SUPREME COURT OF YUKON

Citation: *Blackjack v. Yukon (Chief Coroner),* 2016 YKSC 53

Date: 20161007
S.C. No. 15-A0093
Registry: Whitehorse

Between:

THERESA ANNE BLACKJACK and LITTLE SALMON CARMACKS FIRST NATION

Respondent

And

KIRSTEN MACDONALD, CHIEF CORONER of the YUKON TERRITORY

Applicant

Before Mr. Justice R.S. Veale

Appearances:
Rick Buchan — Counsel for the Applicant
Susan Roothman — Counsel for the Respondent

RULING ON APPLICATION

INTRODUCTION

[1] This is an application brought by the Chief Coroner to strike the Little Salmon Carmacks First Nation ("LSCFN") from the underlying petition brought by it and Theresa Blackjack on the basis that the First Nation has no standing. The underlying petition is for judicial review of the Chief Coroner's decision to close her investigation into the 2014 death of Cynthia Blackjack after an inquiry rather than order an inquest.

[2] The Chief Coroner also sought to strike two affidavits from the record, but when pressed in oral submissions, this aspect of the application was largely dropped. If there are any issues arising from the content of the affidavits, they can be addressed later in

the context of the substantive petition. I am satisfied that there is sufficient evidence before the court to determine the issue of standing raised by this application. I similarly decline to decide to strike two paragraphs of the petition, as this position was also not strenuously argued.

BACKGROUND

[3] Cynthia Roxanne Blackjack died on November 7, 2013, at the age of 29. Her death occurred at the end of a four-day period during which she called or attended the Carmacks nursing station complaining about toothache, abdominal pain and vomiting. She was tentatively diagnosed with alcohol-induced gastritis and treated accordingly. Although she was urged to make her way to the Whitehorse General Hospital on November 6, she did not make that trip. On the morning of November 7, she was brought to the Carmacks nursing station in an agitated and disoriented state and a decision was made at 11:15 a.m. to medevac her to Whitehorse. Treatment from that point was fraught with delay, due to the medevac team inadvertently bringing the wrong tubing for a blood transfusion and a failure of the ventilator equipment at the nursing centre. Ultimately, Ms. Blackjack was moved onto the medevac aircraft around 5 p.m., but she became bradycardic and her vital signs were lost when the aircraft was about ten minutes outside of Whitehorse. She was pronounced dead just before 6 p.m. on November 7.

[4] Upon being notified of Ms. Blackjack's death, the Chief Coroner commenced an inquiry. In addition to an autopsy report, she arranged for Ms. Blackjack's mouth and teeth to be examined by a forensic dentist, she seized and tested ante-mortem blood taken from Ms. Blackjack at the Carmacks nursing station, and she conducted

interviews with people who had seen Ms. Blackjack in the days leading up to her death. The Chief Coroner's file relating to Ms. Blackjack was then referred to an expert panel of multi-disciplinary medical professionals in Ontario via the Office of the Chief Coroner in that jurisdiction. Ultimately, the Chief Coroner concluded the case with a five-page Judgment of Inquiry, dated August 4, 2014, that classified Ms. Blackjack's death as Natural and as a result of "Multi-Organ Failure due to Hyperacute Liver Failure of Unknown Cause". The Chief Coroner made eight recommendations directed towards the Health and Social Services and Community Services Departments of Yukon Government.

[5] On March 2, 2015, a letter was sent to the Chief Coroner by Susan Roothman on behalf of LSCFN, requesting that a formal inquest be held into the death of Ms. Blackjack. The Chief Coroner responded on June 15, 2015, by saying that her investigation had been concluded and that she had determined an inquest was not necessary. The underlying petition in this matter was filed in Supreme Court on October 1, 2015. The petition was filed on behalf of both Theresa Blackjack, who is Cynthia Blackjack's mother, and LSCFN.

ISSUES AND POSITIONS OF THE PARTIES

[6] Although the application filed on behalf of the Chief Coroner sought to strike the affidavits of Rachel Byers and Theresa Anne Blackjack and portions of the pleadings as well as remove LSCFN as a party, as noted above, the affidavit-related relief was effectively abandoned at the hearing. Counsel for the Chief Coroner also did not press his argument to strike two subparagraphs of the petition. Accordingly, these reasons will only deal with whether or not LSCFN is a proper party to this judicial review proceeding.

[7] The Chief Coroner primarily asserts that LSCFN has no standing in relation to the subject matter of the petition or the relief requested. She says that there is no established right at common law to standing at an inquest, and that, while the *Coroners Act*, R.S.Y. 2002, c. 44, provides a broad discretion for the Chief Coroner to grant standing, the legislation contemplates the participation of individuals and not governments. To the extent that LSCFN is not entitled to participate in an inquest, they are even less entitled to weigh in on the conduct of an inquiry, and LSCFN cannot now come to court to take a position on whether the process used by the Chief Coroner was procedurally fair. Counsel further observes that LSCFN's interests have not been directly or materially impacted by the Chief Coroner's decision to not hold an inquest.

