Re

Black Action Defence Committee and Huxter, Coroner Re Urban Alliance on Race Relations for Metropolitan Toronto (Justice) and Huxter [Indexed as: Black Action Defence Committee v. Huxter, Coroner]

11 O.R. (3d) 641

[1992] O.J. No. 2741

Action No. 612/92

Ontario Court (General Division), Divisional Court,

Steele, Montgomery and Adams JJ.

December 21, 1992

Coroners -- Inquest -- Standing -- Mentally ill member of black community fatally shot by police officer -- Trial of police officer and investigation by O.P.P. revealing no evidence that race was direct factor in shooting -- Coroner correctly denying standing to organization which sought to raise concerns of black community that race played direct role in shooting -- Organization not having substantial and direct interest in inquiry -- Coroner erring in denying standing to organization with expertise on need for cross-cultural training in dealing with mentally ill -- Issue to be raised at inquest by at least one witness -- Issue not peripheral -- Organization having direct and substantial interest in issue -- Coroners Act, R.S.O. 1990, c. C.37, s. 41(1).

D, a member of Toronto's black community who had been diagnosed as a paranoid schizophrenic, was fatally shot during an altercation with police officers in 1988. The applicant, Black Action Defence Committee (BADC), was formed in the wake of D's death. Its purpose was to work towards a fair and just system of policing in Ontario and throughout Canada. The applicant, Urban Alliance on Race Relations for Metropolitan Toronto (Justice) ("the Alliance"), was founded in 1975 and was dedicated to promoting racial harmony within Toronto's multicultural society by providing advocacy support to minority groups suffering the effects of racial disharmony and through pro-active educational programmes on issues of race relations. It offered specialized expertise in the areas of the accessibility of health care services to racial minorities and cross-cultural health services.

Both applicants sought standing at an inquest into D's death which was to be conducted by the respondent. BADC sought standing on the ground that there was concern in the black community that

police harassment, motivated by racism, had led to D's mental illness and that race had played a direct role in the shooting. The Alliance sought standing on two grounds. The first ground was similar to that on which BADC's application was based. The second ground centred on the potential need for cross-cultural training in dealing with the mentally ill.

The respondent denied standing to both applicants. He held that as there was no evidence, after the criminal trial of the police officer who shot D and the investigation conducted by the O.P.P. at the direction of the respondent, that race played a part in D's death, the jury would not hear evidence with respect to race, and that BADC, therefore, had not demonstrated that it had a direct and substantial interest in the inquest, as required by s. 41(1) of the Coroners Act . He further held that he had no residual discretion to grant standing apart from s. 41(1), but that if he had, he would not exercise it in BADC's favour.

With respect to the Alliance, he stated that he did not anticipate a great deal of evidence on cross-cultural training and did not anticipate that the jury would be making many, if any, recommendations on that subject. For that reason, he held that the interest of the Alliance was not so acute as to amount to a substantial and direct interest.

BADC renewed its application for standing based on additional affidavit evidence. It also requested the respondent to disqualify himself on the basis of apprehended bias. The latter claim was based on unsuccessful attempts by the Chief Coroner (not the respondent) to limit the scope of the inquest by obtaining consent to a summary inquest procedure. The respondent dismissed the application and refused to disqualify himself. He noted that the affidavit evidence contained speculations and expressions of concern, but presented no evidence that race was a contributing factor in D's death. He stated that to allow public concerns, absent fact, to be a measure of standing would be to discard the concept of relevancy.

The applicants applied for judicial review of the decisions denying them standing, requesting an order setting aside those decisions, an order prohibiting the respondent from presiding as coroner to the inquest by reason of his actual or apprehended bias, and an order prohibiting any coroner employed in the Office of the Coroner for the Province of Ontario from presiding at the inquest by reason of an alleged actual or apprehended bias.

Held, the application of BADC should be dismissed; the application of the Alliance should be allowed.

Per Adams J. (Steele J. concurring): An inquest requires thoughtful and effective administration. It is not the occasion for a roving investigation into general public concerns. However, an inquest must be sensitive to opportunities to utilize public participation in order to fulfil its important preventive function.

A coroner's decision will only be overturned where it involves jurisdictional error. For jurisdictional error to arise with respect to the denial of standing to BADC, the respondent must have manifestly erred in determining that the initial scope of the inquest did not reasonably include race as a principal or direct cause of death. There was no manifest error in the respondent's rulings.

The Alliance argued that the decision ought to be quashed in any event because the respondent refused to disclose the O.P.P. investigation upon which he relied in coming to his conclusion. However, both the Alliance and BADC were aware of the existence of an inquest brief and the presence of an O.P.P. investigation when they made their submissions. Nevertheless, they chose to make

their presentations on the issue of standing without requesting access to this material and without justifying to the respondent beforehand the need behind such a request. The Alliance therefore consented to the lack of disclosure before making its submissions and thereby waived any right of access to this material it might otherwise have had.

The respondent took too narrow a view of the Alliance's interest in the inquest and in so doing committed a serious error in principle which excluded the Alliance from any participation in the proceedings. It was anticipated that at least one witness would testify on the issue of cross-cultural sensitivity in dealing with the mentally ill and the need for police training in that respect. A person does not require a substantial and direct interest in all, or even most, of the issues likely to arise at an inquest to be granted standing. The Alliance had significant expertise in cross-cultural sensitivity as it relates to mental health issues and it had the clear confidence of the black community. It was a serious error in principle to characterize the cross-cultural/mental health aspect of the proceedings as peripheral. Cross-cultural sensitivity in the delivery of mental health services was an issue which was not inquired into by any previous proceeding or investigation related to D's death. Thus, the relevance of the issue was in marked contrast to that of race as a direct factor. The Alliance's interest was substantial and direct given its almost unique expertise in a potentially significant issue and the fact that it represented a community having a direct interest in any preventive recommendations in this area.

The attempts of the Chief Coroner to have the matter dealt with in a summary manner were aimed at achieving a less adversarial inquest for the benefit of D's family and the families of the affected police officers, and did not give rise to an apprehension of bias. The respondent's rulings were made in good faith on the evidence before him, and could not reasonably be the basis for an alleged bias, either actual or apprehended.

It was not necessary to decide whether a coroner possesses a residual discretion to grant standing to an organization which has been found to lack the requisite interest in an inquest set out in s. 41(1) of the Coroners Act.

Per Montgomery J. (dissenting in part): There was no evidence that in entering into the pre-inquest discussions the Chief Coroner sought to come to a focus for or to approach the inquest in a way which would exclude any issue arising from the circumstances of D's death. Furthermore, the Chief Coroner at no time consulted with the respondent or involved him in the discussions. It was not an improper purpose to attempt a concise and short hearing because it would save a great deal of public expense. The pre-inquest discussions could not form a ground for either actual or reasonable apprehension of bias.

A decision of a coroner will not be reviewed where there is no evidence on the record to suggest that the coroner acted improperly, unfairly or unreasonably.

The respondent properly concluded that the affidavits relied on by BADC were inadmissible. None of the affidavits of either applicant contained any evidence that race was a factor in the shooting. Suppositions and opinions were not sufficient to meet the test of relevance and fell short of establishing a basis to bring the applicants within s. 41 as having a substantial and direct interest in the inquiry.

With respect to the issue of cross-cultural awareness in dealing with minorities who suffer from mental illness, it was proposed that Crown counsel would call a body of material opinion that would

properly and adequately address that subject. It was unnecessary, then, to grant standing to the Alliance.

Beckon (Re) (1992), 9 O.R. (3d) 256, 93 D.L.R. (4th) 161 sub nom. Beckon v. Beckon Inquest (Coroner of) (C.A.); People First of Ontario v. Porter, Regional Coroner Niagara (1991), 5 O.R. (3d) 609, 85 D.L.R. (4th) 174 sub nom. People First of Ontario v. Niagara (Regional Coroner) (Div. Ct.), revd on other grounds (1992), 6 O.R. (3d) 289, 87 D.L.R. (4th) 765 (C.A.); Stanford v. Regional Coroner, Eastern Ontario (1989), 38 C.P.C. (2d) 161, 38 Admin. L.R. 141 (Ont. Div. Ct.), consd

Other cases referred to

Committee for Justice and Liberty v. National Energy Board, [1978] 1 S.C.R. 369, 68 D.L.R. (3d) 716, 9 N.R. 115, revg (1975), 65 D.L.R. (3d) 660 sub nom. Re Canadian Arctic Gas Pipeline Ltd. (Fed. C.A.); Evans v. Milton (1979), 24 O.R. (2d) 181, 97 D.L.R. (3d) 687, 46 C.C.C. (2d) 129, 9 C.P.C. 83 (C.A.) [leave to appeal to S.C.C. refused 24 O.R. (2d) 181n, 97 D.L.R. (3d) 687 n, 46 C.C.C. (2d) 129n]; Faber v. R., [1976] 2 S.C.R. 9, 27 C.C.C. (2d) 171, 32 C.R.N.S. 3, 65 D.L.R. (3d) 423, 6 N.R.1; Huynh v. Jones (1991), 2 O.R. (3d) 562, 46 O.A.C. 152 (Div. Ct.); Knight v. Indian Head School Division No. 19 , [1990] 1 S.C.R. 653, 68 D.L.R. (4th) 489, [1990] 3 W.W.R. 289, 90 C.L.L.C. 14,010, 30 C.C.E.L. 237, 83 Sask. R. 81, 106 N.R. 17; Komo Construction Inc. v. Quebec Labour Relations Board , [1968] S.C.R. 172, 1 D.L.R. (3d) 125 sub. nom. R. v. Quebec Labour Relations Board, Ex p. Komo Construction Inc. , 68 C.L.L.C. 14,018; R. v. Dubois, [1935] S.C.R. 378, [1935] 3 D.L.R. 209; Selvarajan v. Race Relations Board, [1976] 1 All E.R. 12, [1975] 1 W.L.R. 1686, 119 Sol. Jo. 644 (C.A.); Wolfe v. Robinson, [1961] O.R. 250, 27 D.L.R. (2d) 98, 129 C.C.C. 361 (H.C.J.), affd [1962] O.R. 132, 31 D.L.R. (2d) 233, 132 C.C.C. 78 (C.A.)

