

ONTARIO
SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

Re: Nishnawbe Aski Nation, Applicant

- and -

Dr. David Eden, Coroner, Respondent

Before: Karakatsanis J.

Counsel: Julian N. Falconer, Julian K. Roy and Jackie Esmonde, for the Applicants
Suzan E. Fraser, for the Provincial Advocate for Children and Youth
Kimberly Murray, for Rhoda and Berenson King
David Rose and Joseph Neuberger for the Respondent

Heard at Toronto: May 27, 2009

ENDORSEMENT

[1] The applicants seek a stay of the Inquest into the death of Reggie Bushie, pending the determination of the application for judicial review scheduled to be heard before the Divisional Court on Friday, June 5, 2009. The inquest is scheduled to commence June 8, 2009 for an estimated three weeks.

[2] Reggie Bushie, 15 years of age, died of drowning while attending high school in Thunder Bay as there was no high school in his remote community of Poplar Hill First Nation. The inquest will examine the circumstances surrounding his death and will also explore issues concerning how First Nation youths are impacted when attending school far away from their home communities. There were four other deaths of First Nations children from remote fly-in communities attending the same high school in Thunder Bay between 2000 and 2007.

[3] Nishnawbe Aski Nation (NAN), representing 49 First Nations within their territory, sought this inquest and was granted public interest standing by the Coroner. Reggie Bushie's mother and step father Rhoda and Berenson King; the Northern Nishnawbe Aski Education Council (NNEC), and the Provincial Advocate for Children and Youth were also granted standing at the Inquest. These parties join in the applicant's request for a stay of the inquest pending determination of the judicial review application. The Department of Justice takes no

position with respect to the stay. The Ontario Ministry of the Attorney General has advised it will not participate.

[4] The Coroner has refused to adjourn the inquest pending determination of the judicial review for reasons delivered this past Monday, May 25, 2009.

[5] Sections 33 and 34 of the *Coroners Act*, R.S.O. 1990, c. C.37 provide for the selection of the inquest jury from names “from the jury roll prepared under the *Juries Act*.” The issue raised in the application for judicial review relates to whether the jury roll is representative of First Nations people within Thunder Bay District as required by s. 6(8) of the *Juries Act*, R.S.O. 1990, c. J.3, and whether the parties in this case are entitled to call evidence in order to challenge the jury selection on that basis.

[6] NAN seeks judicial review of the Coroner’s decision refusing to issue a summons for the Ministry of the Attorney General official responsible for the jury roll in the District to give evidence in a pre-inquest motion on the process for inclusion of First Nations members in the jury roll.

Background

[7] The King family first raised concerns with the Coroner’s Counsel in November 2008 about the jury roll from which the jurors would be chosen and requested confirmation that First Nation individuals from the 15 First Nations within the Thunder Bay District were included in the jury roll. The concern about whether the jury roll complied with the *Juries Act* arose as a result of affidavit evidence filed in another inquest (before the same Coroner) indicating that many First Nation individuals were not included in the 2008 Kenora District jury rolls. The affidavit of the Ministry of the Attorney General official outlined that the federal government ceased providing the names of First Nation members to be included in jury rolls in 2000, and that the provincial jury center located in London, Ontario, has responsibility for sending questionnaires to First Nation residents living on-reserve in each district. The affidavit indicates an extremely low representation from First Nation communities on jury rolls in the Kenora District.

[8] The Coroner’s Counsel advised by letter that based on a review of case law and current practices for preparing the jury roll in the District of Thunder Bay, they believed the practices are in compliance with the *Juries Act*. In response to a further request for details concerning the current practices, the family was advised to contact the Director of Court Operations Robert Gordon directly. Mr. Gordon, in turn declined to provide any information without a summons.

[9] The King family and NAN brought a motion on January 16, 2009 asking the Coroner for a summons to compel the attendance of Robert Gordon to answer questions relating to efforts to include names of eligible First Nation reserve members in jury rolls and how many First Nation individuals are on the current jury rolls for Thunder Bay District.

[10] In a decision given January 13, 2009, with reasons dated January 16, the Coroner refused to issue the summons. The Coroner did not accept that the applicants had established adequate grounds to inquire further into the operation of the Thunder Bay jury rolls. He noted that the *Coroners Act* contained a curative provision, s. 36, and that the 2008 Kenora affidavit was not adequately probative to impugn the 2009 Thunder Bay jury roll; the INAC’s (the federal

government department) failure to provide the names of First Nations residents after 2000 was of questionable value for this purpose. He found that the currently available information about the jury roll represented adequate grounds to proceed and that he was satisfied that Coroner's Counsel enquired broadly enough, and that an adequate process has been employed in jury selection. He did not describe the process.

[11] NAN and the King family sought an adjournment pending disposition of the judicial review. The Coroner has refused to further adjourn the inquest for reasons delivered this past Monday May 25, 2009. The Coroner noted that an adjournment would result in a further delay until at least September, and subject to additional time required to complete the judicial review process, that the delay could extend into years rather than months. If this was the case, the public safety purpose of the inquest would be grossly compromised. He noted the curative provision in s. 36 of the *Coroners Act* and that success on the application did not necessarily require that the inquest be restarted. The Coroner relied not only upon the general public interest in proceeding expeditiously but also the fact that unnecessary delay increases the risk of further, preventable deaths, and that a June inquest would ensure that the jury's recommendations would be available before the commencement of the next school year.

