional jurisdiction of the province.

11. After a lengthy review of the case law, Legg J. stated (at p. 505):

I have considered the effect of the release on the same day of the reasons in *Keable No. 2* and the reasons in the *Canadian National* case. Although the reasons of Chief Justice Laskin in *Canadian National* in fully endorsing the reasons of Mr. Justice Martin in *Hoffmann-La Roche* appear to place a limitation on the *Keable* decisions, there is no statement by the court in *Canadian National* which expressly disclaims the result pronounced by the court in *Keable No. 1* pronounced by Mr. Justice Pigeon at p. 67 C.C.C., p. 179 D.L.R., and which I have quoted, ante, p. 503 of these reasons. Indeed the decision in *Keable No. 1* is not referred to by the court in *Canadian National*. Moreover *Canadian National* was not concerned with the constitutional validity of a provincially enacted Order in Council. Rather it was concerned with whether it was within the competence of the Parliament of Canada to enact legislation (s. 2 of the Criminal Code and s. 15 of the Combines Investigation Act, R.S.C. 1970, c. C-23) to authorize the Attorney-General of Canada to prefer indictments and conduct proceedings in respect of alleged violations of that Act. I have therefore concluded that I am bound to apply the reasoning in the decision in *Keable No. 1* and *Keable No. 2* to the case at bar.

Applying those cases, he concluded (at p. 506):

In my respectful opinion, when the text of the whole Order in Council is examined in the context of the surrounding circumstances the inquiry which is authorized by the Order in Council may be fairly categorized as one which in pith and substance is an inquiry into the administration of justice in the province. The Order in Council is similar to the Order in Council in *Keable No. 1*. The reasoning of the decision of the Supreme Court of Canada in *Keable No. 1* is applicable and particularly the passage at p. 67 C.C.C., p. 179 D.L.R., of the reasons of Mr. Justice Pigeon which I have quoted earlier upholding the validity of the Commissioner's mandate "to the extent that it is for an inquiry into specific criminal activities". The Order in Council is also in accord with the reasoning of the Supreme Court in *Keable No. 2* which I have quoted, ante, p. 504 of these reasons where Mr. Justice Beetz stated ". . . a province can investigate the allegedly illegal or reprehensible behaviour of a police force within its constitutional jurisdiction, as well as the allegedly illegal actions of any peace officer".

For these reasons I consider that the Order in Council is within the legislative competence of the province. The arguments advanced by the petitioners contending that the inquiry is an invasion of the legislative authority of the Parliament of Canada under s. 91(27) of the Constitution Act, 1867 are rejected.

Legg J. went on to dismiss the appellants' claim (since abandoned) that the inquiry would contravene ss. 7, 11 (h) and 13 of the Canadian Charter of Rights and Freedoms. In so doing he said (at p. 507):

I agree with counsel for the Attorney-General that the commission of inquiry appointed by the Order in Council is a recommendatory not an adjudicative body. It will report findings to the Lieutenant Governor in Council. It will make no determinations as to guilt or innocence or civil or criminal liability. It cannot terminate the employment or otherwise discipline any person. Nor will its report necessarily lead to any subsequent proceedings against anyone. That being so, it cannot be said that the inquiry will deprive any person of liberty or security of the person . . .

adding:

It cannot be presumed that the proceedings before the commissioners appointed under the Order in Council will not be in accordance with the "principles of fundamental justice". Rather, it must be presumed that they will be. If they are not, they may be susceptible to judicial review at an appropriate juncture.

British Columbia Court of Appeal

12. Seaton J.A. (Craig and Esson JJ.A. concurring) delivered oral reasons dismissing the appeal. He stated (at p. 94):

The reasons of Mr. Justice Legg are complete and detailed. I agree with him that this inquiry is not an investigation of a crime, but an investigation of the administration of justice in British Columbia. That conclusion is in accordance with the decisions of the Supreme Court of Canada.

He added:

There was something very wrong at the Vancouver Police Station that night. Justice cannot be properly administered until what happened in this case is discovered, because only then can steps be taken to ensure that it does not happen again. As well, public confidence in the administration of justice is threatened by what has happened here. A public inquiry is necessary so that the public will know that this matter is being dealt with. Incidental to the inquiry, evidence might be discovered that would lead to charges being laid. That possibility does not make the inquiry ultra vires. I agree with Mr. Justice Legg. I would dismiss the appeal.