Statutes referred to

Coroners Act, R.S.O. 1990, c. C.37, ss. 2(1), 3(7), 9, 10(4), 15(4), 16, 18(2), 25, 27(3), 31, 41, 44(1)
Criminal Code, R.S.C. 1985, c. C-46
French Language Services Act, R.S.O. 1990, c. F.32
Mental Health Act, R.S.O. 1990, c. M.7
Metropolitan Toronto Police Force Complaints Act, 1984, S.O. 1984, c. 63 (repealed 1990, c. 10, s. 146(1) -- see now Police Services Act, R.S.O. 1990, c. P.15, Part VI)
Police Services Act, 1990, S.O. 1990, c. 10, ss. 73, 113 (now R.S.O. 1990, c. P.15)

Rules and regulations referred to
Rules of Civil Procedure, O. Reg. 560/84, rule 39.03

Authorities referred to

Beaupré, Michael, Interpreting Bilingual Legislation (Toronto: Carswell, 1986), p. 28
Bunt, "The Inquest", Law Society of Upper Canada -- Inquests and the General Practitioner , 1987, pp. D-2, D-3
Collins-Robert, French-English, English-French Dictionary (Don Mills: Collins Publishers, 1978)
Manson, A., "Standing in the Public Interest at Coroner's Inquest in Ontario" (1988), 23 Ottawa L. Rev. 637
Marshall, Canadian Law of Inquests, 2nd ed. (1991)

Ontario Law Reform Commission, Report on the Coroner System in Ontario (Queen's Printer, 1971), p. 89
Royal Commission Inquiry into Civil Rights, Report No. 1, vol. 1 (Queen's Printer, 1968), p. 491
Shorter Oxford English Dictionary, vol. I (Clarendon Press: Oxford, 1973)

APPLICATIONS for judicial review of decisions of the coroner denying standing at an inquest.

Peter Rosenthal, for Black Action Defence Committee, applicant.

Julian N. Falconer, for Urban Alliance on Race Relations for Metropolitan Toronto (Justice), applicant.

Thomas C. Marshall, Q.C., and Thomas H. Bell, Q.C., for Dr. Robert Huxter, respondent.

Peter J. Pliszka, for Myrtle Donaldson.

Todd L. Archibald and Kevin McGivney, for Metropolitan Toronto Police Force.

ADAMS J. (STEELE J. concurring):--This matter involves the judicial review of a coroner's decision denying standing at an inquest to two community organizations, the Black Action Defence Committee ("BADC") and the Urban Alliance on Race Relations for Metropolitan Toronto (Justice) which is an affiliate spokesbody for the Urban Alliance on Race Relations ("the Alliance"). The inquest relates to the death of Mr. Lester Donaldson who was fatally shot by Police Constable David Deviney on August 9, 1988 during an altercation between Mr. Donaldson and five members of the Metropolitan Toronto Police Force. The applicants seek orders prohibiting the coroner, Dr. Robert H. Huxter, or any other coroner for the Province of Ontario from presiding at this inquest on the basis of either actual or apprehended bias. They also request to be granted standing at a new inquest to be directed by this court before a judge of the Ontario Court of Justice (Provincial Division).

I THE BACKGROUND

Mr. Donaldson was a member of Toronto's black community and was 44 years old when he died. He had been diagnosed as a paranoid schizophrenic in 1983. There was as well a history of conflict between Mr. Donaldson and the police, including an incident four months prior to the fatal shooting when he was also shot by police. At the time of his death, Mr. Donaldson's environment reflected very difficult living conditions.

Mr. Donaldson's death provoked several community demonstrations in Toronto and newspaper accounts of this public concern featured allegations by various members of Toronto's black community and others that racism was a factor in the incident. Indeed, BADC was formed in the wake of this incident.

Subsequently, Constable Deviney was charged with manslaughter. Newspaper reports show that several members of BADC complained that the charge was not severe enough while representatives of the Metropolitan Toronto Police Association asserted that the charge was politically motivated as a response to the earlier demonstrations. In fact, the charge was laid on the advice of a Crown attorney from outside of the Metropolitan Toronto area and based on an investigation by the Ontario

Provincial Police, who were brought in to remove any possible perception of a lack of impartiality in the investigation. Constable Deviney testified at his trial as did all the police officers who were witnesses to the August 9, 1988 incident. In November of 1990 he was acquitted. No evidence of racism or racist motive was tendered at Constable Deviney's trial.

Mr. Donaldson's wife, Myrtle Donaldson, lodged a complaint on August 19, 1988 with the Public Complaints Investigation Bureau. She alleged that the police had used excessive force resulting in her husband's death; that Police Constable Deviney improperly and without good and sufficient cause discharged his firearm; and that the police had sufficient time and opportunity to avoid a fatal confrontation and, thus, failed to follow reasonable and proper procedures to deal with the situation. Mrs. Donaldson did not assert that race was a factor in her husband's death. The Chief of Police for Metropolitan Toronto asked that this complaint be taken over by the Office of the Public Complaints Commissioner and Mr. Clare Lewis, the Commissioner, agreed to this request. The report of the Commissioner contained 10 recommendations dealing with police responses to the mentally ill. Racism was not found to have been a factor in Lester Donaldson's death.

An inquest is mandatory under the Coroners Act, R.S.O. 1990, c. C.37 ("the Act"), pursuant to s. 10(4), where a person dies in the custody of a peace officer. However, by s. 27(3) of the Act, such inquest must await the final disposition of any charges under the Criminal Code arising out of the death. An inquest into the death of Lester Donaldson was directed by a warrant for holding an inquest dated July 14, 1992 and signed by Dr. R.H. Huxter, Regional Coroner for Metropolitan Toronto. Pursuant to s. 25(1) and (2) of the Act, on July 31, 1992, Dr. James G. Young, Chief Coroner for Ontario, directed Dr. Huxter to conduct this inquest.

A brief outline of several community events preceding and subsequent to Lester Donaldson's death help to put these applications in context. Two black men had been shot to death in altercations with police in Toronto prior to the death of Lester Donaldson. Andrew Evans died in 1978 and Albert Johnson died in 1979. These deaths also provoked community concern. Indeed, this kind of concern led to the creation of the Public Complaints Bureau, headed by the Police Complaints Commissioner, as an independent civilian review body. While initially created to review the activities of the Metropolitan Toronto Police Force, the Commissioner's mandate was extended under the Police Services Act, 1990, S.O. 1990, c. 10, s. 73, to the review of complaints against all police officers in Ontario. Accordingly, the Commissioner is now required to monitor investigations of all public complaints against police. While police forces have the initial responsibility to investigate complaints by members of the public, the Commissioner can take over an investigation at the request of the chief of police. The Commissioner also undertakes review and re-investigation of complaints if required by the complainants after the chief of police has reached a decision.

Another black man, Wade Lawson, was shot by police in December 1988 evoking still more expressions of public concern. In response, the Ontario government set up a task force headed by the Public Complaints Commissioner, Mr. Clare Lewis, to inquire into, among other issues, matters of race, colour and ethnicity in policing throughout the province. This task force reported in 1989 making many recommendations aimed at improving relationships between the police and members of visible minority groups as well as fostering enlightened race relations.

Following these recommendations, the Special Investigations Unit ("SIU"), a civilian agency, was established in 1990 under the Police Services Act, 1990 , s. 113. The purpose of the SIU is to enhance police accountability in situations involving serious injury and death. The SIU's first director was the Honourable John H. Osler, a highly respected former jurist.

Since Mr. Donaldson's death, there have been several other police shootings involving black persons, in addition to Wade Lawson. Moreover, in 1992 there was a riot in Toronto generally understood to have racial discontent at its origin. In response, Ontario's Premier requested Mr. Stephen Lewis to act as his Advisor on Race Relations. Mr. Lewis embarked on an intensive, month-long inquiry leading to a report to the Premier dated June 9, 1992. In the preface to his many recommendations, Mr. Lewis wrote:

> As a result of the overall experience, I have four initial observations to make.
>
> First, what we are dealing with, at root, and fundamentally, is anti-Black racism. While it is obviously true that every visible minority community experiences the indignities and wounds of systemic discrimination throughout Southern Ontario, it is the Black community which is the focus. It is Blacks who are being shot, it is Black youth that is unemployed in excessive numbers, it is Black students who are being inappropriately streamed in schools, it is Black kids who are disproportionately dropping-out, it is housing communities with large concentrations of Black residents where the sense of vulnerability and disadvantage is most acute, it is Black employees, professional and non-professional, on whom the doors of upward equity slam shut. Just as the soothing balm of "multiculturalism" cannot mask racism, so racism cannot mask its primary target.
>
> It is important, I believe, to acknowledge not only that racism is pervasive, but that at different times in different places, it violates certain minority communities more than others. As one member of the Urban Alliance on Race Relations said: "The Blacks are out front, and we're all lined up behind."
>
> Second, most of my meetings were astonishingly frank and helpful. They were also suffused with intensity. There is a great deal of anger, anxiety, frustration and impatience amongst those with whom I talked in the visible minority communities. They don't understand why it takes forever to fashion and implement race relations policies. Often during our discussions, there was a weary and bitter sense that I was engaged and they were engaged in yet another reporting charade. It was truly depressing. And it means, I think, that government initiatives must come soon, and they must be pretty fundamental.
>
> Third, there was another emotion that was palpable, and it was fear. Mostly, of course, it was from members of the Black community, and in particular, mothers. The eight shootings over the last four years, and the sense, real or imagined, of unpredictable police encounters with Black youth has many families very frightened. I will admit to you that nothing left so indelible an impression on me as the expressions of apprehension and fear. I can't even begin to imagine it about my own children. Nor could you. We must find a way out of the present tension because it's intolerable, in this society, to know that, as one woman put it: "Mothers see their sons walk out the door; they never sleep until they see their sons walk back in."

> Finally, it was good that this project was only one month long. Everyone I talked to, absolutely everyone, wants to see speedy action on a whole variety of fronts. Naturally, I feel both self-conscious and inadequate about making recommendations on such complex subjects in so short a time. On the other hand, everything I'm about to suggest flows directly from the intensive consultations of the last few weeks, and in each instance there are several different sources of corroboration. In any event, you will know how to pick and choose and amend in ways which make things possible. Let me, then turn to specifics.

Among his many recommendations was the establishment of a review or inquiry into the justice system. In this respect he wrote:

> During the last few weeks, I've heard enough expressions of concern, and enough anecdotal horror stories about alleged racist episodes that it's clear that we have to correct the balance. I'm therefore persuaded that we should establish some sort of Panel of Inquiry or Review, with broad terms of reference, to examine those parts of the Justice System which cry out for assessment and evaluation, but always seem to escape it.

