

SWINTON J.:

Overview

[1] At issue in these two applications for judicial review are the decisions of two coroners not to issue a summons to an employee of the Ontario Ministry of the Attorney General to give evidence before an inquest respecting the selection and composition of the jury roll in the Thunder Bay district. In particular, the applicants sought information about the representation of First Nations individuals from reserves on the jury roll.

Background

The Reggie Bushie Inquest

[2] Reggie Bushie (“Reggie”) was a 15-year old First Nations individual from Poplar Hill First Nation. Poplar Hill is a remote fly-in community located 120 kilometers north of Red Lake, Ontario.

[3] In September 2007, Reggie left his community to attend high school in Thunder Bay. He lived in a billeting style arrangement with a family in Thunder Bay.

[4] On October 26, 2007, Reggie went missing. His body was found in the McIntyre River in Thunder Bay on November 1, 2007. The post-mortem examination concluded that death was consistent with fresh water drowning.

[5] The coroner decided to hold an inquest into his death pursuant to s. 20 of the *Coroners Act*, R.S.O. 1990, c. C.37 (“the Act”). The inquest is to “explore issues concerning how First Nation youths are impacted when attending school far away from their home communities”.

[6] The applicant in Court File 75/09, Nishnawbe Aski Nation (“NAN”), is a political territorial organization representing 49 First Nations communities throughout the province of Ontario. It encompasses James Bay Treaty 9 territory and Ontario’s portion of Treaty 5. The total approximate population of NAN First Nations members, on and off reserve, is 45,000.

[7] NAN had pressed the coroner to hold an inquest into the deaths of several First Nations students like Reggie, who were living away from their communities so that they could attend school. It has been granted public interest standing at the inquest. Reggie’s mother and step-father, the King family, have also been granted standing.

[8] NAN became concerned about the way in which the jury roll had been constituted as a result of information disclosed in the fall of 2008 at an inquest in Kenora concerning

the death of two First Nations individuals. In that inquest into the deaths of Ricardo Wesley and Jamie Goodwin, an employee of Kenora Court Services, Rolanda Peacock, provided an affidavit setting out the process for obtaining the names of First Nations individuals for the jury roll in the Kenora district. She indicated that Indian and Northern Affairs Canada (“INAC”) had ceased providing band electoral lists to the provincial jury centre in 2000. She also described attempts that had subsequently been made to obtain band lists from reserves, first by a letter faxed to 42 bands (of which four replied) and then by visits in 2007 to 14 communities, resulting in lists from eight bands. There were 44 First Nations individuals on the Kenora district jury roll.

[9] The King family raised concerns about the Thunder Bay district jury roll in a telephone call with coroner’s counsel on November 25, 2008. Counsel responded, “I believe the 1st Nations Community of Fort William is appropriately represented within the jury pool for Thunder Bay but that issue can be discussed more fully at the pre-inquest meeting in December”.

[10] On December 11, 2008, counsel for the King family again expressed concern about the jury roll and whether the *Juries Act*, R.S.O. 1990, c. J. 3 had been complied with. Coroner’s counsel replied that based on a review of the case law and information about current practices for preparing the jury roll in the Thunder Bay district, she believed that practices complied with the *Juries Act*.

[11] Counsel for the Kings asked for further information, including the name of the person who had provided information about the jury roll. She was advised that the individual was Robert Gordon, Director of Court Operations (North Region).

[12] Counsel for the Kings subsequently made a request on January 7, 2009, supported by NAN, that a summons be issued to Mr. Gordon. In the request, the parties stated that they wished to examine Mr. Gordon about the compilation of the jury roll in the Thunder Bay district on the ground that there was reason to believe that the jury roll is not in compliance with the *Juries Act*. They also sought information about the process used to select the jury to determine whether the selected jurors were free of interest or bias.

[13] On January 8, 2009, the coroner, Dr. Eden, advised that he was not satisfied that Mr. Gordon’s evidence was relevant. He gave a brief period for the parties to provide supplementary submissions on the reasons for the issuance of a summons and the specific areas in which evidence would be elicited.