III

The Constitutional Question

13. On April 13, 1987, the constitutional question in this appeal was stated as follows:

Is Order in Council No. 590 promulgated March 19, 1986 ultra vires the province of British Columbia in whole or in part by reason of being legislation in relation to the Criminal Law including the procedure in criminal matters pursuant to s. 91(27) of the Constitution Act, 1867 ?

The Attorneys General of Ontario, Quebec, New Brunswick and Alberta intervened in the appeal in support of the Attorney General of British Columbia. The Attorney General of Canada did not take any position in the appeal.

IV

The Law

14. Section 92(14) of the Constitution Act, 1867 grants to provincial legislatures the authority to pass laws in relation to "The Administration of Justice in the Province, including the Constitution, Maintenance, and Organization of Provincial Courts, both of Civil and of Criminal Jurisdiction, and including Procedure in Civil Matters in those Courts". It has long been established by this Court that a province is responsible for, and has control and supervision of, law enforcement in the province with respect to provincial legislation and criminal law as defined by the federal Parliament. Duff C.J., in *Reference Re the Adoption Act*, [1938] S.C.R. 398, referred to provincial responsibility in this area as extending to "the policing of the country, the execution of the criminal law, the suppression of crime and disorder". Provincial responsibility for the "administration of justice" was more recently interpreted by Beetz J. in his concurring judgment in *Di Iorio*, supra, at p. 223 as follows:

Before Confederation, the provinces were in charge of the administration of justice, including criminal justice. It was contemplated by s. 91(27) of the British North America Act, 1867, that criminal law, substantive and procedural, would come under the exclusive legislative authority of the Parliament of Canada. But subject to this provision and to the paramountcy of federal law enacted under primary or ancillary federal jurisdiction, the provinces were to remain responsible in principle for the enforcement of criminal law and to retain such power as they had before with respect to the administration of criminal justice. They continued in fact to police their respective territories, to investigate crime, to gather and to keep records and informations

relating to crime, to prosecute criminals and to supervise police forces, sheriffs, coroners, fire commissioners, officers of justice, the summoning of juries, recognizances in criminal cases, and the like. [Emphasis added.]

15. Legg J. of the British Columbia Supreme Court indicated the general nature and effect of major cases on point and in my opinion correctly concluded that, despite Parliament's exclusive jurisdiction over criminal law and criminal procedure, s. 92(14) authorizes a province to establish an inquiry to investigate and report on alleged wrongdoings committed by members of a police force under its jurisdiction, and to enable such an inquiry to conduct compulsory examinations of witnesses.
16. I agree with the judgments of the British Columbia courts. I say this for two main reasons. First, it is well established that pursuant to s. 92(14) a province may create a commission or inquiry and, in certain circumstances at least, arm such a body with coercive investigatory powers. In *Faber*, for example, a majority of this Court held that a province may equip a coroner with coercive investigatory powers. Subsequent decisions of this Court have applied the *Faber* principle to uphold provincial inquiries into alleged police wrongdoing. See *Di Iorio*; *Keable No. 1*; *Attorney General of Alberta v. Putnam*, [1981] 2 S.C.R. 267; and *Keable No. 2*. See also the judgment of the Manitoba Court of Appeal in *Kelly & Sons v. Mathers* (1915), 23 D.L.R. 225 at p. 247, per Cameron J.A. In *Keable No. 1*, for example, Pigeon J. held that a province, under s. 92(14), is entitled to establish an inquiry into certain, specific, allegedly criminal activities of federal police officers, although it could not intrude into the management of a federal police force. He stated, at p. 242, that R.C.M.P. officers "enjoy no immunity from the criminal law and the jurisdiction of the proper provincial authorities to investigate and prosecute criminal acts committed by any of them as by any other person". In *Putnam*, the Court was faced with the issue whether the *Alberta Police Act*, 1973, S.A. 1973, c. 44 (now R.S.A. 1980, c. P-12), and its provisions respecting discipline and supervision could be said to constitutionally apply to provide a procedure whereby discipline could be meted out to R.C.M.P. officers who had engaged in activities outside the scope of police services contracted for by the province. Laskin C.J., for a majority of the Court, held that the disciplining of R.C.M.P. was an exclusive federal responsibility. In *Putnam*, the concern was not so much the potential of provincial usurpation of criminal evidence and procedure, but rather provincial interference in federal organizations.
17. Since *Keable No. 1* and *Putnam*, then, it is clear that the boundaries of the "administration of justice" do not include the discipline, organization and management of the R.C.M.P. In my dissent in *Putnam* I sought to make clear, however, that the "administration of justice" does include the organization and management of police forces created by provincial legislation. As I stated at p. 279:

It has never been doubted that constitutionally the phrase "Administration of Justice in the Province" included responsibility for providing general policing services. Thus it is clear that the province can appoint, control and discipline municipal and provincial police officers.

On this point, I did not understand any other member of the Court to disagree. Putnam thus illustrates that the scope of a provincial inquiry into provincial police wrongdoing is greater than an equivalent provincial inquiry into federal police forces. One of the concerns in this area -- provincial intrusion into the management of a federal organization -- is absent.

18. It is true that the authority to establish such an inquiry is not without limits. A province must respect federal jurisdiction over criminal law and criminal procedure. For example, a province may not compel a person charged with a criminal offence to testify as a witness before a provincial inquiry into the circumstances giving rise to that charge: *Batary v. Attorney General for Saskatchewan*, [1965] S.C.R. 465. Nor may a province enact legislation enabling a police officer to summon a suspect before an official and submit that suspect to a compulsory examination under oath with respect to his involvement in a crime solely for the purpose of gathering sufficient evidence to lay criminal charges. See *Attorney General of Canada v. Canadian National Transportation, Ltd.*, *supra*. In addition, a province may not rely on its jurisdiction over the "Administration of Justice in the Province" to intrude into the management of a federal organization. Thus, it is beyond the competence of a province to authorize an inquiry, concerned with investigating allegations of illegal or reprehensible acts by various police forces, including the R.C.M.P., to extend its inquiry into the administration and management of that police force: see *Keable No. 1* and *Putnam*. Despite these limitations, however, the jurisprudence of this Court leaves little doubt, if any, that a province in certain circumstances may endow provincial commissions of inquiry with coercive investigatory powers.
19. Secondly, I am of the view that those circumstances are present in the case at bar. Section 92(14) not only authorizes the establishment of provincial commissions of inquiry in certain circumstances, but also grounds provincial jurisdiction over the appointment, control and discipline of municipal and provincial police officers. Such was recognized unanimously by this Court in *Keable No. 2*. *Beetz J.* at p. 79 stated this principle in the following terms:

The mandate of respondent Commissioner is concerned not with the powers, duties and capacities of peace officers as determined by the criminal law, but with the manner in which they were in fact exercised in the circumstances described in the mandate. These are matters which fall within the administration of justice and which cover the discipline of police forces and their members. *Saulnier v. Quebec Police Commission*, [1976] 1 S.C.R. 572, is an illustration of this. In *Attorney General of Alberta v. Putnam*, [1981] 2 S.C.R. 267, this Court held that a province does not have the power to take disciplinary action against R.C.M.P. officers assigned to local police duties, but it implicitly recognized as axiomatic that a province has such a power over provincial and municipal police officers. *Dickson J.*, dissenting, but not on this particular point, wrote at p. 279:

Thus it is clear that the province can appoint, control and discipline municipal and provincial police officers.

By the same reasoning, a province can investigate the allegedly illegal or reprehensible behaviour of a police force within its constitutional jurisdiction, as well as the allegedly illegal actions of any peace officer. [Emphasis added.]