On October 1, 1992, the Government of Ontario announced such an inquiry. The preamble to the Order in Council reads:

> WHEREAS Stephen Lewis, in his Report to the Premier of Ontario, has recommended the establishment of an inquiry into race relations and the criminal justice system;
>
> AND WHEREAS the government recognizes that throughout society and its institutions patterns and practices develop which, although they may not be intended to disadvantage any group, can have the effect of disadvantaging or permitting discrimination against some segments of society (such patterns and practices as they affect racial minorities being known as systemic racism);
>
> AND WHEREAS it is deemed advisable in the public interest to conduct an inquiry into systemic racism and the criminal justice system in Ontario;
>
> NOW THEREFORE, the Lieutenant Governor by and with the advice and concurrence of the Executive Council orders that David Cole and Margaret Gittens be appointed Co-Chairs, and Toni Williams, Sri-Guggan Sri-Skanda-Rajah, Moy Tam and Ed Ratushny be appointed members of a Commission established October 26, 1992 to inquire into, report and make recommendations on systemic racism and the criminal justice system in accordance with the following terms of reference:

Finally, in April of 1992, the Metropolitan Toronto Police Services Board requested Mr. Allan G. Andrews, the Metropolitan Toronto auditor, to perform an unprecedented audit of policies, procedures and practices that impact on racial minorities and the police race relations climate. Mr. Andrews reported September 4, 1992. The preface to the study reads:

> The relationship of the Metropolitan Toronto Police Force to minorities within the Metropolitan Toronto community has been the topic of a number of studies and reports throughout the past two decades. Many of these have set out recommendations and suggestions for change and in fact many changes have occurred. The Police Force has invested considerable effort and resources in improving its relationship with the communities it polices. In spite of this, tension between the Force and segments of these communities still exists.
>
> Some of this tension is undoubtedly the result of changes within the Metropolitan area itself. In particular, the massive inflow of immigration through the 1970's and 1980's has dramatically changed the character and composition of many communities. As a consequence, the Force has been faced with the need not only to make basic changes but also to adapt to a rapidly and continually changing environment.
>
> This study is primarily a review of the internal processes of the Force. It has focused on the structure strategies, procedures and processes under which the Force operates. Unlike previous studies, which have for the most part relied heavily on external and often anecdotal evidence, this has looked first hand at the internal workings of the Force. It has had virtually unrestricted access to relevant records, procedures and personnel at all levels and in all areas within the Force.
>
> As far as could be ascertained, there is no precedent for this audit. The conceptual approach and the detailed audit methodology were designed as part of the review. Improvements in this process are suggested in this report for future reviews, but the project has demonstrated that an audit is feasible and the methodology workable.
>
> The findings and recommendations of this review do not provide quick answers to resolving racial tensions. If anything, they underline the complexity and breadth of the issues involved . Hopefully, the findings of this report will provide a framework for constructive changes within the Force to address many of these issues.

(Emphasis added)

The summary to the report -- a report containing many recommendations -- notes the following observations at p. 2:

> In this study, we found no evidence at all of organized, intentional prejudice or bias against racial minorities. Nor did we find evidence that the Force attracts individuals who are overtly racist. We did find evidence that, over time, officers develop strong feelings and beliefs as to attributes of individuals based on factors such as appearance and racial background. These attributes, when taken collectively, can and do produce a bias in behaviour which produces unequal treatment of individuals of difference cultural or racial background .
>
> This is not a reflection on individual officers. But it requires targeted remedial action if officers are to maintain a more balanced perspective of the members of the community they serve. It also requires modification of organizational elements which impact or

> develop the values and culture of the Force such as supervision, systems of reward and punishment and promotional system.

(Emphasis added)

II THE INQUEST

(i) BADC's Application for Standing

At the commencement of the inquest into Lester Donaldson's death on August 24, 1992, BADC sought standing. Section 41(1) and (2) of the Coroners Act provides:

> 41 (1) On the application of any person before or during an inquest, the coroner shall designate the person as a person with standing at the inquest if he finds that the person is substantially and directly interested in the inquest.
>
> (2) A person designated as a person with standing at an inquest may,
>
> (a) be represented by counsel or an agent;
> (b) call and examine witnesses and present arguments and submissions;
> (c) conduct cross-examination of witnesses at the inquest relevant to the interest of the person with standing and admissible.

(Emphasis added)

BADC is an unincorporated voluntary association and, as previously discussed, was formed in the wake of Lester Donaldson's death. Its purpose has been to work towards a fair and just system of policing in Ontario and throughout Canada. BADC has been invited to express its views on the problems of racism and policing to a number of government forums in recent years. In particular, a representative of this group sat on the Committee on Public and Officer Safety which reported to the Solicitor General this past summer. BADC receives representations from many people in the black community about concerns over police-community relations and has become a significant community voice on this issue.

Counsel to BADC described the group's formation and activities. He also emphasized the black community's concern over the death of Lester Donaldson. In light of this concern, it was submitted to Dr. Huxter that the close association between Crown attorneys and the police, dictated the need for a viewpoint like BADC's to be represented at the inquest. No one opposed BADC's application. Indeed, the Donaldson family supported the group's participation. Counsel to BADC also submitted that a coroner possessed a residual discretion to permit persons to participate who might not qualify under the strictures of s. 41(1) and that such discretion, if necessary, should be exercised in BADC's favour having regard to all the circumstances.

Dr. Huxter read his ruling on standing at a hearing convened for that purpose on August 26, 1992. He noted that his decision would be the same whether or not a coroner possessed a residual discretion. He granted standing to the Police Complaints Commissioner, the Ministry of Health, several physicians who had treated Mr. Donaldson, the Donaldson family, the police constables who had attended at Mr. Donaldson's home, including Constable Deviney, and the Metropolitan Toronto Police Force.

BADC was not granted standing. In coming to this decision, Dr. Huxter stated (reproduced from the unedited transcript of inquest proceedings):

> As a Coroner I must out of necessity assess all submissions made to me by all counsel on potential issues that might come before this inquest. The Crown Attorney had advised me that based on an investigation by the O.P.P., evidence is not available to substantiate that race played a part in Lester Donaldson's death.
>
> Nor on submission on behalf of the Police Complaints Commission, who conducted an investigation into his death, was any suggestion made his death was due to his race. I'll make two other observations.
>
> In the recommendations provided to me by Mr. Manuel [counsel to the Police Complaints Commissioner] and his authorities, there were no recommendations with respect to race. Moreover, in the criminal process which preceded this inquest, which was a public forum, race was not addressed as an issue . As Coroner I am bound by the Statute that governs me. This inquest is not a public platform or a Royal Commission and cannot assess direct and substantial interest in a vacuum.
>
> I must divert my mind to those issues that I anticipate the evidence will bring forward, at least to this point in time. While I recognize that the Black Action Defence Committee asserts that race was a factor in this death, that assertion is not evidence. Even with respect to the preventive aspect of an inquest, the jury's recommendations must arise out of the evidence presented to them. The jury was so sworn in the court at the opening of this inquest on the 14th of August 1992.
>
> With respect to granting a party standing, they must show that they are uniquely situated. With respect to the Black Action Defence Committee, its application in this regard, the jury will hear evidence related not to his culture but to his mental status and how that might have affected his dealing with the police and their dealings with him .
>
> I appreciate the inordinate interest of the Black Action Defence Committee and other members of the black community, with respect to this death. I accept that interest is genuine and deeply felt. But I as Coroner must fulfil my duties in accordance with the law. In this I have no choice. Upon that law I cannot find that the Black Action Defence Committee has demonstrated that they have a direct and substantial interest in this inquest at this time.
>
> In light of this ruling, it is unnecessary for me to decide whether or not the Black Defence Committee would in any event be the appropriate group to represent the black community. As has been pointed out earlier in this inquest, section 41 of the Coroners Act allow parties to re-apply at any time during the inquest. Should evidence come to light to substantiate the position put to me, by the Black Action Defence Committee, I

> would consider such an application. Therefore an application by the Black Action Defence Committee, is denied at this point.

(Emphasis added)

Counsel for BADC was further advised by Dr. Huxter that if the group he represented possessed evidence that race was a factor, it should be provided to the Crown Attorney and the police would investigate.

(ii) The Alliance's Application for Standing

On September 1, 1992 the Alliance also sought standing. The Alliance is a non-profit, multi-racial organization that was founded in 1975, during a time of severe racial tensions in the Metropolitan Toronto area. At present, it is comprised of 258 persons who come from diverse cultural backgrounds and walks of life. The Alliance is dedicated to promoting racial harmony within Metropolitan Toronto's multicultural society by providing advocacy support to minority groups suffering the effects of racial disharmony and through pro-active educational programs on issues of racial relations. It publishes a newsletter, an annual report and, over the years, has prepared many public briefs on issues it is interested in. With respect to the issue of minority interests and policing, the Alliance is a founding member of the Liaison Committee on Race Relations and Policing formed in 1977 and whose membership includes the Metropolitan Toronto Police Force. The Alliance was also very active in promoting the idea of a civilian complaints bureau to investigate citizen's complaints of alleged police misconduct. It publishes a quarterly international journal, Current-Readings in Race Relations , and has published work such as "The Canadian Task Force on Mental Health Issues Affecting Immigrants and Refugees" (Vol. 5, No. 3, November 1989); "Minority Access to Services" (Vol. 4, No. 3, Summer 1987); and "Health Care and Aging in a Multiracial Society" (Vol. 7, No. 2, July 1991). The Alliance offers specialized expertise in the areas of the accessibility of health care services to racial minorities and cross-cultural health services.

All of this background of the Alliance was reviewed for Dr. Huxter. Counsel to the Alliance emphasized that an important function of an inquest was to allay community suspicions and that a coroner possessed a residual discretion to permit the participation of community organizations which could contribute to the fulfilment of this public function. Affidavits sworn by Rabbi Gunther Plaut and Mr. Stephen Lewis were relied upon to highlight the black community's concerns on policing issues. For example, counsel read to Dr. Huxter the following paragraph from Stephen Lewis' affidavit:

> 7. In my report I focus on the sensibilities of the visible minority communities. I write of the anger, anxiety, frustration and impatience amongst those of whom I talked. I point out in the report that the 8 shootings over the last 4 years, in a sense, real or imagined, of unpredictable police encounters with black youth, had many families very frightened.
> 8. The tragedy of Lester Donaldson, of course, is included as one of the above-mentioned 8 shootings. I am aware, as others, that police authorities consider the death of Lester Donaldson to have been caused by circumstances entirely unrelated to matters of race. However, I verily believe that there is a significant portion of Toronto's minority communities who would contest that view and from a position of thoughtful collective experience,

would wish to have their voices, heard at this inquest. Based on my knowledge of the sensibilities of such people, I believe it is crucial that an organization such as Urban Alliance, with its roots in these communities, appears and actively participates in the herein proceedings. Urban Alliance would play a valuable and important role in ensuring that all relevant issues were canvassed from all possible perspectives.

9. Based on my experience as described above, I verily believe that the fact of racial discrimination within the context of police minority relations or, indeed, within the delivery of health care services to racial minorities, is not always discernible at first blush. As in the case of many systemic realities, the problem can only be addressed by a canvassing of the issues by those with the expertise and experience necessary to do the job. I verily believe that the Urban Alliance is capable of accomplishing this task. I am very concerned about the perception in the racial minority communities that would undoubtedly be created by not having the organization participate and represent their interests. Simply put, Urban Alliance's absence would mean that there would be no organization with which these communities could identify.