[14] On January 13, 2009, Dr. Eden denied the motion, refusing to issue the summons. He concluded that the Kenora affidavit was not “adequately probative” to impugn the 2009 Thunder Bay district jury roll. Nor did he find useful an article by Mark Israel, “The Underrepresentation of Indigenous Peoples on Canadian Jury Panels” (2003), 25 *Law & Policy* 37, as it did not provide direct information about the Thunder Bay district jury roll. In his view, the currently available information about the jury roll represented adequate grounds to proceed with the inquest, and there was no need for further inquiry

into the process of jury selection. Coroner's counsel had enquired broadly enough, and he was satisfied that an adequate process had been employed in jury selection.

[15] He also rejected the parties' argument that natural justice is violated if the parties are not provided with disclosure about the process for selection of the jury. He noted that the Act confers the responsibility on the coroner to ensure the jury is properly constituted and impartial. Nevertheless, he accepted that parties

certainly have the right and the obligation to bring to the Coroner's attention any concerns about the jury, but parties have neither legal authority nor entitlement to decide whether a jury is in compliance with legislation.

[16] NAN has brought this application for judicial review seeking an order quashing the coroner's ruling and directing him to issue a summons to Mr. Gordon. NAN also seeks an order requiring the coroner to provide information on the way in which the jury for the inquest is being selected.

[17] The inquest, originally scheduled to hear evidence on January 19, 2009, was rescheduled to June 8, 2009. It has been further postponed to September 2009 as a result of this application for judicial review and a stay of proceedings granted by a motions judge of this Court.

[18] Subsequent to the launching of this application for judicial review, the coroner made a ruling on May 25, 2009 with regard to jury composition. He granted the motion in part, allowing a *Parks* type question to be put to jurors. He also refused to direct that the jury be constituted with a specific number of First Nations persons, or that the sheriff be directed to provide a list of names that includes persons living on Indian reserves in the Thunder Bay district.

The Pierre Inquest

[19] Jay Duncan Pierre was a citizen of Fort William First Nation. He died on October 27, 2007 as a result of a drug overdose, while on remand in the Thunder Bay District Jail. Because of his death in custody, the coroner ordered an inquest pursuant to s. 10(4) of the *Coroners Act*. His family was granted party status.

[20] After the Pierre family learned of the underrepresentation of First Nations people on the Kenora district jury roll, they sought information from the Office of the Chief Coroner and then the Ministry of the Attorney General about the composition of the jury roll in the Thunder Bay district.

[21] In a letter dated January 22, 2009, Lorraine Cavion, counsel to the Coroner, wrote:

With respect to your enquiry regarding the jury roll, I would point out that the Coroner's Office does not administer or supervise the compilation of jury rolls and would therefore suggest that you seek the information you require directly from the Ministry of the Attorney General, which administers the *Juries Act*.

If you have any information to the effect that the relevant jury roll may not be compiled in accordance with the *Juries Act*, the Coroner asks that you provide it to me at your earliest opportunity so that the Coroner may take appropriate action.

The letter also stated that the coroner had directed the constable to screen potential jurors for hostility and bias against Aboriginal persons.

[22] On February 2, 2009, the Pierre family filed a Notice of Motion in relation to the jury selection process, asking Dr. McRae, the presiding coroner, about how she screened potential jurors for hostility against First Nations people. They also asked that at least three First Nations jurors be selected for the jury.

[23] The family was advised that jury selection had been completed in accordance with the customary procedure used by coroners and as required by the *Coroners Act*. In her ruling dated February 19, 2009, Dr. McRae described the process used for jury selection and stated that there was no evidence before her to establish that the Thunder Bay district jury roll was unrepresentative of the community, or that an impartial jury could not be selected from it. She concluded as follows:

As part of the normal procedure at the beginning of the inquest, the Coroner asks the juror to declare if they have any biases and reviews a list of potential sources of bias, I am prepared to include "bias for or against Aboriginal persons" to that list – if they do not default at that point they will then be sworn to render a verdict without partiality or bias.

