SUPREME COURT OF YUKON

Citation: Silverfox v. Chief Coroner, 2012 YKSC 36

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
(Application to Strike)

INTRODUCTION

[1] Counsel for the Chief Coroner applies to strike paragraphs 12, 13 and 14 of the Second Amended Petition. 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 on December 2, 2008. The Petitioners seek declarations that, among other things, the Coroner's investigation was biased, the Coroner's conduct of the inquest was biased, or at least raised a reasonable apprehension of bias, and the charge to the jury was biased.

[2] The pleadings that the Chief Coroner wishes to strike are not causes of action but rather remedies sought in addition to an order quashing the jury verdict. The impugned paragraphs are:

> 12. The Coroner be prohibited to hold a new inquest. (sic)
>
> 13. The Coroner's Service, Department of Justice, Yukon Government conducts a quality assurance review of the autopsy done by the pathologist, Dr. Charles Lee, which assurance review should include a peer review of the autopsy findings and conclusions.
>
> 14. The Coroner's Service, Department of Justice, Yukon Government provides the review reports to the Petitioners' lawyer and the Court.

[3] Following the hearing, I dismissed the application to strike paragraph 12 and granted the application to strike paragraphs 13 and 14. These are my reasons.

ANALYSIS

[4] Rule 20(26) of the *Rules of Court* states:

> (26) At any stage of a proceeding the court may order to be struck out or amended the whole or any part of an endorsement, pleading, petition or other document on the ground that
>
> > (a) it discloses no reasonable claim or defence as the case may be,
> >
> > (b) it is unnecessary, scandalous, frivolous or vexatious,

> (c) it may prejudice, embarrass or delay the fair trial or hearing of the proceeding, or
>
> (d) it is otherwise an abuse of the process of the court,
>
> and the court may grant judgment or order the proceeding to be stayed or dismissed and may order the costs of the application to be paid as special costs.

[5] The law on an application to strike is set out in *Hunt v. Carey Canada Inc*., [1990] 2 S.C.R. 959, and can be summarized as follows:

1. it is only in plain and obvious cases where the case is absolutely beyond doubt that a claim should be struck out;
2. the mere fact that a case is weak or not likely to succeed are not grounds for striking it out;
3. if the action involves serious questions of law or if facts are to be known before rights are definitely decided, the rule should not be applied;
4. a statement of claim may be amended;
5. the allegations in the statement of claim are accepted as true for the purpose of the application;
6. the statement of claim should be struck out only if the action is certain to fail because it contains a radical defect;
7. if there is a chance that the plaintiff might succeed, the plaintiff “should not be driven from the judgment seat”.

The Prohibition against a new Inquest

[6] The Chief Coroner submits that it is the Chief Coroner’s lawful authority and her legal duty to hold an inquest when a prisoner dies in RCMP custody as set out in the *Coroner’s Act*, R.S.Y. 2002, c. 44, ss. 10 and 11:

> *Direction of chief coroner or judge to hold inquest*
>
> 10 If the chief coroner or a judge has reason to believe that a deceased person came to their death under circumstances which, in the opinion of the chief coroner or judge, make the holding of an inquest advisable, the chief coroner or judge may direct any coroner to conduct an inquest into the death of the person and the coroner so directed shall conduct an inquest in accordance with this Act, whether or not that coroner or any other coroner has viewed the body, made an inquiry or investigation, held an inquest into or done any other act in connection with the death.
>
> *Death of prisoner*
>
> 11 If a prisoner in a prison, jail or lock-up or in the custody of the Royal Canadian Mounted Police or a peace officer dies and notice of the prisoner's death is given to a coroner by the warden or other official or person in charge or in whose custody the prisoner was, the coroner shall issue a warrant in the prescribed form and hold an inquest on the body.