(Emphasis added)

Counsel for the Alliance also advised of his understanding that the Crown Attorney would be calling a witness to testify, in part, on "the importance of cultural sensitization in race relations training for the police". He again emphasized the Alliance's long-standing expertise in such matters. Ms. Kingston, the Crown Attorney, confirmed that Dr. Joel Dvoskin was an anticipated witness. He is Associate Commissioner for Forensic Services for the New York State Office of Mental Health. Ms. Kingston reported he would be called to testify about police training in dealing with the mentally ill. She told Dr. Huxter that Dr. Dvoskin would express the view that cross-cultural training, including cultural sensitivity training, should be included as one component in police training regarding the mentally ill.

Dr. Huxter read out his ruling on the Alliance's application for standing on September 9, 1992. He saw the application having two grounds. The first was premised on a widespread community concern about whether or not race played a part in Mr. Donaldson's death, irrespective of the absence of evidence to that effect. This ground, he found, was similar to the previous BADC application. The second ground of the Alliance's application centred on the potential need for cross-cultural sensitivity training in dealing with the mentally ill.

With respect to the first ground, he accepted that one of the functions of an inquest was to dispel doubt but only within the confines of the Coroners Act in the sense that an inquest was not a Royal Commission or public inquiry. Unlike those investigations, in his view, an inquest cannot explore issues that might merely assist a segment of society on the sole basis that anxiety exists if there is no evidential basis to support such a concern. The Act requires questions and cross-examination to be "relevant" in light of the scope of the inquiry. A coroner is required to determine the scope of the inquiry based on a prior involvement with the subject matter of the inquest. Accordingly, in dismissing this ground for the Alliance's application, he ruled (taken from the unedited transcript):

> As I have previously stated, if there were sufficient evidence that race was a contributing factor in the death of Mr. Lester Donaldson, it would become an issue before this inquest. No new evidence was brought to my attention through this application. The issue of race as a partial cause of Mr. Donaldson's death had been previously ruled on. I see nothing in the submission before me to show us a factual basis for this issue.

And again at p. 10 of his ruling:

> On the same basis of lack of evidence, I cannot anticipate that the jury will make any recommendations in this area. Therefore, I see no significant degree of interest on behalf of the applicant in the recommendations that the jury might make. Therefore, on this issue, I am denying standing to the Urban Alliance.

On the issue of cross-cultural sensitivity in dealing with the mentally ill, Dr. Huxter also denied standing but in quite different terms (taken from the unedited transcript):

> It may be that a witness or witnesses will say that cross-cultural sensitivity should be a part of that training. The focus of this inquest is as made out by my counsel in her remarks of August 24th, 1992 at page 32 and 33 of the official transcript. At present cross-cultural sensitivity is not a focus on this inquest. The matter of substantial and direct interest was argued at length on the 24th of August, 1992. I adverted my mind to the case law on this subject. As I said previously in this ruling I cannot assess substantial and direct interest in a vacuum. As I am entitled to, I do not anticipate a great deal of evidence on cross-cultural training and therefore I do not anticipate that the jury will be making many, if any, recommendations on this subject .
>
> As Mr. Justice Campbell outlined in the above reference [Stanford v. Harris (1989), 38 Admin. L.R. 141] on page 175, different applicants have a different degree of interest in the potential recommendations of a jury. In some cases the interest of an applicant or applicants will be so remote that there is no question of substantial interest. In other cases the interest will be substantial but not direct.
>
> In other cases the interest of the applicant in the recommendations will be so acute that it will amount to substantial and direct interest. For the reasons set out above, I do not find that the interest of the applicant in the potential recommendations to be so acute that it amounts to a substantial and direct interest. Therefore I must find that the Urban Alliance does not have substantial and direct interest in this aspect of the interest. [inquiry]
>
> If the situation arises that evidence is given in this inquest with respect to cross-cultural sensitivities and if that raises the issue, the Urban Alliance may well wish to approach my counsel, or she them, to see if there are suitable witnesses known to them who might assist the jury.

> In the event it develops into a significant issue, I would be happy to reassess the argument already laid before me on behalf of the Urban Alliance, to see if the criteria of direct and substantial are met at this time. Uh, are met at that time, I would ask my counsel to direct her mind to this. Notwithstanding, counsel for the Urban Alliance may make subsequent application for standing is such or any other circumstances arise, pursuant to their interests.

(Emphasis added)

He also determined a coroner lacked any residual discretion to permit the involvement of the Alliance notwithstanding its lack of standing pursuant to s. 41. In this respect, he ruled (taken from the unedited transcript):

> I then adverted my mind to whether or not the issue of doubt in the community, without factual evidence in the death before this inquest would allow standing under Mr. Justice Campbell's decision, it does not. That left me with the consideration of whether I had residual discretion and whether under residual discretion I would find room for the Urban Alliance in this inquest.
>
> As Associate Chief Justice Morden stated in the matter of Diane Beckon and James G. Young, Chief Coroner , at page 28 of this Court of Appeal judgment and I quote:
>
> > The legal basis of a Coroner's inquest is in the Coroner's Act and it had no other basis. The common law component of Coroner's proceedings had been abolished, Coroners Act, section 2-1.
>
> Having regard to its legislative history, it is not reasonable to interpret the Act as conferring any more powers, respecting inquests, than those prescribed by it.
>
> Section 2, subsection 1 of the Coroners Act states and I quote:
>
> > In as far as it is within the jurisdiction of the legislature, the common law as it relates to the function, powers and duties of Coroners within Ontario, is repealed.
>
> Therefore I feel I do not have residual discretion in this matter. I therefore need not consider whether the Urban Alliance would meet the test of this criteria. Therefore at this time I deny standing to the Urban Alliance.

In response to the submission that such rulings would disenfranchise "either the community or this inquest with respect to looking at any involvement of race in Mr. Donaldson's death", Dr. Huxter stated (taken from the unedited transcript):

> I would like to make comment on the issue of whether denying any particular party standing on the basis of the law before me, disenfranchises either the community or this inquest with respect to looking at any involvement of race in Mr. Donaldson's death. There are at present 5 parties to this inquest. The family, who are represented by able

> counsel. The Police Complaints Commission with its own public mandate. The Minister of Health who is responsible for the delivery of mental Health care to all segments of the community.
>
> The police who must administer part of the Mental Health Act to all segments of the community. And the physicians who treat the mentally ill in all segments of the community. We have a jury of able-minded citizens who will hear all the evidence. My counsel, myself and the jury may ask relevant questions of each witness. All parties with standing may also ask relevant questions of each witness with respect to their client's interests. And last, we have an investigative team who will respond appropriately to new evidence.
>
> This inquest has issues before it that if properly explored, can result in tremendous good for all those involved in the administration of and the delivery of provisions the Mental Health Act. If that good is to come out of this inquest, we must focus on those issues which arose out of the death. As indicated by Mr. Justice Campbell in his decision on Stanford -- Harris and I quote: "The danger is not simply that the busybody or the crank, but also the danger of sincerely motivated groups, seeking a public platform for views that are not sufficiently relevant to the subject of the inquest and which will only result in undue delay and inefficiency."

(Emphasis added)

(iii) Second BADC Application and the Charge of Bias

BADC on September 10, 1992, renewed its application for standing based on additional affidavit evidence and also requested Dr. Huxter to disqualify himself on the basis of "apprehended bias". Affidavits of Akua Benjamin, Charles C. Roach, Dudley Laws, Lennox Farrell, Dr. Al Harris, Enid Lee, Mary R. Nnolim, T. Sher Singh, Charis Newton, Paul Copeland, Roger Hollander, Anne Malloy and Livingston A. Wedderburn were filed with Dr. Huxter. None of these people had direct knowledge of the circumstances pertaining to the shooting of Lester Donaldson. For example, Akua Benjamin, who is a professor and a member of BADC, stated:

> There were several elements of the police treatment of Lester Donaldson which appeared to indicate that he had been treated more harshly because of his race, including the following:
>
> (a) the excessive use of force against him prior to the day of the fatal shooting; in particular, the shooting several months earlier which had left him disabled;
> (b) the telephone call that the police claimed they received on the day of the fatal shooting (which was said to be about a disturbance involving Mr. Donaldson) was never substantiated; BADC has received similar complaints from many Black residents of Toronto;
> (c) five officers arrived at Lester Donaldson's home on the day of the shooting; this appears extraordinary even if the allegation of a disturbance had been substantiated;

(d) Lester Donaldson was described in a way that appeared to be a stereotypical image of a Black man.

Mr. Dudley Laws, chairman of BADC, stated:

> The officer who fatally shot Lester Donaldson was acquitted of criminal charges. However, he did not take the witness stand at his trial and thus was not examined about any racial aspects of the shooting.

However, it was conceded by counsel that Mr. Laws was in error in asserting Constable Deviney did not testify at his trial.

Mary Nnolim, who is a member of the Regional Municipality of Peel Police Services Board, stated in her affidavit:

> I am aware of the concerns of many people into the fatal 1988 police shooting of Lester Donaldson. I am equally concerned, as anyone, at the idea that systemic racism is pervasive in our society and exists in most organizations in Toronto and Canada. Consequently, it is my view that at the inquest race should be an issue.

T. Sher Singh, a lawyer and member of the Task Force on Race Relations and Policing created by the Solicitor General of Ontario in December 1988, stated in his affidavit:

> The Task Force conducted a detailed study of various issues concerning relations between police and members of the racial minorities.
>
> The Task Force did not do a detailed investigation of the Lester Donaldson shooting as it was understood that that would be the subject of a Coroner's Inquest.
>
> The knowledge I gained about the Donaldson matter and the broader context of police-minority relations as a result of my participation in the Task Force has led me to the conclusion that there is a prima facie case that race was a factor in the incident that led to Lester Donaldson's death.
>
> The Task Force received representations from many members of the community; these representations made it clear that there was widespread concern about racial aspects of the Donaldson matter.

Anne Molloy, who is a lawyer, appended to her affidavit dated August 28, 1992 an undated affidavit of Carla McKague, another lawyer. This latter affidavit was apparently filed in a judicial review application of some earlier and otherwise unrelated matter. The McKague affidavit attested to events in 1990 arising out of the death of another black person. Ms. McKague described discussions with the appointed coroner Dr. Tepperman and with Dr. Huxter who was Dr. Tepperman's supervisor at the time. Ms. McKague stated she had a meeting with Dr. Huxter and Dr. Tepperman where she advised there would be "no allegation of excessive force by the police or of any racial element to the incident". She stated that "Dr. Tepperman and Dr. Huxter informed me that in their view there

was no issues whatever to be dealt with." Subsequently there was a meeting on March 21, 1990 which Dr. Huxter did not attend, and in respect of this meeting, Ms. McKague alleged:

> He [Dr. Tepperman] then addressed me directly, and informed me that part of the material about to be disclosed was damaging to my client. He stated that the Coroner's office had no intention of introducing this material into evidence so long as I co-operated by not raising certain issues he did not wish raised. He specifically indicated that I should not raise any racial issue or issues around the Mental Health Act.