This proposal was, in fact, used by the coroner on the first day of the inquest.

[24] The family then asked that a summons be issued to Mr. Gordon to speak to the validity of the jury roll prior to the swearing in of the jury. Mr. Gordon had refused to respond to any questions about the jury roll posed by the family, directing them to the coroner.

[25] On February 20, 2009, counsel for the coroner informed the family that a summons would not be issued for Mr. Gordon to appear on February 23. The letter stated, "It would be reasonable to summons this witness on such short notice only if his evidence were vital to the purpose of the inquest, that is, an investigation of Mr. Pierre's death".

[26] The family then launched an application for judicial review and also sought an order staying the coroner's inquest. The stay motion was dismissed on February 25, 2009.

[27] The family withdrew from participation in the inquest on February 24, 2009, following the conclusion of the argument of the stay motion, because of the failure of the coroner “to ensure that Aboriginal persons will be represented on the Jury”.

[28] The inquest proceeded, resulting in a verdict dated February 25, 2009 and a number of recommendations from the jury.

[29] The family’s application for judicial review initially raised three issues: the failure to summons Mr. Gordon, the refusal to provide information about the jury selection process used by the constable, and the question put to potential jurors respecting bias. At the hearing of this application for judicial review, the applicants did not proceed with the argument respecting the question put to the jurors.

The Statutory Context

The Coroners Act

[30] Section 31 of the *Coroners Act* sets out the purposes of an inquest: to determine the five questions of who the deceased was and how, when, where and by what means the deceased died. Pursuant to s. 31(3), the jury may make recommendations directed to the avoidance of death in similar circumstances, although it can make no findings of legal responsibility. Thus, there is both an investigative function and a separate social and preventive function for an inquest.

[31] These purposes of a coroner’s inquest were described in the 1971 report of the Ontario Law Reform Commission on the coroner system, quoted in *People First of Ontario v. Porter, Regional Coroner Niagara*, [1991] O.J. No. 3389 (Div. Ct.) at para. 41:

... the inquest should serve three primary functions: as a means for public ascertainment of facts relating to deaths, as a means for formally focusing community attention on and initiating community response to preventable deaths, and as a means for satisfying the community that the circumstances surrounding the death of no one of its members will be overlooked, concealed, or ignored.

[32] Sections 33 to 36 of the Act set out the process for selecting a jury. Pursuant to s. 33, the jury is to be composed of five persons. Section 34 empowers the coroner to issue a warrant to obtain names from the jury roll from the sheriff for the area in which the inquest is to be held. It states:

34.(1) A coroner may by his or her warrant require the sheriff for the area in which an inquest is to be held to provide a list of names of such number of persons as the coroner specifies in the warrant taken from the jury roll prepared under the *Juries Act*.

(2) Upon receipt of the warrant, the sheriff shall provide the list containing names of persons in the number specified by the coroner, taken from the jury roll prepared under the *Juries Act*, together with their ages, places of residence and occupations.

The forms for the coroner's warrant and the sheriff's list of names are specified in Forms 5 and 6, O. Reg. 264/99.

[33] The actual selection of the jury from the list is made by a constable directed by the coroner to select five suitable persons to serve on the jury (s. 33(2)). The coroner can exclude a person from serving on a jury if the coroner believes that "there is a likelihood that the person, because of interest or bias, would be unable to render a verdict in accordance with the evidence" (s. 34(6)).

[34] Section 36 provides that jury irregularities are not to affect the outcome, stating:

The omission to observe any of the provisions of this Act or the regulations respecting the eligibility and selection of jurors is not a ground for impeaching or quashing a verdict.

[35] In addition to the statutory provisions governing jury selection, the regulations under the *Coroners Act* set out grounds for disqualification of prospective jurors because of interest or bias: direct pecuniary or personal interest, personal hostility, personal friendship, family relationship, professional or vocational relationship and employer-employee relationship (R.R.O. 1990, Reg. 180, s. 2).