[7] Counsel for the Chief Coroner submits that a superior court may review the legality of administrative action by quashing the decision based upon error of law or breach of procedural fairness but it cannot prohibit the rehearing of the same matter unless there are exceptional circumstances. See *Rathé v. Health Profession Appeal and Review Board* (2002), 166 O.A.C. 161 (Div. Ct.), at para. 29.

[8] Generally speaking, exceptional circumstances are gross or shocking abuses of process but not procedural fairness or bias. See *Blencoe v. British Columbia (Human Rights Commission),* 2000 SCC 44, at para. 180 and *Canada Border Services Agency v. C.B. Powell Limited*, 2010 FCA 61, at para. 33.

[9] Counsel submits that there is a great reluctance in the courts to use prohibitive orders to pre-empt administrative proceedings. See *Halifax (Regional Municipality) v. Nova Scotia (Human Rights Commission),* 2012 SCC 10.

[10] I do not take issue with any of the submissions made by the Chief Coroner's counsel. I also recognize that the claim for a prohibition from holding a new inquest may not succeed in light of the Chief Coroner's duty under s. 11 of the *Coroner's Act*, but it cannot be considered "plain and obvious" or "absolutely beyond doubt" that it will fail. It remains to be determined whether the circumstances of this case meet the threshold of "exceptional circumstances" that are gross or shocking abuses.

[11] The application to strike paragraph 12 is dismissed.

The Quality Assurance Review

[12] I should say at the outset that the relief in paragraphs 13 and 14 is unusual. It is based on the position of counsel for the Petitioners that Dr. Lee's autopsy report, concluding that Mr. Silverfox died of sepsis and pneumonia, is contrary to the evidence of other medical practitioners and the evidence at the inquest. It may be, for the sake of argument, that this court will find Dr. Lee's report insufficient in some way, resulting in the jury's verdict being set aside. But I have concerns about the appropriateness of the relief as well as my jurisdiction to make such an order.

[13] Counsel for the Petitioners could have commissioned a peer review to present at the inquest hearing. I appreciate that this course may not be very realistic in these circumstances, as few families have the financial ability to fund such a review. On the other hand, it is the obligation of the Chief Coroner to ensure that the expert she chooses is qualified to give the opinion sought.

[14] Secondly, the remedy presumes that Dr. Lee erred in some way, such that his professional qualifications are called into question and a peer review is merited. The point is that this judicial review challenges the actions of the Chief Coroner and while

Dr. Lee's report may be wanting in some way, he is not a party to the judicial review. To add Dr. Lee as a party would unduly complicate this proceeding.

[15] In the case of *Taser International Inc. v. British Columbia (Commissioner)*, 2010 BCSC 623, Taser applied for declarations that a doctor who gave evidence was in dereliction of his duty to act honestly and that the commission's counsel failed to fulfill his duties and obligations and was biased.

[16] Both the doctor and commission counsel succeeded in their applications to have the impugned pleadings struck as an abuse of process pursuant to Rule 19(24)(d). In doing so, Sewell J. said the following at para. 62:

> I have concluded that the declarations sought against Mr. Vertlieb and Dr. Chambers do constitute an abuse of process. I consider that the allegations made against them are unnecessary, scandalous and vexatious. I also consider that those allegations may prejudice or embarrass the fair hearing of this proceeding. I say this because if the declarations sought are allowed to stand fairness would require that Mr. Vertlieb and Dr. Chambers be allowed to participate fully in the hearing of this application on the merits. In my view there is a grave danger that the consideration and resolution of the allegations made against these gentlemen would divert the attention of the Court from deciding the real issues before it.

[17] I do not consider the pleadings in paras. 13 and 14 to be in the order of abusiveness in the *Taser* case, but I find that the pleading for a peer review of Dr. Lee would require the participation of Dr. Lee as a party, which would result in diverting the judicial review from its true purpose of judicially reviewing the investigation, conduct and jury charge of the Chief Coroner.

[18] I conclude that the pleading in paras. 13 and 14 should be struck on the grounds that they are unnecessary and will delay of a fair hearing of this case.

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

VEALE J.