[8] The Chief Coroner also says that LSCFN should be barred from seeking judicial review, as it has not exhausted other available alternative relief. Specifically, the Chief Coroner takes the position that, as a self-governing First Nation, LSCFN should deal with the Yukon Government on a government-to-government basis to address any perceived systemic failures in the provision of health care services to its citizens. Alternatively, the Chief Coroner suggests that LSCFN pursue its own independent inquiry.

[9] In response, LSCFN says that inquests serve an important preventative and public interest function, and that First Nations are routinely involved in inquests in other jurisdictions. In addition, here, LSCFN has explicit obligations to its citizens under its Constitution in the areas of health care, human rights and social services. LSCFN points to a Yukon Government webpage about Coroner's Inquests that says standing may be granted "to persons and agencies with substantial or direct interest, or who may be

affected by any potential recommendations". LSCFN says that there is nothing in the *Coroners Act* that precludes granting standing to a First Nation and that LSCFN in fact has a common law and/or equitable right to participate in an inquest into the death of one of its citizens. In support of this position for standing on this judicial review, it cites the legal principles governing public interest standing in court actions and submits that LSCFN satisfies the three-part test that has been articulated in caselaw (see e.g. *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45).

ANALYSIS

[10] I will address the issues of standing and alternative remedy separately.

Standing of LSCFN

[11] Although counsel for the Chief Coroner and LSCFN both spent a significant amount of time addressing whether LSCFN has standing in the context of a coroner's inquest in Yukon, that is not precisely the issue before me. The immediate question is whether LSCFN has standing in the Supreme Court in judicial review proceedings about the conduct of a coroner's inquiry. That is not to say that considerations about First Nation standing at inquests are not relevant, but the actual issue to be resolved on this application is slightly different.

[12] Counsel for LSCFN included *Wright v. Yukon (Utilities Board)*, 2014 YKSC 43, which considered a request for standing in a judicial review proceeding and, in that case, I found that Mr. Wright did not have standing based on the tests for private and public interest standing. I agree with counsel for LSCFN that this is the framework applicable to this case.

[13] In *Wright,* the petitioner was seeking judicial review of a Yukon Utility Board report approving a Yukon Energy Corporation diesel to natural gas conversion project. Mr. Wright had appeared before the Board to give a presentation, although he did not have any sort of formal, i.e. intervener, status in the proceedings. I concluded that he did not have private interest standing and that public interest standing should not be granted, as he had not satisfied any component of the three-part test given the narrow scope of his issue.

[14] In this case, as in *Wright,* the petitioner LSCFN did not have any formal status in the coroner's inquiry. In *Wright,* I found that Mr. Wright's lack of intervener status before the Board precluded him from claiming party status as a matter of right under Rule 54 of the Supreme Court *Rules of Court* ("Application for Judicial Review"). I would make the same finding in these circumstances.

[15] The *Coroners Act* does not provide for any intervention in either a coroner's inquest or a coroner's inquiry, however, as observed by the Chief Coroner, it is not uncommon for family members to seek and be granted standing at an inquest. I do not think the same can be said for an inquiry process. In my view, a coroner's inquiry is not meant to serve the same broad public interest function as an inquest and does not require the same public input to fulfill its purpose. While a person or organization with standing at an inquest would automatically be a party to a judicial review on the basis of Rule 54, there are no such persons in the context of an inquiry.

[16] I am also satisfied that LSCFN does not meet the test for private interest standing, as that test has been articulated in *Wright* and *Sandhu v. British Columbia (Provincial Court),* 2013 BCCA 88. As noted, LSCFN does not fit into Rule 54 as a

party. As well, there is no statutory mechanism under the *Coroners Act* by which it, or any other person or organization, can complain about a coroner's decision not to hold an inquest. Nor, according to common law principles, can LSCFN be considered an "aggrieved person", an "affected person", or someone "exceptionally prejudiced" by the Chief Coroner's decision in this case (see para. 38 of *Sandhu*).

[17] I conclude that LSCFN does not have private interest standing to bring this petition for judicial review.

[18] I do find, however, that LSCFN does meet the criteria for public interest standing. As set out in para. 37 of *Downtown Eastside Sex Workers*, the test for public interest standing is three-pronged. It asks: 1) whether there is a serious justiciable issue raised; 2) whether the plaintiff/petitioner has a real stake or genuine interest in the issue; and 3) whether, in all the circumstances, the proposed suit is a reasonable and effective way to bring the issue before the courts. These factors should be applied purposively and flexibly.

[19] With respect to the first factor, I am satisfied that there is a serious justiciable issue here. The review of an administrative action is something that falls squarely within the jurisdiction of the court and the question of whether the coroner properly exercised her discretion in determining not to convene an inquest in these circumstances cannot be considered frivolous.

[20] In terms of LSCFN's interest in this judicial review proceeding, I agree with counsel for the petitioners that it does have a real stake in the subject-matter of the petition. To the extent that the application for judicial review contemplates the failure of the Chief Coroner to call an inquest in these circumstances, it engages a consideration

of the broad, public-interest function of an inquest. LSCFN, as a self-governing First Nation, is necessarily concerned with the possibility that systemic failures in the health care system played a role in the death of an LSCFN citizen, especially given its obligations under the LSCFN Constitution.