[36] With respect to the conduct of an inquest, s. 40 of the Act empowers the coroner to issue a summons in the following terms:

A coroner may require any person by summons,
 (a) to give evidence on oath or affirmation at an inquest; and
 (b) to produce in evidence at an inquest documents and things specified by the coroner,
 relevant to the subject-matter of the inquest and admissible.

[37] Section 50 of the Act empowers the coroner to make such orders as he or she considers proper to prevent an abuse of process.

The Juries Act

[38] Sections 2 through 4 of the *Juries Act* govern the eligibility of jurors.

[39] Sections 5 through 11 go on to deal with the preparation of jury rolls. Each year on or before September 15, the sheriff for a county shall determine the number of jurors

required for the following year and notify the Director of Assessment (s. 5). The Director of Assessment then mails jury service notices to persons selected at random from the most recent enumeration of inhabitants of a county under the *Assessment Act* (s. 6(2)).

[40] Subsection 6(8) deals with Indian reserves, stating,

In the selecting of persons for entry in the jury roll in a county or district in which an Indian reserve is situate, the sheriff shall select names of eligible persons inhabiting the reserve in the same manner as if the reserve were a municipality and, for the purpose, the sheriff may obtain the names of inhabitants of the reserve from any record available.

[41] Each year, the sheriff is to prepare a jury roll in the form prescribed by the regulations (s. 7), listing the names of those who return jury service notices.

The Broader Context

[42] The applicants have brought these applications because of their concern that First Nations people have historically been excluded from juries in Canada. Having seen the Peacock affidavit relating to the Kenora district, having learned that INAC ceased providing band electoral lists in 2000 and considering the history of exclusion of Aboriginal people from juries, they fear that the Thunder Bay district jury roll is underrepresentative of First Nations people.

[43] The King family's factum relates the sad history of the exclusion of Aboriginal people from participation in the jury system. Historically in Canada, jurors, including those serving on coroners inquests, were drawn from the municipal voters' list. In 1974, the *Coroners Act* was amended so that names were obtained from the jury roll prepared under the *Juries Act*.

[44] According to Israel, "The Underrepresentation of Indigenous People on Canadian Jury Panels" (above at p. 39):

The laws of each Canadian province and territory govern the assembly of a source list of persons qualified to be jurors, the exclusion of those who are disqualified, and the selection of the jury panel from the list of qualified jurors. Historically, this process has had a racial bias as members of the First Nations were barred from sitting on juries by provincial legislation. Between 1875 and 1922 most "Indians" were removed from the voters' roll, the main source list for juries. Indigenous people did not reappear on the roll throughout the country until 1969. Consequently, Inuit first served as jurors in 1957, and other indigenous Canadians perhaps only as late as 1972.

The Issues

[45] The following issues arise in these applications:

1. What is the applicable standard of review?
2. Should the NAN application be dismissed as premature?
3. Did the coroners err in refusing to issue a summons to Robert Gordon?
4. Did the manner in which Dr. Eden dismissed the motion for a summons in the Bushie inquest violate the rules of natural justice?
5. What process should be followed by Dr. Eden with respect to entertaining the applicant's inquiries as to the validity of the jury roll, should the application for judicial review succeed?

Analysis

Issue No. 1: What is the applicable standard of review?

[46] In their factum, the applicants submit that the applicable standard of review is correctness, as they frame the issue before the coroners as the legality of the Thunder Bay district's jury roll and compliance with the *Juries Act*. They submit that there is no privative clause in the *Coroners Act*, and the coroner has no special expertise with respect to legal issues concerning jury selection. They also submit that the nature of the question of law in issue – the legality of the Thunder Bay district jury roll – is of central importance to the legal system.

[47] While that is the argument raised in their factum, I note that their argument before this Court was not directed at compliance or non-compliance with the *Juries Act*. Rather the alleged error by the coroners was their refusal to issue a summons to Mr. Gordon, so that he could give evidence about the selection and composition of the Thunder Bay district jury roll, thus showing whether there is a problem that needs to be addressed further.

