SUPREME COURT OF YUKON

Citation: *Silverfox v. Chief Coroner et al.*, 2010 YKSC 39

Date: 20100726
S.C. No. 10-A0022
Registry: Whitehorse

Between:

DEANNA-LEE CHARLIE, DELORES AILEEN LINDSTROM, DEBORAH ANN SILVERFOX, GERALDINE JEAN 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:

André Roothman and Susan Roothman	Counsel for the Petitioners
Lee Kirkpatrick	Counsel for the Chief Coroner
Alex Benitah and Suzanne Duncan	Counsel for the Attorney General of Canada

REASONS FOR JUDGMENT
(Undertaking)

INTRODUCTION

[1] The Petitioners have filed a judicial review application of the Coroner's Inquest into the death of Raymond Benjamin Silverfox in RCMP cells on December 2, 2008.

[2] This application concerns the undertaking signed by counsel for the Petitioners regarding the Coroner's Brief of Documents prepared for the inquest and the use to be made of those documents in the judicial review application. It is agreed that all documents that became exhibits, including a restricted exhibit, will be admitted at the hearing of the judicial review application. However, the use to be made of the other disclosed documents is contentious.

[3] There is also disagreement on the scope of the judicial review application and whether it includes the investigation procedures as well as the inquest hearing and decision.

[4] I made the following interim order:

1. Counsel for the Petitioners shall sign a new undertaking permitting the Petitioners to possess all documents in the Coroner's Brief for this proceeding and any appeals;
2. Counsel for the Petitioners shall file a sealed affidavit on or before August 20, 2010, exhibiting all the documents in the Coroner's Brief and identifying those documents it wishes to use in either a hearing into the investigation procedures or a hearing limited to the Coroner's Inquest;
3. The application to determine the scope of the judicial review and the documents to be admitted will be adjourned to September 10, 2010.
4. The Petitioners' Outline shall be filed on August 27, 2010, and the Respondents' Outline shall be filed on September 3, 2010.

[5] The following are my reasons.

BACKGROUND

[6] On December 2, 2008, Raymond Silverfox died while in RCMP ‘M’ Division custody. A criminal investigation was commenced by the RCMP immediately following his death. The investigation was led by RCMP ‘E’ Division in British Columbia.

[7] The RCMP ‘E’ Division also commenced an investigation on behalf of the Chief Coroner for the Yukon, Sharon Hanley (the “Chief Coroner”). Information collected for purposes of the Coroner was generally the same as the information collected for purposes of the criminal investigation.

[8] Information provided to the Chief Coroner by the RCMP in the form of the Coroner’s Brief included: physical evidence, statements of witnesses, timelines of the activities of Mr. Silverfox and other relevant witnesses, medical records, photographs, drawings, audio and video recordings, background information regarding Mr. Silverfox (including current and historical RCMP information sheets), background information on other individuals present in cells during Mr. Silverfox’s detention, internal RCMP policies, procedures and training materials, and pathology and autopsy reports.

[9] In early 2010, the Chief Coroner scheduled the hearing of the Inquest for April 2010.

[10] In February 2010, counsel for the Silverfox family sought standing at the Inquest through its counsel, Ms. Susan Roothman.

[11] The Chief Coroner requested that Ms. Roothman provide an express undertaking (“the Undertaking”) prior to receiving a copy of the Coroner’s Brief.

[12] On March 30, 2010, Ms. Roothman signed and returned the Undertaking to the Chief Coroner. No concerns about the language or the effect of the Undertaking were raised by Ms. Roothman.

[13] The language of the Undertaking requires, amongst other things, that Ms. Roothman:

a) Use the Coroner's Brief for the sole purpose of the Inquest;

b) Maintain the contents in strictest confidence; and

c) Return the Coroner's Brief within 30 days of the jury's return of its verdict.

[14] All parties with standing had the opportunity to introduce exhibits. During the hearing of the Inquest, no documents tendered by the Petitioners were refused admission.

[15] The jury to the Coroner's Inquest returned a verdict on April 23, 2010, stating that Raymond Silverfox died of natural causes.

[16] Counsel for the Petitioners commenced a judicial review application on May 13, 2010. On May 31, 2010, counsel for the Petitioners filed an application for an order that:

1. Counsel for the Petitioners be released from the Undertaking; and

2. The contents of the Coroner's Brief may be used by the Petitioners for the purpose of the judicial review of the Coroner's Inquest proceedings and the civil litigation that has been filed in Supreme Court, Action No. 10-A0019 (the wrongful death action).

[17] This decision is confined to the use of the material in the judicial review.

[18] On July 21, 2010, the Petitioners filed an amended Petition to include, in addition to grounds relating to the Coroner's conduct and the Charge to the Jury, the allegation that the conduct of the Coroner's investigation into the death of Raymond Silverfox was biased and breached the rules of natural justice.