20. Counsel to O'Hara submits that the Order in Council at bar is quite simply not the same in its pith and substance as the one in Keable No. 1 and Keable No. 2. The central purpose of the Keable inquiry, it is said, was to investigate police procedures generally, a valid provincial purpose in relation to the administration of justice. It is argued that (i) in Keable No. 1 and Keable No. 2 the investigation of specific events was necessary as part of the Commission's broader mandate respecting police procedures generally and (ii) that mandate is completely absent from Order in Council No. 590. It is submitted that while a provincial inquiry may validly consider police conduct in aggregate, it may not inquire into specific events of alleged criminal conduct on the part of the police.
21. As I read the Terms of Reference of the Keable Commission 1977 (see [1979] 1 S.C.R. 218, at pp. 226-27) the Commission was required to investigate and report on four specific events, a certain search, an illegal entry, the setting of a fire and the theft of some dynamite, and the conduct of all persons involved in those acts and events. In respect of one of the events, namely, the search carried out during the night of October 6 to 7, 1972, at 3459 St. Hubert Street in Montréal, the Commission was asked to investigate and report on the discrepancy in the different versions that were given of this search. It is true that the final paragraphs of the mandate in Keable read:
 - (c) to investigate and report on the methods used during the acts referred to in paragraph (b) and the frequency of their use;
 - (d) to make recommendations on the measures to be taken to ensure that any illegal or reprehensible acts the Commission uncovers will not be repeated in future; [Emphasis added.]

but I do not regard this as a decisive distinguishing constitutional feature. In Keable No. 1, at p. 241 per Pigeon J., it was stated:

On the other hand, it appears to me that the majority opinion in *Di Iorio v. Warden of the Montreal Jail*, is conclusive of the validity of the Commission's mandate to the extent that it is for an inquiry into specific criminal activities. I can see no basis for a distinction between such an inquiry and an inquiry into "organized crime" as in *Di Iorio*, or a coroner's inquiry into a criminal homicide as in *Faber v. The Queen*, or a fire marshal's inquiry into arson as in *Regina v. Coote*. Notwithstanding all the arguments submitted by counsel for the Solicitor General of Canada, I find myself bound by authority to hold that such inquiries come within the scope of "The Administration of Justice in the Province".

Similarly, in Keable No. 2, it was held that an inquiry into a specific incident of wrongdoing by provincial police relates to the "Administration of Justice in the Province" and was accordingly within provincial legislative competence. Beetz J. at p. 78 stated:

Appellant raised a further argument, namely, that respondent Commissioner's mandate illegally covered specific acts which can only be the subject of a criminal pre-inquiry.

The same argument was raised in Keable No. 1 but it was dismissed by this Court

I would also dismiss this argument. [Emphasis added.]

22. A certain degree of overlapping is implicit in the grant to the provinces of legislative authority in respect of the administration of justice and in the grant to Parliament of legislative authority in respect of criminal law and criminal procedure. A matter may well fall within the legitimate concern of a provincial legislature as pertaining to the administration of justice, and may, for another purpose, fall within the scope of federal jurisdiction over criminal law and criminal procedure: *Di Iorio*, supra, at p. 207. Such is the case in the present appeal. The administration of justice in this country is reflected in and ensured by the provision of police services and other enforcement agencies responsible for the investigation, detection and control of crime within the respective provinces. The control and discipline of police forces is also necessary to the administration of justice. Section 92(14) of the Constitution Act, 1867 includes the administration of criminal justice: *Di Iorio*. A province has a valid and legitimate constitutional interest in determining the nature, source and reasons for inappropriate and possibly criminal activities engaged in by members of police forces under its jurisdiction. At stake is the management of the means by which justice is administered in the province. That such activity may later form the basis of a criminal charge and thus engage federal interests in criminal law and criminal procedure, does not, in my view, undermine this basic principle. As the Attorney General of British Columbia submits, the present inquiry is aimed at getting to the bottom of an incident of police misconduct which has undermined the proper administration of justice. The federal authorities have no jurisdiction over the discipline of the police officers who are the subject of the inquiry. There is no federal involvement in the actions of the Vancouver Police Force. The inquiry is mandated to investigate alleged acts of wrongdoing for purposes different from those which underlie criminal law and criminal procedure. The purpose of the inquiry is not to determine criminal responsibility. As such, it is no different from a coroner's inquiry, the constitutionality of which was affirmed by this Court in *Faber*, supra. Indeed, because the alleged wrongdoing occurred in a jail, the province possesses additional legislative authority to inquire into the events in question, in so far as s. 92(6) permits it to enact laws in relation to "[t]he Establishment, Maintenance, and Management of Public and Reformatory Prisons in and for the Province". Section 92(6) provides a constitutional anchor independent of s. 92(14) by which provincial jurisdiction over the inquiry can be secured. Reference might also be had to s. 92(16) of the Constitution Act, 1867, which provides that a province may legislate in respect of "Generally all Matters of a merely local or private Nature in the Province".