[12] Counsel for the family in this case, is also counsel for the Pierre family in an application for judicial review relating to another inquest held in Thunder Bay in February 2009. Although the circumstances of the death in that inquest were very different, the issues and rulings in that judicial review are very similar. On Wednesday February 25, 2009, I dismissed a motion to stay that inquest pending determination of the application for judicial review. The inquest in that case was already underway, having commenced on the Monday and was scheduled to be completed by the end of that week. Following my ruling, the Pierre family withdrew as a party from the inquest and the inquest was concluded with recommendations from the jury.

The test for a stay

[13] The test for a stay is well established. The moving party must show: (a) the application raises a serious question; (b) irreparable harm will result if the stay is not granted; (c) and the balance of convenience favours the granting of a stay. These factors must be considered as a whole. The overarching consideration is whether the interests of justice call for a stay: *RJR MacDonald inc. v. Canada (Attorney General)*, [1994] S.C.J. No. 17; *College of Physicians and Surgeons of Ontario v Porter*, [2003] O.J. No. 540 (Sup. Ct.); *Longely v. Canada (Attorney General)*, [2007] O.J. No. 929 at para.14-15 (C.A.).

Serious Issue to be heard

[14] Coroner's counsel takes the position that the selection of the jury is not a reviewable issue on the basis of the Ontario Court of Appeal decision in *Evans v. Milton* (1979), 24 O.R.(2d) 181 at paras. 24-26 and thus cannot be a serious issue to be tried. In effect, counsel submits that the selection of a coroner's jury cannot be the subject of judicial review. In that case, the applicant alleged a reasonable apprehension of bias on the part of the jury on the sole basis that the coroner's constable was a member of the Toronto Police Services and the inquest was examining the conduct of officers of the Toronto Police Services. The Court of Appeal found that the selection of the jury in that case was not reviewable because there was no basis to find a reasonable apprehension of bias where the coroner and the coroner's constable had followed the

process to select the jury in the *Coroner's Act* (see para. 36). The Court of Appeal held that the inquest was subject to court supervision, depending on the nature of the complaint made, but the appellants had completely failed to establish any basis upon which it could be said there was a reasonable apprehension of bias (see paras. 7, 17, 18). This is not such a case.

[15] As I found in the *Pierre* motion to stay on substantially the issue, the application for judicial review raises serious issues to be heard. The test is a low bar. The court should not extensively review the merits but must determine that the issues raised are not frivolous or vexatious: *Ontario v Shehrazad Non-Profit Housing Inc.* (2007), 85 O.R. (3d) 81 (C.A.) at para. 19.

[16] The Coroner in this case found that the applicants had not established adequate grounds for the Coroner to inquire further into the operation of the Thunder Bay jury rolls. However, in my view the issue raised by the applicant is not frivolous or vexatious. The applicants have raised reasonably held concerns regarding the composition of the jury roll and whether the jury roll is representative of First Nations in compliance with the *Juries Act*. As I found in the *Pierre* decision, the Kenora affidavit indicates that the Federal government no longer provides information about members of the First Nations for the jury roll, that results from efforts made by the Ministry to obtain the names of First Nations in the neighbouring court district have been limited, and that these factors have resulted in under-representation of First Nation individuals in the Kenora rolls. This affidavit, coupled with the refusal of the Ministry of the Attorney General to provide the information requested, provides a reasonable basis upon which to raise the issue of whether the jury is representative of the community in compliance with the *Juries Act*. As well, the issue of the extent of the Coroner's power to address such questions in the context of an inquest are serious issues to be heard in the judicial review application.

[17] In *R. v. Nahdee (No. 1)*, [1993] O.J. No. 2425 at paras. 20-24 (Gen. Div.), Donnelly J. found that insufficient efforts to identify First Nations residents did not comply with the *Juries Act* and non-compliance constituted partiality, albeit in the context of a *Charter* application in a criminal case. The Ontario Court of Appeal has made it clear that even in a criminal trial where liberty is at stake, an accused is not entitled to jurors of a specific ethnicity, but a jury selected at random from persons representing a cross-section of society (see *R. v. Brown*, [2006] O.J. No. 5077 (C.A.)). The cases regarding criminal juries and *Charter* applications do not necessarily apply to a coroner's jury. A jury in an inquest is chosen in advance of the commencement of the inquest and the parties play no role in the selection of the jury: ss. 33-34 of the *Coroners Act*. The jury in an inquest does not make any findings of law or legal responsibility.

[18] However, under the *Coroners Act*, the jury is to be selected from the jury roll prepared under the *Juries Act*. Thus it provides for recommendations of members representing a broad spectrum of the community, specifically including the First Nations pursuant to s. 6(8) of the *Juries Act*. In addition to investigating and determining the how, when, where and by what means the deceased came to his death, the jury has the increasingly important and wider public interest role in making systemic recommendations to prevent deaths in similar circumstances: *People First of Ontario v. Porter*, [1991] O.J. No. 3389 at paras. 33-34 (Div. Ct.).