Counsel for BADC submitted that the affidavit evidence of Akua Benjamin, Dudley Laws and T. Sher Singh, very strongly suggested race must also be investigated as a factor in Mr. Donaldson's death. He further submitted that the combined effect of the affidavit of Ms. McKague, Dr. Huxter's earlier ruling that "[t]he jury will hear evidence related not to his culture but to his mental status", and Dr. Huxter's observation it was not necessary to decide if BADC would be the appropriate group to represent the black community, created a reasonable apprehension of bias.

The hearing of BADC's second application was continued over to September 14, 1992 by which time BADC filed even more additional material before Dr. Huxter including the previously mentioned audit report into police and visible minority relations conducted by Mr. Andrews. BADC also questioned the propriety of Chief Coroner Dr. Young delaying the Donaldson inquest after the completion of the criminal trial in a failed attempt to achieve an "alternate procedure" to a formal inquest. It was counsel's submission that an attempt by the Chief Coroner to prevent an open inquiry added support to his client's "apprehension of bias about the conduct of this inquest". Counsel's concluding submissions took the following form (taken from unedited transcript):

> On the one hand, sir, you have the conclusion of the O.P.P. investigation that race is not an issue. I wonder what questions they asked to come to that conclusion, sir. But you have that conclusion.
>
> On the other hand you have the conclusion of Sher Singh as written in this sworn affidavit. And Lester Donaldson and professor Benjamin and Dudley Laws and all these other persons, leading people in the community, Charles Roach, Lennox Farrell, what should you do now sir?
>
> At the beginning of this inquest, when there was no evidence in front of you, in a formal sense. Is it not your responsibility, sir, to ensure that the question of how race may have played a role in this death, be investigated thoroughly in the course of this inquest. And should it not, sir, give us apprehension of bias that you have stated at the outset, there will be no evidence of that.
>
> And if we wanted to bring forward any evidence of that, we should give it to the Crown Attorney, who will give it to the O.P.P. to investigate. Filter it through the O.P.P. again when there is all this other surrounding evidence. Why, sir would you not want to allow questions to be asked about it at this inquest, by persons who are vitally concerned about that aspect. So that this matter can be dealt with in an open and public setting.

> Phipson and Cross on evidence. Well, opinions are allowed from expert witnesses, sir, and T. Sher Singh by any definition would be an expert on these matters. So would Mr. Stephen Lewis. But in any case, sir, you are relying on the opinion of the O.P.P. and the result of their investigation. In coming to the opposite conclusion. Do we have to prove at this stage that race was a factor in order to have it investigated at this inquest? How can that possibly be, sir?
>
> If this is a fair and open inquest, really delving into the issues, at the end of the day the jury will decide the matter. They will see the extent to which race was a factor, the extent to which mental illness was a problem, the extent to which the mental illness was caused by racism by the police or others. That is for the jury to decide at the end of the day.
>
> It is not, sir, in my respectful submission, for you to decide at the outset of the inquest and to preclude that finding, especially in light of the serious public concern throughout our community, throughout our city, that race was indeed a factor in tragedy. Subject to any questions, sir, those are my submissions, sir.

(Emphasis added)

On September 22, 1992, Dr. Huxter delivered his ruling with respect to BADC's second application. He believed he was entitled to anticipate issues before the inquest. He pointed out he was not present at the second meeting between Dr. Tepperman and Ms. McKague and that, in his presence, Ms. McKague had advised race was not an issue. He advised that in rendering his earlier ruling on the relevance of race he only meant it was not necessary to rule on whether BADC met the test for standing. Nothing else was intended.

He reviewed the copy of the document entitled "Proposed Recommendation for Jury's Consideration at the Inquest into the Death of Lester Donaldson" filed by counsel by BADC and said to be Dr. Young's proposal to truncate the inquest. This document was the subject of negotiations between the Donaldson family, the Police Services Board and the Chief Coroner. The proposal takes the form of a suggested jury recommendation for an exhaustive inquiry, by a committee of experts, into police procedures for dealing with the mentally disabled and a review of the provisions of the Mental Health Act, R.S.O. 1990, c. M.7. Apparently, an agreed statement of facts and the proposed recommendation for an inquiry were to be put to a jury for its consideration. If the jury accepted the recommended investigation by a committee, the inquest would be concluded and the recommendation would be immediately acted on.

Dr. Huxter stated that he saw no nefarious motive in the earlier deliberations over the proposal, pointing to remarks of Associate Chief Justice McMurtry in a public speech welcoming innovation in administrative procedures. He denied taking part in any of the discussions concerning the proposal. He also denied having seen either a copy of the proposal or any earlier version of it prior to BADC's submission. He admitted, however, to having been informed by the Chief Coroner that ongoing discussions were being held.

In refusing to disqualify himself on the basis of apprehended bias, Dr. Huxter ruled (taken from the unedited transcript):

This death was investigated pursuant to section 10(4) of the Act. Section 19 and all other sections with respect to the investigation were complied with. In this death the Chief Coroner, pursuant to the provisions of section 9(2) requested the criminal investigation branch of the Ontario Provincial Police to provide assistance.

The presiding Coroner in preparing for and conducting an inquest must have regard to the evidence and relevance to the proceeding.

Section 40(1) states "A coroner may require any person by summons,

(a) to give evidence on oath or affirmation at an inquest.
(b) to produce in evidence at an inquest documents and things specified by the Coroner relevant to the subject matter of the inquest and admissible."

I have signed one hundred and eighteen summonses for this inquest to date.

Section 44(1) states: "Subject to subsections 2 and 3, a Coroner may admit as evidence at an inquest, whether or not admissible as evidence in a court:

(a) any oral testimony.
(b) any document or thing relevant to the purpose of the inquest and may act on such evidence that the Coroner may exclude anything unduly repetitious or anything he considers does not such standards of proof as are commonly relied on by reasonable prudent men in the conduct of their affairs."

Having become acquainted with the evidence before me, I applied the test of substantial and direct as laid out in Section 41(1) of the Act. In this section relevance of the issues must be determined with respect to this application.

Mr. Justice Dubin in Evans and Milton states:

> I am at a complete loss to understand how the Coroner became disqualified from proceeding with the inquest, merely because she had complied with what was mandated of her by the government statute.

I am mandated to determine the issues and relevance to the issues in this or any other inquest. Have I failed in my duty or gone beyond my duty? And if so, is a reasonable apprehension of bias raised?

In this context I must ask myself,

> "What would an informed person, viewing the matter realistically and practically, and having thought the matter through, conclude."
>
> (Re Evans and Milton)

> I have considered all of Mr. Rosenthal's arguments as set out previously in this ruling. Any informed person reviewing the matter realistically and practically would conclude no reasonable apprehension of bias exists. Therefore, I find no reason to remove myself from presiding at this inquest.

He then proceeded to review in detail each and every additional affidavit filed by BADC. With respect to Mr. Singh's affidavit, Dr. Huxter concluded it was not evidence but rather it amounted to opinion and contained the admission that the Task Force of which Mr. Singh was a member did not do a detailed investigation of the Lester Donaldson shooting. Akua Benjamin's affidavit was evaluated by Dr. Huxter and found to be unsupported by all of the proceedings and investigations preceding the inquest. He was unaware any "stereotypical" reference to Mr. Donaldson was alleged. He pointed out the number of officers confronting Mr. Donaldson was a function of his address having been previously and routinely "flagged" as a result of earlier altercations. The assertion that "excessive force" had been employed was determined to be a "conclusion" as was the assertion "race played a part in the death". Accordingly, he ruled (taken from the unedited transcript):

> I am in possession of all of the facts. There is no evidence at this time that race was a contributing factor in Mr. Donaldson's death. As previously stated I cannot assess substantial and direct interest in a vacuum. Therefore, I must find that the Black Action Defence Committee does not meet the requirement of substantial and direct, pursuant to section 41(c).
>
> As I do not anticipate any recommendations on the issue of race, I have no basis on which to find that the BADC are uniquely situated. I have already ruled that concern in and of itself without factual basis does not meet the test of either section 41(1) or the Campbell criteria as stated in Stanford and Harris.

(Emphasis added)

> Finally, he concluded (taken from the unedited transcript):
>
> I would like to make further comment upon the notion that concern in an of itself, would be sufficient reason for the granting of standing at an inquest.
>
> As I have noted previously in this ruling, the Report on the Coroner's system in Ontario states:
>
> > It can be said that an inquest is not a forum for inquiring into matters that are not concerned with the identity of the deceased and how, when, where and by what

> means he came to his death. Therefore one basic guideline for the presiding officer should be the matter of relevance to those questions.
>
> The applicant before me wishes to be able to explore, to look for issues and at the end of the day, let the jury decide whether or not there is evidence that the issue they allege is valid. To allow public concern, absent fact, to be a measure of standing would mean under the present statute to discard the concept of relevancy .
>
> Loss of relevancy would open the flood gates to anyone who can demonstrate a concern. Each time a concern arose during an inquest, its direction would necessarily shift. The control normally exercised by the Coroner would fail to exist.
>
> The legislature in setting down the rules of conduct for inquests, used relevancy as a foundation upon which to lay those rules. If that foundation is to be removed, new guidelines would be necessary for the conduct of an inquest. Even public inquiries or commissions called specifically to enquire into a particular set of circumstances will be given a mandate out of which the issue of relevancy naturally arises.
>
> The effect of loss of relevancy is that the search for issues will supplant the task of dealing with those issues which arise out of the death.
>
> As the Report on the Coroner System notes, at page 91, "An inquest is essentially a public inquiry and the public has a right to know on what evidence the finding of a Coroner's jury is based." This inquest is a public hearing. I invite the public to attend to hear and assess the evidence. I invite the media to assist the public in that regard.
>
> This application is denied. Thank you.

(Emphasis added)

(iv) Alliance's Request for the Inquest Brief

By letter dated September 20, 1992, counsel for the Alliance wrote to counsel for the coroner and requested the inquest brief which had been provided to parties of standing at the inquest. This letter was not placed before us but there is an affidavit filed indicating counsel wished to review the Ontario Provincial Police report relied upon by the coroner in his ruling and which was said to be contained in the brief. When the brief was given to parties with standing was not made clear. Counsel for the coroner replied by letter dated September 28, 1992 refusing the request. The basis for the refusal was that only those persons with standing were accorded the privilege of such disclosure.