23. As stated, there are limits to a province's jurisdiction to establish an inquiry and equip it with coercive investigatory authority. Broadly speaking, those limits are twofold in nature. First, a province may not interfere with federal interests in the enactment of and provision for a uniform system of criminal justice in the country as embodied in the Criminal Code . An inquiry enacted solely to determine criminal liability and to bypass the protection accorded to an accused by the Criminal Code would be ultra vires of a province, being a matter relating to criminal law and criminal procedure. This limitation on provincial jurisdiction is an acknowledgement of the federal nature of our system of self-government. Secondly, neither a province nor Parliament may infringe the rights of Canadian citizens in establishing inquiries of this kind. This limitation is of a different sort. It is an acknowledgement of a respect for individual rights and freedoms and is embodied in the common law, various acts of both levels of governments, including the Canada Evidence Act, R.S.C. 1970, c. E-10, and, more recently, the Charter . Thus, neither level of government may establish and insist upon procedures which infringe fundamental rights and freedoms, such as the right against self-incrimination as it is defined in our law. It will suffice to say that while the appellants framed their arguments in terms strongly reminiscent of a challenge to the constitutionality of the inquiry based on the latter set of concerns, this Court was asked only to address its constitutionality in terms of the distribution of powers between the two levels of government. I therefore express no opinion upon the nature and extent of rights guaranteed by the Charter and the law of evidence as they relate to the inquiry's proceedings except to say that those rights, of course, must be respected by the relevant authorities.

V

Conclusion

24. The constitutional question should be answered in the negative. Accordingly, I would dismiss the appeal with costs.

The following are the reasons delivered by

25. Estey J. (dissenting)--With all respect and after much consideration of the two constitutional provisions raised in this appeal, namely s. 92(14) and (6) of the Constitution Act, 1867 , I conclude that this appeal should be allowed. The facts and the applicable constitutional provisions are set out in the reasons of the Chief Justice and need no repetition here.
26. The provincial inquiry undertaken pursuant to s. 40 of the Police Act, R.S.B.C. 1979, c. 331, determined that the injury to Jacobsen had been caused by an assault upon him by two or more police officers in a jail. All that remained was for the inquiry now established under the Inquiry Act of the province to determine the guilty person or persons and to obtain the information necessary to lay and to prosecute the appropriate criminal charges.

27. In *Batary v. Attorney General for Saskatchewan*, [1965] S.C.R. 465, this Court set out the basic constitutional requirement with respect to provincial inquiries in the form of coroner's inquests associated as they frequently are with the criminal process. Cartwright J. (as he then was) states at pp. 476 and 478:

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. In the absence of clear words in an Act of Parliament or other compelling authority I am unable to agree that that is the state of the law.

...

. . . I am of opinion that any legislation, purporting to ... alter the existing rules which protect a person charged with crime from being compelled to testify against himself, is legislation in relation to the Criminal Law including the Procedure in Criminal Matters and so within the exclusive legislative authority of the Parliament of Canada under head 27 of s. 91 of the British North America Act.

The existence of an outstanding charge is not decisive on the question of the propriety of a provincial inquiry as part of the preliminaries in a criminal process.

28. Perhaps the high water mark for provincial agency activities in criminal law enforcement was reached in *Faber v. The Queen*, [1976] 2 S.C.R. 9. The majority, speaking through de Grandpré J., approved a coroner proceeding as being prior to the onset of the criminal process and as a validly appointed provincial agency. Prejudice to the individual charged or likely to be charged was not considered by the Court. The risk of proceeding further in this direction is well sounded by Pigeon J. in dissent where he stated (at pp. 17-18):

In my view, the decision in *Batary*, although rendered in a case where the suspected person was actually charged before the inquest, is equally applicable where a person is likely to be charged. The legislation under consideration purported to replace a provision expressly dealing with both situations on the same footing and it was held invalid on the basis that it was "in relation to the Criminal Law including the Procedure in Criminal Matters". No distinction was made in pronouncing such invalidity on that basis and this conclusion on the character and validity of the legislation cannot be treated as restricted to the particular situation arising out of the facts of the case. Even if it could be so considered, the same conclusion should be reached in the instant case as to the character of the coroner's inquest.