[19] Section 36 provides that the omission to observe any of the provision of the *Act* or the Regulations respecting the eligibility and selection of jurors is not a ground for impeaching or quashing a verdict. However, it is certainly arguable that the curative provision does not provide

a shield to entitle the coroner to disregard any concerns about whether the jury roll has been prepared in accordance with the *Juries Act*.

[20] Unlike the *Pierre* application, this application for judicial review does not raise the issue of whether the jurors have been properly screened for hostility or impartiality. The Coroner has indicated that he will screen all prospective jurors with a *Parks*-type question and the parties are satisfied with the wording of the question he has framed.

Irreparable Harm

[21] As noted by the court in *RJR MacDonald* at para. 59, “irreparable” refers to the nature of the harm rather than its magnitude. Irreparable harm cannot be cured.

[22] The applicants submit that the danger is the denial of natural justice if there is inadequate First Nations representation on this jury roll, and the jury is thus not representative and ultimately not impartial. Systemic discrimination and hostility has been recognized in the jurisprudence.

[23] This inquest is to deal with issues that uniquely impact First Nation communities, and in particular remote First Nation communities whose youth must leave to attend high school away from the supports of their family and communities. Given the particular nature of this inquest, I accept NAN’s submission that whether the jury is selected from a jury roll that is representative of the First Nations within the judicial district as required by the *Juries Act* is an important aspect of the legitimacy of the coroner’s inquest for those First Nations communities that have lost five youth attending high school far from their aboriginal communities. There is a risk that public confidence in this Coroner’s inquest may be irreparably harmed, particularly in the eyes of the aboriginal community represented by NAN.

[24] I also accept the concern relating to the emotional trauma of a potential for a second inquest for the family and young witnesses, in particular, the deceased young brother, who was with him on the night he disappeared.

[25] I am satisfied in these circumstances that there is a real risk that there will be irreparable harm to public confidence in the administration of the Coroner’s Inquest if this case proceeds and the application for judicial review is ultimately successful.

Balance of convenience

[26] The applicants submit that proceeding with this inquest may be a waste of time and considerable expense, not only for the public but also for the participants, including the jurors, and the witnesses and youth panel to be flown in for the inquest. The costs would also be significant for the applicant, a public interest party, for NNEC and for the family. NNEC advises it is highly unlikely it could implement any recommendations for the school year commencing in September. The Provincial Advocate for Children and Youth takes the position that the inquest would be better conducted during the school year to permit better participation by the youth at the high school, many of whom live in remote First Nation communities during the summer.

[27] The public interest should be considered at the stage of balance of convenience: *RJR MacDonald* at para. 57. The public interest factors discussed above in irreparable harm are also relevant to this factor.

[28] In his reasons for refusing to adjourn the inquest pending the application for judicial review, the Coroner examined the public interest and his thoughtful decision is entitled to deference. I accept the coroner's deeply held concern that any unnecessary delay increases the risk of further, preventable deaths and that a June inquest (already adjourned once from January) would ensure that the jury's recommendations would be available before the commencement of the next school year.

[29] While an adjournment means a likely delay to the fall, I cannot accept that the judicial review application could result in a delay of years rather than months. While success on the application does not necessarily require that the inquest be re-started with a new jury, the curative provision in s. 36 of the *Coroners Act* should not be used as a shield to avoid inquiry of a reasonable concern about compliance with the *Juries Act*.

[30] Unlike the *Pierre* inquest, this inquest has not yet begun, although I am advised that the jury was selected and sworn in this week. Furthermore, in this case the youth witnesses, including the deceased's brother, may be required to testify a second time if the inquest proceeds at this time. The Provincial Advocate for Children and Youth advises that the aboriginal youth attending the high school will be able to participate more fully and will be better served by an inquest held in the fall during the school year. If the application for judicial review is successful, failure to grant the stay will result in the repetition of some if not all of the evidence, inconvenience and expense to the public, the witnesses, and the parties, and emotional trauma for the youth witnesses. If on the other hand, the application is unsuccessful, the inquest will have been delayed, likely for some three to four months. The timing of the implementation of the recommendations depends of course upon the nature of the recommendations; presumably they will be addressed as soon as practicable after they are made.

[31] I appreciate that it is generally undesirable to interrupt the course of administrative proceedings by an application for judicial review, absent exceptional circumstances (*Ontario College of Art v. Ontario (Human Rights Commission)* (1993), 11 O.R. (3d) 798 (Div. Ct.)). Furthermore, any measures that can prevent such future tragedy should be determined as soon as possible. However, the delay is relatively brief and it is important that such recommendations be made by a jury that is representative of the community. Whether the jury has been chosen in accordance with law and is impartial and representative of the community, including Aboriginal people are serious issues and go to the heart of the legitimacy of the inquest for the First Nation families and communities affected.

[32] I am satisfied that the balance of convenience and the overall interests of justice favour a stay in the circumstances of this case.

Karakatsanis J.