[21] Finally, I am satisfied that this petition is a reasonable and effective means of bringing this issue before the court. While I recognize that the petition could properly have been brought by Theresa Blackjack without the participation of LSCFN, there are circumstances in which it would be appropriate or inevitable that a First Nation commence a petition of this nature in the absence of a participating family member. As well, the participation of LSCFN as a party in addition to Theresa Blackjack, in my view, will provide a different and valuable perspective on the issues to be determined.

[22] This third factor is to be applied flexibly and purposively. While not exhaustive, para. 51 of *Downtown Eastside Sex Workers* sets out a loose framework in which to evaluate it. To run through those considerations, firstly, LSCFN obviously has the capacity to bring this claim forward. It is worth observing that, at least here, LSCFN seems to have more capacity in terms of resources and expertise to bring this petition than does Ms. Blackjack's family member. As well, the First Nation has slightly different interests in the underlying issue to be addressed, as it has more of a stake in the public function of an inquest than does a family member. Secondly, I agree with counsel for LSCFN that the case is of public interest, in that a determination about the coroner's exercise of discretion in calling an inquest will have a broader impact than just the resolution of this petition. In terms of whether there are realistic alternative means to having this issue determined, this is not a situation in which there are parallel

proceedings. Rather, LSCFN is essentially joining Theresa Blackjack in making the application, and as I observed above, is in many ways well-situated to bring a complementary perspective and submissions to bear on it. Similarly, there is no conflict here between the private interest of Theresa Blackjack and the public interest of LSCFN.

[23] I also think it is worth noting that this Court has taken a relatively permissive approach to standing in judicial review applications, albeit in the context of Rule 54 (see e.g. *Western Copper Corp. v. Yukon Water Board*, 2010 YKSC 61; *White River First Nation v. Yukon (Minister of Energy, Mines and Resources*), 2013 YKSC 10).

[24] In the event that I am wrong about standing in a judicial review, I would nonetheless find that LSCFN is properly recognized as having public interest standing under s. 10 of the *Coroners Act*. This section provides a mechanism by which a court can compel a coroner to order an inquest into a death. Although not expressly relied on in the petition, it was raised in oral argument as an alternative basis for at least part of the relief claimed.

Available alternative relief

[25] The Chief Coroner also objected to the participation of LSCFN on the basis that it has not exhausted other avenues of relief.

[26] While the *Coroners Act* does not contemplate any avenue by which a coroner's decision against holding an inquest can be reviewed, counsel for the Chief Coroner takes the position that it is incumbent on LSCFN to seek relief either through intergovernmental channels or by convening its own inquiry.

[27] I point out that the second mechanism is largely unworkable. The *Coroners Act* gives a coroner significant powers with respect to search and seizure as well as with respect to compelling witnesses to attend an inquest proceeding. Without such powers, an inquest could not thoroughly investigate a death and accomplish its ends. As well, the Chief Coroner's submission places too great an onus on any individual or organization that feels they have been denied justice through an administrative decision and could largely immunize decision-makers from judicial review. It cannot be the case that in such situations an appropriate response is to implicitly sanction the conduct by simply advising the aggrieved party to try again elsewhere for their remedy.

[28] In terms of the suggestion that LSCFN has an alternative remedy in the sense that it could pressure Yukon Government at a political level, I do not think this is the type of alternative relief contemplated in the caselaw. In the case filed by counsel in support of this proposition, *KCP Innovative Services Inc. v. Alberta (Securities Commission),* 2009 ABCA 102, the exercise of the court's judicial review jurisdiction was deemed improper because there was a full statutory right of appeal available to the party seeking review. As well, the textbook authority provided by the Chief Coroner expressly states in this context that "[t]he typical alternative is an appeal to court or to an appellate tribunal" and that "[o]thers include arbitration or reconsideration by the same tribunal" (see S. Blake, *Administrative Law in Canada,* 5th ed.). Furthermore, in the relatively recent *Strickland v. Canada (Attorney General),* 2015 SCC 37, the Supreme Court of Canada sets out a number of considerations relevant to the determination of whether an alternative remedy or forum is adequate, including the convenience of the alternative remedy, the nature of the error, the nature of the other

forum, including its remedial capacity, the existence of adequate and effective recourse in the forum that is already handling the litigation, expeditiousness, the relative expertise of the alternative decision-maker, economical use of judicial resources, and cost (see para. 42). All of these considerations to my mind contemplate the availability of an alternative judicial mechanism, not the existence of a possible political avenue for redress.

[29] For these reasons, I find that there is no adequate alternative remedy to judicial review. The *Coroners Act* certainly does not provide a mechanism for review of the impugned decision, and the suggestions made by counsel for the Chief Coroner are, respectfully, not realistic.

Conclusion

[30] I conclude that LSCFN has party standing to proceed with this petition.

[31] Counsel may speak to costs, if necessary, in case management.

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VEALE J.