

MEDIA BRIEFING NOTE

Silverfox v. Chief Coroner (2012 YKSC 74)

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Raymond Silverfox was a 43-year-old member of the Little Salmon/Carmacks First Nation. He was found unresponsive in Whitehorse RCMP custody on December 2, 2008, after being detained in the 'drunk tank' for approximately 13 ½ hours. He was pronounced dead at the Whitehorse General Hospital a few hours later. A coroner's inquest into his death was held in April 2010, and the jury returned a verdict of death by natural causes. Counsel for the Silverfox family applied to the Supreme Court to quash this verdict.

In this decision, Veale J. finds that aspects of the coroner's inquest breached the duty of procedural fairness; specifically, the playing of the video of Mr. Silverfox's cell in fast-forward and the failure of the Chief Coroner to adequately instruct the jury in her charge deprived the family of their right to a fair hearing. The verdict is quashed, but in the circumstances of this case, it would be perverse and unnecessary to require that a new inquest be held.

BACKGROUND

The evidence from the inquest revealed that Mr. Silverfox had been drinking and was arrested for causing a disturbance in the early morning of December 2, 2008. He was checked by Emergency Medical Services before being taken to police cells. During the 13 ½ hours he spent in police custody, he vomited 26 times and defecated and urinated on the floor of his cell. He received no medical treatment until he became unresponsive at 6:43 p.m., at which point he was transported to Whitehorse General Hospital, where he was pronounced dead at 9:13 p.m. An autopsy performed in Vancouver indicated that Mr. Silverfox died of sepsis (an infection of the blood) and acute pneumonia (an infection of the lungs), likely from vomiting and aspirating the vomit into his lungs.

An inquest was called pursuant to the *Coroners Act*. It was held over a period of seven days, starting on April 15, 2010. Twenty-eight witnesses were called. The RCMP, Emergency Medical Services and the Silverfox family were all granted standing and were all represented by counsel. At the end of the inquest, the jury returned a verdict of death by natural causes. The Silverfox family pursued a judicial review of this verdict and asks the Supreme Court to quash it, primarily

on the bases that the Coroner's investigation and inquest breached the duty of procedural fairness and/or raised a reasonable apprehension of bias.

ISSUES

Four issues are addressed in this decision:

1. The relevant tests and standards of review;
2. Whether the Coroner's investigation was biased or raises a reasonable apprehension of bias;
3. Whether the Coroner breached the duty of procedural fairness in her conduct of the inquest or whether the conduct of the inquest raises a reasonable apprehension of bias; and
4. Whether the Coroner's jury charge was sufficient and procedurally fair, or, alternatively, whether it was biased or raises a reasonable apprehension of bias (para. 22).

Issue 1: The relevant tests and standards of review (paras. 27-40)

Procedural fairness

Procedural fairness requires that administrative decisions are made fairly and openly, and that individuals affected by the decision have the opportunity to put forward their views and evidence and have them considered by the decision maker. A high duty of procedural fairness applies to a coroner's inquest. If this duty was breached, the decision, here the jury verdict, is rendered invalid (paras. 27-31).

Reasonable apprehension of bias

Administrative decisions must be made free from a reasonable apprehension of bias and by an impartial decision maker. Unlike a judge in court, a coroner in an inquest has a dual role in that she marshalls the evidence and presides over the inquest, and the test needs to be modified accordingly (paras. 32-40).

Standard of review

The standard of review for decisions made in a coroner's inquest is one of reasonableness. These decisions will only be reviewed if there is no breach of procedural fairness and no reasonable apprehension of bias arises on the proceedings (paras. 23-26).

Issue 2: Whether the Coroner's investigation was biased or raises a reasonable apprehension of bias (paras. 41-47)

This is a case where the RCMP investigated itself. Counsel for the family argued that the Coroner's decision not to use an independent body for at least some of the investigation raises a reasonable apprehension of bias.

Although the RCMP conducted the investigation, Yukon members were not involved in the investigation, which was conducted by a Division from Prince George, BC, monitored by an independent observer from the Commission for Public Complaints Against the RCMP, and reviewed by an RCMP Inspector from Alberta (para. 42). The *Coroners Act* permits the Coroner to use the RCMP for investigations, and the Court finds no issue with the thoroughness or professionalism of the investigation (paras. 44-45). Although it is preferable to avoid having a police force investigate itself, beyond being a case of an internal investigation, there is nothing here to support the position that the use of the RCMP raises a reasonable apprehension of bias (paras. 46-47).

Issue 3: Whether the Coroner breached the duty of procedural fairness in her conduct of the inquest or whether the conduct of the inquest raises a reasonable apprehension of bias (paras. 48-93)

Counsel for the family raised a number of aspects of the inquest that she argued individually or cumulatively raise an apprehension of bias or comprise a breach of the duty of fairness. These are set out in paras. 48-93.

While the Court finds that most of these issues do not raise an apprehension of bias or comprise a breach of the duty of fairness, the decision to play the video of Mr. Silverfox's cell in fast-forward did breach the duty of procedural fairness (paras. 83-93). The primary issue in the inquest was to determine how Mr. Silverfox's death occurred, and the circumstances of his detention were of crucial importance to this inquiry. The decision to play the video in fast-forward deprived the jury of the opportunity to consider the true conditions of Mr. Silverfox's detention and severely limited its ability to understand and evaluate the RCMP and guard evidence (para. 92).

Issue 4: Whether the Coroner's jury charge was sufficient and procedurally fair, or, alternatively, whether it was biased or raises a reasonable apprehension of bias (paras. 94-131)

Section 24(1) of the *Coroners Act* requires a 'summing up' by the coroner. This directs the coroner to summarize and explain the evidence and positions of the parties (paras. 106-111). This was not done. The jury was simply tasked with coming to a conclusion 'as to the cause of death' followed by a reference to the 'medical cause of death' (i.e. sepsis and acute pneumonia). There was no explanation of the evidence and the competing theories about whether a lack of medical treatment played a role in the death of Mr. Silverfox (para. 118). This is especially significant given that there were no closing addresses made by counsel. The result is that the jury did not hear anything of the views held by the Silverfox family (para. 118). The Coroner relied on boilerplate language with little application to the complex evidentiary context

of this inquest (para. 128). It is not obvious that the verdict that Mr. Silverfox's death was from natural causes is the only outcome available on the evidence. The mere fact that there is a medical explanation for a death does not make it 'natural' in the sense that an individual would have died regardless of treatment (para. 129).

Given the Court's finding that the jury charge did not meet the requirements of procedural fairness, Veale J. did not consider whether it raises a reasonable apprehension of bias.