The Alliance submits that Dr. Huxter breached his "duty of fairness" and denied the applicants natural justice in relying on the O.P.P. and the Public Complaints Commissioner's investigations without first disclosing this material to it for review and comment.

(v) Campbell J.'s Disclosure Order

BADC and the Alliance commenced the instant applications for judicial review on September 29 and 30, 1992, respectively. Both applications seek the disqualification of any coroner in Ontario from presiding at the Donaldson inquest on the basis of apprehension of bias and request standing for the respective applicant in a restructured inquest before "a provincial judge". Supporting the applicant's assertion of apprehended bias are additional materials received as a result of an order by Campbell J. dated October 14, 1992 directing the disclosure of certain documents and information relating to the earlier efforts of Dr. Young, the Chief Coroner, to obtain consent to a summary inquest procedure. The material was produced well after the issuance of Dr. Huxter's challenged rulings and, thus, was not considered by him in making the rulings that he did.

Dr. Young's attempt to develop an alternative to the normal inquest process was ultimately unsuccessful because of the insistence by the Metropolitan Toronto Police Services Board ("the Board" or "Police Services Board") on conditions concerning the committee inquiry to be substituted for a full inquest. The conditions, which the Donaldson family refused to accept, were that neither the committee's study nor its members could be used in a pending civil action between the Donaldson family, the Board, the Chief of Police and the named police officers. Counsel for the Board's liability insurers had indicated that the Board would be putting its insurance coverage in issue were it to proceed without the conditions being accepted.

In a letter to the Donaldson family's counsel dated May 15, 1991, Dr. Young urged that serious consideration be given to his proposal for the study of arrest procedures noting that it offered "the major advantage of being less confrontational in this instance and therefore the recommendations may be more satisfactory and seriously considered by all". Ms. Egan, counsel to the Police Services Board, also set out her recollection of the negotiations with Dr. Young in correspondence between counsel as a result of the direction of Campbell J. A paragraph from this correspondence reads:

> Ms. Egan had a number of conversations with Dr. Young during the course of the negotiations regarding the draft inquest proposal. Ms. Egan recalls in a conversation with Dr. Young, although she is unable to recall its date or circumstances, that he told her that a recent decision in the Divisional Court regarding standing at an inquest indicated that standing had to be given in a lot more cases than had been the previous practice. He indicated for example, that in the Donaldson matter if there was a full inquest, as opposed to Dr. Young's proposal, and a group such as the Black Action Defence Committee applied for standing, that they would probably get standing because of that decision. Ms. Egan recalls disagreeing with this interpretation because she was of the view that such a group would not get standing at an inquest such as the Donaldson inquest because of the fact that no issue related to race was present in the Donaldson case. While she recalls those thoughts, she does not recall specifically expressing those thoughts to Dr. Young.

(Emphasis added)

As a result of the impasse between the Police Services Board and the Donaldson family over how the fruits of a study might or might not be used in the any civil action, Assistant Deputy Attorney General Michael Code convened a meeting on March 23, 1992 with the interested parties save Mrs. Donaldson's counsel. The meeting was preceded and followed by correspondence from Mr. Code to Ms. Eng, Chair of the Metropolitan Toronto Police Services Board. This correspondence was central to BADC's submissions and should be set out in full:

March 5, 1992

Ms. Susan Eng
Metropolitan Toronto Police Services Board
40 College Street
Toronto, Ontario M5G 2J3

Dear Ms. Eng:

Re: Lester Donaldson Inquest

I am writing to you as a result of a telephone conversation I had yesterday with Albert Cohen of Metro Legal concerning the above-captioned matter.

As you know, our Ministry is very concerned about the unnecessary waste of public funds, time and energy that this inquest will involve if it proceeds through a full hearing. All the facts of this case were thoroughly aired at a public trial and are well-known to everyone. There is simply no need to re-hash them a second time.

Nevertheless, the Coroner has no discretion under the Coroners Act in this case and must hold an inquest. We met with the Coroner and he met with the widow of the deceased and her counsel. A proposed agreement was reached to limit the inquest to the one essential issue that remains to be resolved, namely appropriate police response to incidents involving suspects who may be mentally or emotionally disturbed. This issue could be studied by an independent committee of experts at a greatly reduced cost to the hearings. Dr. Young has followed this procedure in past cases where the facts are already publicly known and where only systemic issues need studying.

I understand that the officers involved and their counsel are agreeable to the inquest being conducted in this fashion. It will save the officers involved and the widow of the deceased the anxiety of having to go through the facts of the case yet again in public.

It appears that the only dissenter from this proposal is your Board, on the advice of Metro Legal. As a result, Dr. Young has now scheduled a full-blown inquest.

I am advised that the investigating officer for the inquest estimates that a full public hearing of this matter could last from three to eight months. The legal costs and other costs associated with such a hearing would be enormous.

In my opinion, we ought not to incur these public expenditures in a time of severe economic restraint unless absolutely necessary. From my preliminary discussion with Mr. Cohen, I am not convinced that he had made out a case of such necessity.

Mr. Cohen had been good enough to agree to convene a meeting where we could all sit down together and discuss this matter and hopefully arrive at a resolution. We agreed

that the appropriate people to attend the meeting would be Mr. Cohen and Mr. Ayres (outside counsel for the insurer), yourself and any other members of your Board who are interested in the issue, myself and Jerry Wiley from our Ministry, the Coroner, Dr. Young and Rusty Beauchesne from the Metro Toronto Police Force.

I trust this meets with your approval and I will await Mr. Cohen's call.

I also wanted to thank you for forwarding the package of material you sent me on your Board's gun control initiatives. I have set up a policy team in this Ministry to study the issue and come forward with recommendations. We will be sure to confer with you in light of your Board's obvious interest, concern and expertise.

I would look forward to the chance to meet with you as I am sure there will be many occasions in the future where we will need to work together. Perhaps you would be free for a breakfast meeting some morning?

Yours truly,
Michael Code
Assistance Deputy Attorney General
Criminal Law Division

April 1, 1992

Ms. Susan Eng
Chair
Police Services Board Metropolitan
Toronto Police
40 College Street
Toronto, Ontario

Dear Ms. Eng:

Re: Inquest into the death of Lester Donaldson

Recently, Jerome Wiley and I met with Mr. O. Doyle, Mr. Cohen and Ms. Egan of the Metro Solicitor's Office regarding the process for conducting the above-noted Inquest. The Chief Coroner, Dr. James Young, Rusty Beauchesne of the Chief of the Metropolitan Toronto Police Force's staff, Mr. Ted Ayres, Counsel for the Municipality's insurers, and counsel from the Solicitor General, Ed Maksimowski were also in attendance.

Counsel for the Municipality and Mr. Ayres took the position that they could not agree to the procedure which has been proposed by Dr. Young. As Mr. Wiley and I understand it, their objection seems to be based on an apprehension that the study proposed by Dr. Young will create experts who could later be used against them in the civil suit which has been instituted by Mrs. Donaldson. This position assumed that the experts

will turn out to be favourable to th e plaintiff and it assumes that such experts could not be found or created in any event.

Our position is that the procedure proposed by Dr. Young is eminently reasonable under the circumstances, especially so because it has been agreed to by Mrs. Donaldson and her counsel. In our view, the Coroner's proposal provides no additional benefits to the plaintiffs in the civil suit and no less protection to the defendants than would be afforded in a routine Inquest pursuant to the Coroners Act. Experts are going to study this case in any event and they will end up being favourable or unfavourable to one side or the other regardless of the process.

The proposed procedure, on the other hand, has a number of advantages. There is no dispute that the facts of this death were fully canvassed in the Criminal trial and are already publicly known and established through sworn testimony. A re-hearing of these issues would be extremely time consuming, expensive and distressing to the deceased's family. It may also have the unfortunate side effect of unnecessarily heightening racial tensions and damaging the strides made by the Metro Police in the area of race relations.

The proposed study would result in a report and recommendations which could benefit Police Forces generally and the interests of the public as well.

Any damage to the private interests of the defendants in the civil suit, caused by the Coroner's proposed process, seems to me to be speculative and marginal at best. On the other hand, the public interest advantages in following the Coroner's proposed process are concrete and substantial. The cost savings alone are extremely compelling in the current fiscal climate. To pay for lawyers to attend a lengthy four month inquiry, at public expense, when all the facts are already publicly known and when neither the widow nor the Police Force want such an inquiry, seems unsupportable.

Could you please re-consider the position your Board has taken on this matter.

Yours truly,

Michael Code
Assistant Deputy Minister
Criminal Law Division

(Emphasis added)

Ms. Laura Rowe, a member of the Board, recalled that counsel to the Chief of Police indicated to the Board that at a formal inquest anti-racist groups in the city would probably apply for standing and this was not what the inquest was about. The advantages and disadvantages of the proposal discussed at the meeting called by Mr. Code were later described to the Board in the following terms:

6. There were many arguments advanced in favour of the proposal:

i) the expected length of this inquest is 4 months;

ii) need to supply a crown attorney and a coroner for that period of time;
iii) the media attention generated by the inquest, if the Buddy Evans and Albert Johnson inquests are indicative, could well generate all sorts of racial tensions between the Force and minority groups i.e. picketing in front of Coroners Courts, etc.
iv) the Solicitor General's present intention is to have such a study commissioned regardless of whether there is an inquest;
v) the stress that such a protracted inquest would have on the officers involved and their families;
vi) the senior crown attorney who prosecuted P.C. Deviney is of the opinion that the policies of the Force in relation to arresting such individuals appeared quite proper and were followed by the officers.

7. As to the concerns regarding the possibility of incurring greater civil liability should Metro Legal's condition not be met, the following comments were made:

i) the study would not make any finding of legal responsibility or express any conclusion of law as presently exists in s. 31(2) of the Coroners Act;
ii) a concern was expressed by Metro Legal as to the possibility of some of the members of the Committee being called upon as self-made experts at the civil trial. The fact remains that this is but a mere possibility since they would still have to be qualified as experts and accepted as such by the judge;
iii) the same would apply to the admissibility of the report in that it would be up to the judge to decide on its relevancy and admissibility and that it is, but a possibility again, that it would be admitted at the trial;
iv) even if the judge ruled in favour of the plaintiff relating to the above it is not likely to greatly affect the outcome of the damages awarded since we are talking of a middle aged gentleman on welfare.

(Emphasis added)

Paragraph 10 of the same memorandum dated April 2, 1992 described a concern of the Chief of Police as follows:

10. The Chief is somewhat concerned, on behalf of the Force, that we will alienate ourselves in the eyes of Chief Coroner and the Ministry of the Attorney General, who both happen to play very important roles in day to day policing activities.