29. These and similar considerations arose in *Attorney General of Quebec and Keable v. Attorney General of Canada*, [1979] 1 S.C.R. 218 ("Keable No. 1"). What I had occasion to say on that appeal is, in my view, apt here and I take the liberty of repeating a short passage (at pp. 254 and 256):

I do not read the Di Iorio case [Di Iorio v. Warden of the Montreal Jail, [1978] 1 S.C.R. 152], as going so far as to permit the invasion by provincial action of the sanctity of the right to remain silent during what is in truth and substance a criminal investigation. The investigation of the incidence of crime or the profile and characteristics of crime in a province, or the investigation of the operation of provincial agencies in the field of law enforcement, are quite different things from the investigation of a precisely defined event or series of events with a view to criminal prosecution. The first category may involve the investigation of crime generally and may be undertaken by the invocation of the provincial enquiry statutes. The second category entails the investigation of specific crime, the procedure for which has been established by Parliament and may not be circumvented by provincial action under the general enquiry legislation any more than the substantive principles of criminal law may be so circumvented.

...

The circumstance, sometimes almost accidental or at least undirected, of the existence or non-existence of a charge by indictment, information or otherwise, is not, in my view, of controlling significance when determining the constitutional status of a process such as we are now considering.

It may be, of course, that a valid provincial inquiry might mandate an investigation that leads from the general into the specific and from criminal activities at large to the commission of actual crimes by known or unknown individuals. It is obvious that no formula can be produced which will immediately classify an inquiry by a province as being within or without its constitutional mandate. Again from the Keable No. 1 judgment, *supra*, at p. 257:

It is the Criminal Code which sets forth the procedure prescribed by the sovereign authority, the Parliament of Canada, and which is to be followed in the investigation of crime and in the prosecution of ensuing charges. The Province, in the discharge of its role under s. 92(14) of The British North America Act may be required, or may find it convenient, to examine by the usual executive agencies or by a commission of enquiry, the operation of its policing facilities and personnel, and the prevalence of crime and its nature in the Province. Such was the case before the Court in Di Iorio, *supra*. At the other end of the scale, the enforcement agencies of the Province may of course investigate allegations or suspicions of specific crime with a view to the enforcement of the criminal law by prosecution. This investigation must be in accordance with federally prescribed criminal procedure and not otherwise, as for example, by coercive enquiry under general enquiry legislation of the Province.

30. The overriding consideration, in my view, was described in Keable No. 1, *supra*, and again is apt here (at p. 258):

One of the main bastions of the criminal law is the right of the accused to remain silent. In the coldest practical terms, that right, so long as it remains unaltered by Parliament, may not be reduced, truncated or thinned out by provincial action.

31. The main and apparently only object of the inquiry here under review is the continuation of the work of earlier inquiries into these events so as to isolate and identify the actual wrongdoers with a view to prosecution. In my view, this circumstance provides an unsound basis upon which to expand or project the comments of this Court in *Faber*, *supra*. Rather, these circumstances call to mind the warnings of Pigeon J., *supra*, in that same case.
32. Admittedly it is a very thin line whether the use of a coercive provincial inquiry, overrunning as it does the rights of the citizen under our criminal laws as these rights have been built up over the years in federal procedural and substantive law, falls across the federal jurisdiction. Because of the gravity of the potential consequences to the individual resulting from a provincial encroachment on the criminal process, the courts, in my view, should be very cautious in extending the criminal related inquiries which the provinces may from time to time mount.
33. Section 92(6) might well have afforded a constitutional jurisdictional base for the provincial action under its Inquiry Act had the Order in Council which established the inquiry set out broad institutional objectives analogous to those provisions viewed favourably by this Court in *Bisaillon v. Keable*, [1983] 2 S.C.R. 60. The mandate of this inquiry, however, is narrow and is targeted squarely on the discovery of the identity of the wrongdoers. In the result I conclude that as s. 92(14) cannot properly sustain such an inquiry in these circumstances neither can s. 92(6) .
34. I would therefore allow the appeal.

Appeal dismissed with costs, Estey J. dissenting.

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