ISSUES

[19] The substantive issue addressed in these Reasons is:

1. Should counsel for the Petitioners be released from the Undertaking made to the Chief Coroner?

LAW AND ANALYSIS

[20] The use of undertakings signed by lawyers is a practice which serves the purpose of protecting the privacy of a party that discloses documents by confining their use solely to a particular court proceeding.

[21] In the past, where undertakings have not been signed, the question has been whether there is an implied undertaking rule to not use documents disclosed except in the proceeding in which they were disclosed.

[22] There has been controversy about the existence of the implied undertaking rule. The common law rule is set out in *Goodman* v. *Rossi* (1995), 24 O.R. (3d) 359 (C.A.) at paras. 25-35, which may be summarized as follows:

1. there is a general right of privacy to a person's documents;
2. the discovery process in a civil action is a compulsory intrusion on this right;
3. the intrusion is permitted to secure justice in the proceeding;

4. there is an implied undertaking not to use the disclosed documents for any other proceeding or purpose or to any other person;

5. a breach of the implied undertaking rule may be sanctioned by the court through contempt or other relief;

6. a party may apply to the court for relief from or modification of the rule in a particular case.

[23] In *Juman* v. *Doucette*, 2008 SCC 8, the issue was whether discovery transcripts could be disclosed to the police or any non-party without a court order, in the circumstances where the information disclosed alleged criminal conduct. The Supreme Court of Canada provided a clear response at para. 4:

> Thus the rule is that both documentary and oral information obtained on discovery, including information thought by one of the parties to disclose some sort of criminal conduct, *is* subject to the implied undertaking. It is not to be used *by the other parties* except for the purpose of that litigation, unless and until the scope of the undertaking is varied by a court order or other judicial order or a situation of immediate and serious danger emerges.

[24] The implied undertaking rule was adopted in Rule 26 of the Supreme Court of Yukon *Rules of Court* on September 15, 2008 and therefore applies to this proceeding. However, as Rule 26 did not apply to the Coroner's Inquest, the common law implied undertaking rule applies, subject to the express terms of the Undertaking.

[25] Coroner's inquests are not adversarial in the same way that criminal and civil cases are. In *Hudson Bay Mining and Smelting Co. v. Cummings*, 2006 MBCA 98, the Manitoba Court of Appeal provided useful and extensive consideration of the purpose of an inquest and the role of Crown counsel. This is important background for a

discussion of the role of the Undertaking in the case at bar. Steel J.A. said the following in a ruling that ordered the production of transcripts of witness interviews:

> [47] Thus, an inquest is designed to be an impartial, non-adversarial and procedurally fair, fact-finding inquiry committed to receiving as much relevant evidence about the facts and issues surrounding the death of a community member as is in the public interest, but without making findings of criminal or civil responsibility.
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> ...
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> [108] In accordance with the purpose of an inquest and the role of Crown counsel, procedural fairness requires the disclosure of all relevant, material and non-privileged information. Such disclosure has been routinely made in the past in Manitoba and is consistent with the authorities and contemporary legal requirements. A high standard of disclosure would assist the inquest judge in accomplishing the very wide purposes of an inquest and increase the likelihood of truly meaningful recommendations. This is particularly true in the facts in this case, where some of the transcripts contain new and sometimes different factual information not otherwise available to some of the parties with standing.
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> [109] The contents of these interviews are not privileged or confidential. An inquest is not litigation in the sense that there are adversarial parties engaged in a dispute. There is no evidence that the witnesses themselves, as opposed to the unions, had an expectation of confidentiality. The inquest judge and the reviewing judge erred in law when they held that Crown counsel was no different than a solicitor preparing an ordinary case and that these notes fell within the doctrine of work product privilege.

[26] As a consequence of this high standard of disclosure, it is incumbent on counsel to comply meticulously with a signed undertaking.

[27] In *Jackson v. D.A.*, 2005 ABQB 702, Veit J. stated at para. 33:

> In Canada also, courts have emphasized the importance of lawyers' promises. Although a court may decline to intervene in a dispute between lawyers concerning

> satisfaction of an undertaking, it will "require whenever possible that undertakings be carried out as strictly and honourably as though they were embodied in orders of the Court, the purpose being to ensure honest conduct on the part of its officers" (citation omitted).

[28] Lawyers may bring disputes over undertakings to court for adjudication. In the case at bar, the dispute arises over whether the Coroner's Brief of Documents had to be returned when the Coroner's Inquest became the subject of an application for judicial review, as arguably this is simply an extension of the inquest. In my view, the appropriate resolution is to return the documents as required in the Undertaking and have the Coroner's Brief of Documents filed in the judicial review. Fortunately, the matter here can be resolved by simply requiring the Petitioners to enter into a new undertaking that extends possession of the documents to this application and any subsequent appeal. I have ordered counsel for the Petitioners to execute a new undertaking to that effect.

[29] The application to determine the use of the documents and the scope of the judicial review will be heard on September 10, 2010 on the terms set out above.

VEALE J.