[48] The coroners submit that the standard of review is reasonableness. They argue it is well established that courts will afford a coroner considerable deference and will intervene only where there is jurisdictional error or a serious error producing an unfair inquest. They submit that this standard applies equally to the coroner's powers to select a jury as to decisions of a medical nature.

[49] Since the decision of the Supreme Court of Canada in *Dunsmuir v. New Brunswick*, 2008 SCC 9, the first step in determining the appropriate standard of review is "to ascertain whether the jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded with regard to a particular category of question" (at para. 62). If not, the court must conduct a standard of review analysis.

[50] The standard of review of a coroner's decisions was discussed in *People First of Ontario v. Porter, Regional Coroner Niagara*, above at para. 113. An appeal from this decision was allowed, without comment on the standard of review ((1992), 6 O.R. (3d) 289 (C.A.)).

[51] The Divisional Court observed that there was no appeal from a decision of the coroner and concluded that it should intervene only where there has been jurisdictional error. However, "[a] serious error in legal principle which produces an unfair inquest would amount to a jurisdictional error". The Court went on (at para. 18):

But it is not every aspect of an inquest that attracts judicial review. As Chief Justice Dubin pointed out in *Evans v. Milton* (1979), 24 O.R. (2d) 181 at p. 220, 97 D.L.R. (3d) 687, it is not every step taken in the convening of an inquest, or every ruling made during its preliminary stages, or at the inquest itself, that is subject to judicial review.

The public interest requires that the coroner be able to go about her job without intermittent interference by the courts, particularly on issues within the specialized medical and curial expertise of the coroner.

[52] In that case, the Court held there should be a strong degree of curial deference, because the issues raised in the rulings involved medical questions, such as disclosure of medical records, cross-examination on the course of illness and the medical cause of death. All of these issues fell within the coroner's specialized medical expertise.

[53] Similarly, in *Katz v. McLellan*, [2002] O.J. No. 4219 (Div. Ct.), Carnwath J. stated (at para. 2):

The standard of review of a coroner's decision on standing is one of curial deference. Only where the coroner commits a serious error in principle that results in unfairness or a denial of justice should we interfere. We are directed to exercise "real restraint" in any review. This deference is easily explained by the experience and expertise coroners bring to their duties and is explained by their special understanding of the Act and the public interest enshrined therein.

Thus, existing case law suggests considerable deference to the rulings of a coroner. However, these cases did not deal with decisions of the coroner about jury selection.

[54] In the present applications, issue is taken with the coroners' rulings refusing to issue a summons to a witness in order to determine the state of the jury roll in the Thunder Bay district. As I noted above, the issue determined by the coroners was not compliance or non-compliance with the *Juries Act*, as the applicants seemed to suggest in their factum. In essence, the applicants argue that there *may* be a fundamental failure of justice if Mr. Gordon is not examined, as they have good reason to believe that the jury roll for the Thunder Bay district has not been legally constituted.

[55] Therefore, the question before the coroners was one both of law and mixed law and fact. One question of law before the coroners went to their jurisdiction – namely, whether they had the power to inquire into and ultimately determine the legality of the process used for selection of the jury roll. In addition, the coroners made determinations of mixed fact and law – that is, the sufficiency of the material submitted to show the relevance of Mr. Gordon’s testimony to the purpose of the inquests, which were to inquire into the deaths of Mr. Bushie and Mr. Pierre.

[56] On questions of fact, deference is owed to the coroner (*Dunsmuir, supra* at para. 53). However, on questions of law concerning the scope of the coroner’s powers to determine the validity of the jury roll, the standard of review is correctness. The issue of statutory interpretation concerning the inquiry into the jury roll selection process is outside the medical expertise of the coroner. Moreover, this issue raises a true question of jurisdiction, which is always subject to a standard of correctness (at para. 59).