BADC relies on Dr. Young's discussions with Ms. Egan and with counsel for the Donaldson family as evidence that the proposal in question was designed to avoid the involvement of BADC in any formal inquest. This alleged intention, it is submitted demonstrates that the Chief Coroner is biased or is reasonably perceived as being biased towards BADC. Moreover, because Dr. Young supervises all other coroners in Ontario, BADC has a reasonable apprehension of bias in respect of any co-

roner who might preside at the Donaldson inquest. Indeed, it is pointed out that Dr. Huxter has his office in the same building and on the same floor where Dr. Young works and that Dr. Huxter is under Dr. Young's direct supervision.

III THE LEGAL FRAMEWORK

An authoritative description of the functions of a coroner's inquest have been set by the Supreme Court of Canada in Faber v. R., [1976] 2 S.C.R. 9 at p. 30, 27 C.C.C. (2d) 171 at p. 189, in the following terms:

> At the present time the coroner's inquest may be taken to have at least the following functions, apart from the investigation of crime:
>
> (a) identification of the exact circumstances surrounding a death serves to check public imagination, and prevents it from becoming irresponsible;
> (b) examination of the specific circumstances of a death and regular analysis of a number of cases enables the community to be aware of the factors which put human life at risk in given circumstances;
> (c) the care taken by the authorities to inquire into the circumstances, every time a death is not clearly natural or accidental, reassures the public and makes it aware that the government is acting to ensure that the guarantees relating to human life are duly respected.

(Emphasis added)

It must also be appreciated that an inquest is essentially an inquisitorial investigation, lacking a lis between parties and not affecting anyone's rights. It was the absence of a lis between parties and the fact that rights are not determined at an inquest which caused Wells J. in Wolfe v. Robinson, [1961] O.R. 250, 27 D.L.r. (2d) 98 (H.C.J.), affirmed [1962] O.R. 132, 31 D.L.R. (2d) 233 (C.A.), to conclude no one had a right to participate or to standing. However, upon the revision of the Coroners Act following recommendations by the Royal Commission Inquiry into Civil Rights , Report No. 1, vol. 1 (Queen's Printer, 1968), p. 491, and by the Ontario Law Reform Commission in its Report on the Coroner System in Ontario (Queen's Printer, 1971), p. 89, a right to standing was enshrined in the Act in the terms now set out in s. 41 and reproduced above.

Nevertheless, the inquisitorial nature of an inquest and its recommendatory role were left unchanged. Thus, a coroner arrives at an inquest with a great deal of prior knowledge about the subject matter to be inquired into as a result of his or her earlier investigation. It is also the coroner, with the assistance of a Crown attorney, who supervises the inquest or inquisition. Illustrative is the fact that prior to the commencement of the inquest, Dr. Huxter had issued 118 summonses.

The Coroners Act therefore evidences a legislative expectation that a coroner will not arrive at an inquest with a "clear mind" as is expected of a judge conducting a jury trial. Instead, the Act obligates a coroner, in particular circumstances, to take possession of a body and conduct the necessary investigation to determine whether or not an inquest is necessary (s. 15). In conducting this investigation, the coroner may retain experts and seek police assistance (ss. 15(4) and 9(1)). Section 9(2) permits the Chief Coroner, in any case considered appropriate, to request the criminal investigation branch of the Ontario Provincial Police to provide assistance to a coroner in an investigation or inquest. A coroner's pre-inquest investigatory powers are substantial and set out in section 16. Section

18(2) requires coroners to keep records of investigations and, in those instances where it is determined an inquest is unnecessary, a coroner is required to release certain specified aspects of these records to "the spouse, parents, children, brother and sisters of the deceased or to his personal representation, upon request".

Section 31 sets out the purposes of an inquest in the following form:

> 31(1) Where an inquest is held, it shall inquire into the circumstances of the death and determine,
>
> (a) who the deceased was;
> (b) how the deceased came to his or her death;
> (c) when the deceased came to his or her death;
> (d) where the deceased came to his or her death; and
> (e) by what means the deceased came to his or her death;
>
> (2) The jury shall not make any finding of legal responsibility or express any conclusion of law on any matter referred to in subsection (1).
>
> (3) Subject to subsection (2), the jury may make recommendations directed to the avoidance of death in similar circumstances or respecting any other matter arising out of the inquest.
>
> (4) A finding that contravenes subsection (2) is improper and shall not be received.
>
> (5) Where a jury fails to deliver a proper finding it shall be discharged.

Section 44(1) outlines what is admissible evidence at an inquest in these terms:

> 44(1) Subject to subsections (2) and (3), a coroner may admit as evidence at an inquest, whether or not admissible as evidence in a court,
>
> (a) any oral testimony; and
> (b) any document or other thing,
>
> relevant to the purposes of the inquest and may act on such evidence, but the coroner may exclude anything unduly repetitious or anything that he considers does not meet such standards of proof as are commonly relied on by responsibly prudent men in the conduct of their own affairs and the coroner may comment on the weight that ought to be given to any particular evidence.

With respect to the scope of judicial review, and particularly in the context of a coroner determination on standing, this court in Stanford v. Regional Coroner, Eastern Ontario (1989), 38 C.P.C. (2d) 161, 38 Admin. L.R. 141 (Ont. Div. Ct.), at pp. 172-74 C.P.C., stated:

There is no appeal from the coroner's decision on standing and the first question is what standard of review this Court should apply in scrutinizing the decision.

The standard of review obviously does not involve a power in this Court to substitute its own view for that of the coroner, on the basis only that the Court, in the position of the coroner, would have reached a different decision.

The coroner is faced with a very difficult task and must be afforded a sufficient degree of insulation from review. He must have the power to keep the inquest from turning into a circus and the power to prevent every busybody from using the inquest as a platform for their particular views. Applications for judicial review should be discouraged as they detract from the coroner's ability to control the proceedings, and they produce delay.

Some cases in this Court, such as Re Brown and Patterson (No. 2), supra, describe the standard of review as that of error in principle.

Others, such as Re Inmates Committee of Prison for Women and Meyer, supra, were put on the basis of error in jurisdiction.

In Re On our Own and King (7 November 1980), Galligan J. (Ont. H.C.) [unreported]), an inquest standing case involving the use of psychotropic drugs by the deceased, Galligan J. dismissed the application for review, on the grounds that he found "no error in principle or in jurisdiction."

The standard of review of coroners' decisions on standing at inquests has thus been stated three ways:

(1) error in principle
(2) jurisdictional error
(3) error in principle or jurisdiction

As a practical matter there may be little difference between error in principle and jurisdictional error. A serious error in principle which deprives an applicant of standing would likely result in such unfairness to the affected party's opportunity to participate in the inquest that an unfair inquest would result. It is common ground between counsel that an error in principle that produces an unfair inquest is an error that goes to jurisdiction.

In my view, the coroner erred in law in the interpretation of his jurisdiction to grant standing to a degree that resulted in jurisdictional error. The Legislative Assembly had not insulted coroners with a private clause, as it had labour tribunals.

> While the coroner enjoys special expertise in medical matters relating to the cause of death and in the conduct of inquiries into institutional deaths, he had no more expertise than this Court in relation to the peculiar legal position of inmates in a prison within a prison or in the interpretation of his or her governing statute.
>
> So far as the legal interpretation of the expression "direct and substantial interest" is concerned, the coroner is in no better position than the Court to determine the intention of the legislature.
>
> The power to review a coroner should, however, be exercised with a real degree of judicial restraint, just like the review of decisions made by prison authorities and tribunals.
>
> Although s. 41 provides mandatory standing without any discretion once substantial and direct interest is found to exist, the application of the test involves a measure of discretion in each case, as Eberle J. pointed out, because the test is expressed in open-ended language.
>
> For the reasons noted above, coroners must be given considerable leeway if they are to discharge their difficult responsibilities effectively. To avoid mere second-guessing of coroners on questions of standing, it is important that the courts exercise real restraint in reviewing the decisions of coroners on standing.

(Emphasis added)

> Campbell J. went on in that case to say at p. 175:
>
> Mere concern about the issues to be canvassed at the inquest, however deep and genuine, is not enough to constitute direct and substantial interest. Neither is expertise in the subject matter of the inquest or the particular issues of fact that will arise. It is not enough that an individual has a useful perspective that might assist the coroner. The interest of an applicant for standing in the recommendations of the jury must be so acute that the interest may be said to be not only substantial, but also direct.

However, this latter observation was qualified in People First of Ontario v. Porter, Regional Coroner Niagara (1991), 5 O.R. (3d) 609, 85 D.L.R. (4th) 174 sub nom. People First of Ontario v. Niagara (Regional Coroner) (Div. Ct.), at p. 619 O.R., p. 184 D.L.R., where it was observed the traditional investigative function of the inquest was coming to be overshadowed by its preventive role -- a role which focuses on the public's interest in avoiding a recurrence of the circumstances giving rise to a particular death. Accordingly, the court acknowledged it was becoming increasingly common to grant standing to public interest advocacy groups having no knowledge or connection to the individual deceased in order to better fulfil an inquest's intended preventive function. The immediate parties of interest may lack the resources or inclination to safeguard the public's interest in this

role, encouraging commentators to advocate that courts embrace a broader conception of standing: see A. Manson, "Standing in the Public Interest at Coroner's Inquests in Ontario" (1988), 23 Ottawa L. Rev. 637, at p. 668. Nevertheless, People First emphasized the difference between Royal Commissions and inquests as well as the central role of the Crown Attorney in the carrying out of an inquest. In these respects, the court wrote at p. 620 O.R., pp. 185-86 D.L.R.:

> Public interest advocates have a special role in many inquests. But in every inquest the primary advocate for the overall public interest is the Crown Attorney who acts as counsel for the coroner. The history and traditions of that office in this province provide a degree of reassurance that the Crown Attorney will act as an independent and responsible advocate for the public interest. There are some special cases like Stanford where the nature of the Crown attorney's office might appear to be adversarial to an interest that needs to be represented; penitentiary inmates like the applicants in Stanford, having been prosecuted by Crown Attorneys, might not have full confidence in the advocacy provided by their former adversary. There is no basis for any such apprehension in this case.
>
> While public interest intervenors can strengthen the coroners inquest it would be inappropriate for them to dominate the inquest by turning it into a Royal Commission or an advocacy forum to advance the particular views of any group. It must never be forgotten that the inquest is held because a member of the community has died under circumstances where the public interest requires examination from the point of view of the deceased persons, their families and associates, and those involved in the death. The social and preventive function is not the only function of the inquest. The interest of the families of the deceased and those dedicated to their case can never be forgotten. The coroner always has the difficult and sensitive job during the conduct of the inquest of balancing the requirements of the social and preventative function against the requirements of the investigative function.
>
> The great value in the separate perspective of the public interest intervenors does not warrant any usurpation of the role of the Crown Attorney as the overall advocate for the public interest in the role of counsel to the coroner. It is for coroner's counsel to ensure that all the evidence essential to an understanding of the deaths is brought forward, and the coroner has an overall supervising responsibility to see that this function is fully and openly performed.

