SUPREME COURT OF YUKON

Citation: *Silverfox v. Chief Coroner,* 2012 YKSC 35 Date: 20120510
S.C. No. 10-A0022
Registry: Whitehorse

Between:

DEANNA-LEE CHARLIE, DELORES AILEEN LINDSTROM, DEBORAH ANN SILVERFOX, GERALDINE JANE SILVERFOX, JANIS LORRAINE SILVERFOX, PETER WILLIAM SILVERFOX, MICHAEL DOUGLAS SILVERFOX, MITCHELL ALLEN SILVERFOX, SHEILA MARIE SILVERFOX, CORINNE MARY SILVERFOX, CHARLENE MARGARET SILVERFOX and JOY MARLENE SILVERFOX

Petitioners

And

SHARON HANLEY, CHIEF CORONER, DEPARTMENT OF JUSTICE, YUKON GOVERNMENT and the ATTORNEY GENERAL (CANADA)

Respondents

Before: Mr. Justice R.S. Veale

Appearances:

Susan Roothman	Counsel for the Petitioners
Zeb Brown	Counsel for the Respondent Chief Coroner
Suzanne Duncan	Counsel for the Respondent Attorney General of Canada
Philippa Lawson	Counsel for the Respondent Yukon Government

REASONS FOR JUDGMENT
(Role of Lawyer for Chief Coroner)

INTRODUCTION

[1] The Petitioners have applied for judicial review of the Chief Coroner's investigation and inquest into the death of Raymond Benjamin Silverfox in RCMP cells at Whitehorse on December 2, 2008. In this pre-hearing application, the Petitioners have applied for an order that the role of the lawyer for the Chief Coroner at the judicial

review hearing be limited to explaining the Inquest record and making representations relating to jurisdiction.

[2] The application is based on the principle established in *Northwestern Utilities Ltd. v. Edmonton (City)*, [1979] 1 S.C.R. 684. The application is opposed by the Chief Coroner on the basis that *Northwestern Utilities* does not apply to a Coroner's Inquest, and, in any event, the principle in *Northwest Utilities* has been substantially modified in more recent case law.

[3] For the reasons that follow, I have concluded that the Chief Coroner's submissions at this judicial review should not be limited to the narrow explanatory role set out in *Northwestern Utilities.* I have previously discussed the role of the Chief Coroner in *Silverfox, et al. v. Chief Coroner, et al.*, 2011 YKSC 17.

BACKGROUND

[4] The Petitioners apply for judicial review on numerous grounds, including breaches of natural justice, lack of procedural fairness and a reasonable apprehension of bias, all relating to the conduct of the Chief Coroner in the Silverfox Inquest.

[5] There is no dispute that Raymond Silverfox died in police custody after being held for approximately 13 hours.

[6] The Petitioners have named as Respondents the Chief Coroner, the Yukon Government and the Attorney General of Canada. Yukon and Canada took active roles at the inquest, representing the interests of the Emergency Medical Services and the RCMP, respectively.

ISSUE

[7] The issue is whether the role of the lawyer for the Chief Coroner should be limited to explaining the record or making arguments on jurisdiction based on the principle set out in *Northwestern Utilities*.

ANALYSIS

[8] In *Northwestern Utilities*, the Supreme Court of Canada stated at p. 16 (QL):

> It has been the policy in this Court to limit the role of an administrative tribunal whose decision is at issue before the Court, even where the right to appear is given by statute, to an explanatory role with reference to the record before the Board and to the making of representations relating to jurisdiction. …

[9] The rationale for this position was given by the Court in the previous paragraph, where it noted that counsel for the Board had presented detailed and elaborate arguments in support of the Board's decision. The Court commented that:

> … Such active and even aggressive participation can have no other effect than to discredit the impartiality of an administrative tribunal either in the case where the matter is referred back to it, or in future proceedings involving similar interests and issues or the same parties. …

[10] Counsel for the Petitioners submits that the *Northwestern Utilities* principle has been strictly applied in *Eckervogt v. British Columbia (Minister of Employment and Investment)* 2002 BCCA 675. However, I note that the British Columbia Court of Appeal has also made favourable reference to a more contextual approach: see *Global Securities Corp. v. British Columbia (Executive Director, Securities Commission)*, 2006 BCCA 404, at para. 60:

> I conclude with the following observation, prompted by some of the submissions of the Intervenors. What was said in *Northwestern Utilities*, to the extent that it has been taken as

> an invariable rule, may be due for a re-evaluation. The decision of the Ontario Court of Appeal in *Ontario (Children's Lawyer) v. Ontario (Information and Privacy Commissioner)* (2005), 253 D.L.R. (4th) 489 provides support for that view. In that case, Goudge J.A. expressed the opinion that the standing of administrative tribunals on reviews of their own decisions must be considered contextually rather than by reference to an *a priori* rule.