[57] The third issue raised in the NAN application is an alleged denial of natural justice. No standard of review analysis is required when there is an allegation of a denial of procedural fairness or natural justice. Rather, the role of the court is to determine whether the appropriate level of fairness has been accorded.

Issue No. 2: Should the NAN application be dismissed as premature?

[58] The coroner argues that the NAN application for judicial review is premature, because it has been brought prior to the conclusion of the inquest.

[59] The Divisional Court and the Court of Appeal in *People First*, above, expressed the view that applications for judicial review in the course of an inquest are undesirable. Moreover, this Court has often rejected applications for judicial review on the ground of prematurity, on the basis that fragmentation of the process of administrative tribunals should be avoided (*Ontario College of Art v. Ontario (Human Rights Commission)*, [1993] O.J. No. 61 (C.A.) at para. 4). Only in exceptional circumstances should such an application be granted, in order to prevent a fundamental failing of justice (*Sears Canada Inc. v. Ontario (Regional Coroner, Southwest Region)*, [1997] O.J. No. 1424 (Div. Ct.) at para. 11).

[60] Given the position taken by the coroner in the Pierre application, I would not give effect to the prematurity argument in the NAN application.

[61] In the Pierre case, the coroner, Dr. McRae, argues that the application for judicial review should be dismissed because of the curative provision in s. 36 of the *Coroners Act*. That provision states that the omission to observe any of the provisions of the Act or regulations as they relate to jury selection is not a ground for impeaching or quashing a jury verdict. As the Pierre family has not alleged that the inquest was unfair, the coroner submits that the application for judicial review should be dismissed because of s. 36 of the Act: any irregularity in the jury selection process does not invalidate the verdict.

[62] If the coroner is correct in its argument in the Pierre application, then the argument of prematurity in the NAN application should be dismissed. Otherwise, the coroner's refusal to inquire into the jury roll selection process would be immunized from judicial review. If NAN is correct in its submission that there is a fundamental problem with the jury selection, that matter should be addressed at this point so as to avoid the prospect of an unfair process. Therefore, I would not dismiss the NAN application on the grounds of prematurity.

Issue No. 3: Did the coroners err in refusing to issue a summons to Robert Gordon?

[63] Subsection 40(1) of the *Coroners Act* authorizes the coroner to issue a summons to a person to give evidence "relevant to the subject-matter of the inquest and admissible". A party who seeks the issuance of a summons has the onus to satisfy the coroner that there is some nexus between the anticipated evidence of the proposed witness and the purpose of the inquest.

[64] The applicants argue that the coroners erred in not issuing the summons, because the coroners ignored the importance of transparency in the jury selection process. Absent information about the jury selection process, the applicants argue, there will be a loss of public confidence in the inquest process. They also submit that the material put before the coroners, such as the Peacock affidavit, the Israel article and the failure of INAC to provide band lists since 2000, shows that there is a reasonable basis to require Mr. Gordon to give evidence.

[65] The coroners submit that no error has been made. As they had no jurisdiction to inquire into the preparation of the jury roll, nor any power to remedy any problems with it, the refusal to issue a summons was a reasonable decision that should be respected by this Court. It can not be characterized as a jurisdictional error or a serious legal error that will result in an unfair inquest.

[66] The determination of the function, powers and duties of a coroner falls within the domain of the Legislature. The *Coroners Act* sets out a detailed process for selecting juries. It authorizes the coroner to issue a warrant to the sheriff in Form 5 under s. 12 of O. Reg. 264/99 for a list of names "taken from the jury roll prepared under the *Juries Act*" (s. 34(1)). The sheriff is to provide names taken from the jury roll prepared under the *Juries Act* (s. 34(2)). From these names, the coroner's constable is to select five jurors.

[67] The Act does not provide a role for those granted standing to participate in jury selection. Instead, the Act provides for jury selection to be completed by the coroner's constable outside the presence of the parties, and an omission to observe any part of the Act in the selection of jurors is not a ground to impeach or quash a verdict (s. 36).

[68] In my view, the coroners made no jurisdictional error or any error in legal principle when they refused to issue a summons to Mr. Gordon, as they had no statutory power to review the process for the selection of the jury roll or to provide any remedy if it were shown to be flawed.

[69] The Coroner has a defined and important function – to investigate the circumstances of the death of a member of the community. He or she is to do so with an impartial jury selected in accordance with the *Coroners Act* – for example, through the exclusion of a person who, because of interest or bias, would be unable to render a verdict in accordance with the evidence (s. 34(6)). In their efforts to ensure an unbiased jury, Dr. Eden has accepted a *Parks* type question for potential jurors, and Dr. McRae put a question about bias for and against Aboriginal persons.

[70] The *Coroners Act* is clear. It gives the coroner the power to seek names from the jury roll from the sheriff. However, the coroner has no authority to determine the propriety of the way in which the sheriff has conducted his or her function under the *Juries Act*. There is no provision in the *Coroners Act* similar to ss. 629 and 630 of the *Criminal Code*, R.S.C. 1985, c. C-46, for example, which allow a challenge to a jury panel on the ground of partiality, fraud or wilful misconduct of the sheriff or other officer by whom the panel was returned.

[71] Indeed, the coroner would have no authority to remedy any problems with the jury roll, should they be present. Were Mr. Gordon to give evidence that indicated a problem with the makeup of the jury roll, the coroner could not remedy any lack of representation of First Nations individuals on the jury roll: for example, he or she could not order the sheriff to change the roll or order INAC to provide band lists. At most, the coroner could adjourn the inquest indefinitely, a “remedy” that would undermine the fundamental purpose of the *Coroners Act*: to inquire into the death of a member of the community and to try to prevent future deaths.

[72] Dr. Eden took note of these problems in a ruling dated May 25, 2009, when he denied an adjournment of the inquest:

The *Coroners Act* provides neither the authority for a Coroner to hold public hearings into the process used in the composition of the jury roll, nor to give directions to the Sheriff other than a warrant (under Section 34(1) of the *Coroners Act*) for a list of jurors from the roll.

[73] The applicants also suggest that the coroner can act pursuant to s. 50 of the Act to prevent an abuse of process; therefore, the summons to Mr. Gordon should have been issued.

[74] This argument does not appear to have been made to the coroners. In any event, neither of the coroners was satisfied, on the material submitted, that there was sufficient evidence to require further inquiry in order to prevent an abuse of process. It is the task

of the coroner, not this court, to weigh the evidence. Given the lack of jurisdiction of the coroner to go behind the jury roll, their decisions are deserving of deference.

[75] While the evidence from the Kenora district may well give cause for concern about the representation on jury rolls of First Nations people who live on reserves, the remedy for such underrepresentation does not lie with the coroner in a particular inquest. Rather, the remedy lies elsewhere, perhaps in the context of a challenge to the jury roll under the *Canadian Charter of Rights and Freedoms*, or a challenge to a jury panel in a criminal case, as in *R. v. Nahdee (No. 1)*, [1993] O.J. No. 2425 (Gen. Div.), or by action in the political arena.

[76] The coroners did not err in law nor make an unreasonable decision in refusing to issue a summons to Mr. Gordon.

Issue No. 4: Did the manner in which Dr. Eden dismissed the motion for a summons in the Bushie inquest violate the rules of natural justice?

[77] NAN and the King family submit that there was a denial of natural justice because of the manner in which Dr. Eden dismissed the motion for a summons.

[78] On the one hand, they argue that the principles of natural justice require transparency in the inquest process. The coroner is said to have breached the principles of natural justice and transparency by refusing to give the applicants details about the jury selection. They submit that parties to an inquest are entitled to be informed whether the jury for the inquest is properly constituted in accordance with the *Juries Act*.

[79] The rules of natural justice require parties to be provided with sufficient information to allow them to participate adequately in a proceeding. Natural justice also requires that an adjudicator be free from bias or a reasonable apprehension of bias.