[11] The British Columbia Court of Appeal's most recent statement of its position is in *Henthorne v. British Columbia Ferry Services Inc.*, 2011 BCCA 476:

> [40] The foregoing authorities and others are reviewed in an article by Mr. F. Falzon, Q.C., *Tribunal Standing on Judicial Review,* (2008) 21 C.A.L.T. 21. The author observes that "judges are not necessarily of like mind regarding the extent to which tribunal participation in court truly discredits a tribunal's impartiality" and points out at 35 that the Supreme Court of Canada has, itself, without objection or comment, permitted administrative tribunals to participate fully in court hearings on natural justice issues. (See e.g. *Ellis-Don Ltd. v. Ontario (Labour Relations Board)* [2001] 1 S.C.R. 221.) Elsewhere, the author refers to "confusion" in the law on this matter and suggests that a "categories and exceptions" approach to the issue of tribunal standing is, like *Northwestern Utilities* itself, "due for re-evaluation". (At 38.) He urges that the matter be clarified by the Supreme Court of Canada.
>
> [41] In the meantime, the authorities in this province are in my opinion clearly in favour of applying *Northwestern Utilities,* subject to some exceptions (or "encroachments") arising from *Paccar*. …

[12] Three exceptions or encroachments to the general rule were identified by Mr. F. Falzon in the above-noted article, and these are set out in *Timberwolf Log Trading Ltd. v. Commissioner (Pursuant to s. 142.11 of the Forest Act)*, 2011 BCCA 70 at para. 11:

> a) where the question is whether the tribunal has made a patently unreasonable interpretation of a statutory right to be heard;

b) where the tribunal is defending a long standing policy; and

c) where there is no one else to argue the other side.

[13] Counsel for the Petitioners submits that none of these exceptions apply here. I disagree.

[14] In my view, despite the fact that they oppose the relief ultimately sought by the Petitioners, and are arguably on the same 'side', none of the other Respondents are able to provide this Court with the information that will be necessary for a resolution of the Petitioners' concerns. Neither will their arguments in support of the Coroner's conduct of the investigation and inquest be fully responsive to these concerns. Counsel for the Attorney General of Canada, while generally supportive of the Coroner's position, is primarily focused on the conduct of the RCMP. The Yukon Government is concerned with the actions of the Emergency Medical Services. The Chief Coroner, on the other hand, coordinated the investigation into Mr. Silverfox's death and determined the scope and conduct of the subsequent inquest. As noted by Sharpe J. (as he then was) in a dissenting decision affirmed by the Ontario Court of Appeal, the Coroner has significant investigative, inquisitorial and procedural roles at the inquest: see *Toronto (Metropolitan) Police Services Board v. Young* (1997), 98 O.A.C. 188 (Div. Ct), at paras. 75-81; dissent aff'd (1998), 115 O.A.C. 396. If the role of counsel for the Chief Coroner is limited, there will be no one to knowledgeably argue against the Petitioners' application. Only the Chief Coroner can answer the challenges that the Petitioners have made against these proceedings and explain or defend why she took the approach she did.

[15] I am supported in this conclusion by the decision of Garson J. (as she then was) in *British Columbia Teachers' Federation v. British Columbia (Information and Privacy Commissioner)*, 2005 BCSC 1562:

> [35] In my view, an inquisitorial proceeding is more likely to support the expanded standing of a tribunal in judicial review because the objective of the tribunal is to gather as much information as possible. Conversely, an adversarial proceeding is more likely to support the restricted standing of a tribunal in consideration of the fairness to the parties and the tribunal's opportunity to state its position in the original reasons for its decision.

[16] I also find that the fundamental premise of *Northwestern Utilities* is the preservation of the impartiality of the tribunal. It is highly unlikely that the Chief Coroner would preside over another inquest in this matter. To that extent, the concern over impartiality is considerably lessened.

[17] I do not foresee the potential consequence that *Northwestern Utilities* was concerned about, i.e. that this judicial review would become an unseemly contest between an impartial tribunal and a party to a proceeding before it, such that the tribunal itself is discredited. I also maintain the ability to restrict the submissions of counsel for the Chief Coroner, if, in the course of the review, they threaten to cross the line.

[18] I also note that there are numerous cases that have challenged the right of coroners to proceed to inquest or on the basis of bias and procedural fairness, and in which the coroner was an active party. I have not been presented with any case law that specifically limits the role of the lawyer for a coroner.

[19] The application of the Petitioners is dismissed.

VEALE J.