[80] In a coroner's inquest, parties have a right to disclosure of relevant information in the possession of the coroner so that they can participate fully in the investigation of the death (*Proper v. Ontario (Chief Coroner)*, 2008 CanLII 64388 (Ont. S.C.J.) at paras. 24-25). However, the rules of natural justice do not extend to the point asserted by the applicants – to require the coroner to explain the process of jury selection or to require evidence from a government official about the process used to create the jury roll.

[81] The coroner correctly stated that the *Coroners Act* sets out the process for the selection of the jury and confers responsibility on the coroner to ensure that the jury has been properly selected and is free of interest or bias. The parties do not have a role, under the Act, in the selection of the jury. However, in the Bushie inquest, Dr. Eden has adopted the parties' suggestion that a *Parks* type question be put to jurors when the inquest commences.

[82] With respect to the information the parties seek to obtain from Mr. Gordon, that evidence could only be relevant to the creation of the jury roll, a matter which is outside the authority of the coroner. Therefore, the rules of natural justice have not been breached, as argued by NAN.

[83] In the alternative, NAN argues that Dr. Eden violated the rules of natural justice by the manner in which he ruled on the motion. They submit that he did not give the parties an opportunity to make submissions and should have extended the time for making submissions, as requested.

[84] On January 7, 2009, the King family, supported by NAN, requested that a summons be issued to Mr. Gordon. The following day, the coroner advised that the relevance of Mr. Gordon's testimony to the purpose of the inquest had not been demonstrated. He requested supplementary submissions by 4:00 PM the following day. NAN and the family requested further time to prepare submissions, while counsel for the family also indicated that she could not obtain instructions from her clients within that time.

[85] The coroner agreed to extend the time for a further three hours, but refused to provide a further extension because that would leave insufficient time in advance of the date set for the pre-inquest motions (January 13) to formulate a ruling and, were the ruling positive, to distribute a witness statement and prepare for cross-examination.

[86] When the coroner ruled on the motion, he had the summons motion, plus a written Notice of Motion filed January 8, 2009. The latter document contains seven pages, along with ten documents attached.

[87] NAN has failed to demonstrate that the refusal of an extension of time to make further submissions and/or to file materials on the summons issues resulted in a fundamental failure of justice. The parties had the opportunity to make written submissions. The coroner was not required to hear oral submissions before making a decision. In coming to his decision, he was concerned that an extension of time would leave inadequate time for formulation of a ruling and, if the summons were granted, time to prepare the witness. In my view, he complied with the rules of natural justice, and there is no basis for interference with his ruling by this Court.

Issue No. 5: What process should be followed by Dr. Eden with respect to entertaining the applicant's inquiries as to the validity of the jury roll, should the application for judicial review succeed?

[88] Given my conclusions with respect to the other issues, I need not consider the process that Dr. Eden should follow with respect to inquiries about the jury roll selection process. In any event, it would not be proper for this Court to give "guidance" to the coroner of the kind sought by NAN.

Conclusion

[89] For these reasons, the applications for judicial review are dismissed.

[90] The only party seeking costs is NAN, which seeks costs in any event of the cause because of the public interest nature of the litigation. Given that NAN was unsuccessful, I would not award costs to it.

Swinton J.

J. Wilson J.

Lederman J.

Released: July , 2009

COURT FILE NO.: 75/09 and 77/09
DATE: 20090722

**ONTARIO
SUPERIOR COURT OF JUSTICE**

DIVISIONAL COURT

J. WILSON, LEDERMAN AND SWINTON JJ.

B E T W E E N:

NISHNAWBE ASKI NATION

Applicant

- and -

DR. DAVID EDEN, CORONER

Respondent

AND BETWEEN:

ELIZABETH PIERRE AND MARLENE PIERRE

Applicants

- and -

DR. SHELAGH MCRAE, CORONER

Respondent

REASONS FOR JUDGMENT

SWINTON J.

Released: July 22, 2009