(Emphasis added)

The Divisional Court was reversed in People First in so far as it approved a coroner's refusal to grant access to medical records to certain interest groups who had been granted standing. In allowing the appeal in People First of Ontario v. Porter, Regional Coroner Niagara (1992), 6 O.R. (3d) 289 at pp. 291-92, 87 D.L.R. (4th) 765 at pp. 767-68, the Court of Appeal also expressed a tentative doubt that "stratification" of standing was permitted other than in the extent of cross-examination permitted under s. 41(2)(c). In this respect, it stated:

> It is at least arguable that s. 41(1) of the Coroners Act does not permit any degree of or "stratification" of standing and that the only limitation is in the extent of cross-examination permitted under s. 41(2)(c). In any event, we think counsel for People First made it abundantly clear, both in correspondence before the inquest and in the course of cross-examination, that not only was that organization interested in the investigative side, but in the production of all medical records as well. Any breach of confidentiality could be solved either by an undertaking from counsel or by appropriate deletions in the documents themselves.
>
> In our view, the coroner erred in refusing to turn over the medical records of all the children and that refusal was a matter that, in the circumstances of the case, went to jurisdiction. Neither of the applicants could properly prepare for cross-examination on the cause of death without examining those documents. Through that examination they could be sure that all relevant information would be disclosed in evidence. In our view, in the particular circumstances of this inquest, it was unfair to withhold that information from the appellants, particularly when, as noted earlier, the records were released by the coroner to the other parties. The failure of the coroner to give the medical records to the applicants prevented them from participating as they were entitled to in the inquest and the coroner lost jurisdiction in so doing.

On the issue of apprehension of bias, it has been held prohibition will lie where it is made to appear that the proceedings before a coroner's inquest are such as to create a reasonable apprehension of bias: see Evans v. Milton (1979), 24 O.R. (2d) 181, 97 D.L.R. (3d) 687 (C.A.). In developing this perspective, Dubin J.A. (as he then was) expressed himself in the following way at p. 221 O.R., pp. 727-28 D.L.R.:

> Although the jury is prohibited from making any finding of legal responsibility or expressing any conclusion of law on the matters to be considered by it, the very nature of the proceedings compel it, in my opinion, to act impartially in the conduct of those proceedings. The nature of the duty, in my view, is the same as described by Chief Justice Laskin in the case of Committee for Justice and Liberty et al. v. National Energy Board et al. , [1978] 1 S.C.R. 369 at p. 385, 68 D.L.R. (3d) 716 at p. 728, 9 N.R. 115, when, in commenting on the function of the National Energy Board, he stated as follows:
>
> > What must be kept in mind here is that we are concerned with a s. 44 application in respect of which, in my opinion, the Board's function is quasi-judicial or, at least is a function which it must discharge in accordance with rules of natural justice, not necessarily the full range of such rules that would apply to the Court (although I note that the Board is a Court of record under s. 10 of its Act) but certainly to a degree that would reflect integrity of its proceedings and impartiality in the conduct of those proceedings.

(Emphasis added.)

Impartiality is a rule of natural justice. The basis of disqualification under such circumstances is described in the same judgment at p. 391 S.C.R., p. 733 D.L.R., as follows:

> This Court in fixing on the test of reasonable apprehension of bias, as in Gharadosi v. Minister of Highways for British Columbia, [1966] S.C.R. 367, and again in Blanchette v. C.I.S. Ltd., [1973] S.C.R. 833 (where Pigeon J. said at p. 842-43, that "a reasonable apprehension that the judge might not act in an entirely impartial manner is ground for disqualification") was merely restating what Rand J. said in Szilard v. Szasz, [1955] S.C.R. 3 at pp. 6-7 in speaking of the "probability or reasoned suspicion of biased appraisal and judgment; unintended though it be". This test is grounded in a firm concern that there be no lack of public confidence in the impartiality of adjudicative agencies, and I think that emphasis is lent to this concern in the present case by the fact that the National Energy Board is enjoined to have regard for the public interest.

(Emphasis added.) (Additional emphasis added)

In that case an objection had been made to the identity of the Crown Attorney assisting the coroner and to the method by which the jurors had been selected. Those attributes of the process were provided for by the statute. Accordingly, it was decided the coroner could not be disqualified by complying with the requirements of the governing statute, particularly when it is for the jury to make the determination of facts. Dubin J.A. therefore concluded (at p. 227 O.R., pp. 733-34 D.L.R.):

> In my respectful opinion, these proceedings were quite misconceived. There was no basis to disqualify the coroner, the jury, the Crown Attorney, nor any right to interfere with the decision of the Chief Coroner. The steps taken to date, as I have already observed, were in complete conformity with the statute, and it follows that something more must be shown before any application by way of judicial review could succeed.

In the case of Committee for Justice and Liberty et al. v. National Energy Board et al. , [1978] 1 S.C.R. 369, 68 D.L.R. (3d) 716, 9 N.R. 115, de Grandpré, J. (although dissenting in the result), sets forth the proper test to be applied in determining whether a case has been made out of reasonable apprehension of bias when he stated at p. 394 S.C.R., p. 735 D.L.R.:

> . . . the apprehension of bias must be a reasonable one, held by reasonable and right-minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal, that test is "what would an informed person, viewing the matter realistically and practically -- and having thought the matter through -- conclude."

(Emphasis added.)

The underlying premise of this entire application is that solely because of a potential involvement of a member of the Metropolitan Toronto Police Force, there would be reason to believe that neither the constable who was appointed to select the jury, nor

> the Criminal Investigation Branch of the Metropolitan Toronto Police Force would do their duty. I cannot accept the view that reasonable and right-minded persons would be of that mind.

On the issue of whether a residual discretion exists in a coroner to permit participation in an inquest to a party failing to meet the test for standing prescribed by s. 41(1), Campbell J., in Stanford v. Regional Coroner, Eastern Ontario, supra, expressed the opinion that a discretion has always existed and was not removed upon the enactment of the new Coroners Act in 1971: see Stanford, at p. 178 C.P.C. Recently, however, Morden A.C.J.O. in Beckon v. Young, Ontario Court of Appeal, released July 9, 1992, emphasized that a coroner's powers come from the statute [now reported and indexed as Re Beckon , 9 O.R. (3d) 256, 93 D.L.R. (4th) 161 sub nom. Beckon v. Beckon Inquest (Coroner of)] While that case considered the jurisdiction of a coroner to require jurors to prepare a written narrative, it was held not reasonable to interpret the Coroners Act as conferring any more powers respecting inquests than those prescribed. Earlier in Huynh v. Jones (1991), 2 O.R. (3d) 562, 46 O.A.C. 152 (Div. Ct.), it was held that a power "necessarily incidental" to the coroner's power and duty to protect the process of the inquest may be properly implied. In that case it was held a power to adjourn an inquest pending the completion of certain civil proceedings could reasonably and properly be implied.

IV APPLICATION OF THE PRINCIPLES TO THE FACTS

The facts at hand must be considered against these principles.

(i) Race as a Direct Factor

Central to this matter is Dr. Huxter's initial determination that race is unlikely to be an issue in the inquest. This view was based on the earlier proceedings and investigations which have reviewed Mr. Donaldson's death and on the O.P.P. investigation conducted at the direction of Dr. Huxter. A coroner will inevitably approach an inquest on the basis of his or her earlier investigation into the particular death. This being contemplated by the statute, such knowledge will properly inform the coroner's perspective on the issues relevant to the inquest as should the intended purposes of an inquest. Indeed, how is a coroner to determine who has a direct and substantial interest in the inquiry unless he or she has made a determination as to what are the underlying issues of the inquiry?: see also Bunt, "The Inquest", Law Society of Upper Canada -- Inquests and the General Practitioner, 1987, p. D-2.

While the Act contemplates that a jury will make the determinations required by s. 31, it is for the coroner to administer the inquiry by broadly delineating those issues to be inquired into: see generally Marshall, Canadian Law of Inquests , 2nd ed. (1991). An inquest requires thoughtful and effective administration. It is not the occasion for a roving investigation into general public concerns. But as indicated in People First, an inquest must be sensitive to opportunities to utilize public participation in order to fulfil its important preventive function -- a function in which the public has a significant interest. Indeed, there is some evidence of a trend developing in his respect.

Judicial review, as the authorities reveal, is not an appeal. A coroner's decision will only be overturned where it involves jurisdictional error. For jurisdictional error to arise, Dr. Huxter's decision must amount to "a serious error in principle which deprives an applicant of standing". In other words, he must have manifestly erred in determining that the initial scope of the inquest did not reasonably include race. We take the phrase "not including race", to be a reference by Dr. Huxter to

BADC's wish to review whether Mr. Donaldson's mental illness was caused by racial harassment and whether he was shot because he was black. In other words, it is a reference to race as a prncipal or direct cause of the death and not as a systemic issue which might have contributed to the tragic occurrence.

With respect to race as a direct factor, I cannot find the presence of manifest error in Dr. Huxter's ruling in the circumstances of this case. The inquest has been preceded by a criminal trial at which the officer involved testified and by the disposition of a complaint by the deceased's wife under the Metropolitan Toronto Police Force Complaints Act, 1984 , S.O. 1984, c. 63. In neither proceeding was race, in the sense we have just reviewed, identified as a factor. Several earlier investigations by the O.P.P. also confirmed this to be the case.

The evidence produced by the two applicants was considered by Dr. Huxter in detail and held to be in the nature of opinion, conjecture, and conclusion. There was no serious error in principle in that regard. The applicants protested this determination on the basis that it was for the jurors to decide the cause of Lester Donaldson's death in the same way a civil jury trial would be conducted. However, in a civil trial there are pleadings against which to test the relevance of tendered evidence and, in a civil trial, the trial judge has played no earlier investigational role. The statute clearly confers on an inquest an inquisitorial form and assumes that the coroner will come to that inquest armed with the facts as then known. In this particular case, Dr. Huxter was also armed with the transcript from an earlier criminal proceeding and the results of the Police Complaints Commissioner's investigation. Accordingly, I am unable to conclude that Dr. Huxter manifestly erred in coming to the conclusion that race, as a direct factor, would not reasonably be in issue in the sense contended by BADC.

I appreciate that many in the community may still require assurance, but there is no manifest error in the coroner's conclusion that an inquest is not the appropriate forum to attempt to provide that assurance in the circumstances.

(ii) Refusal to Disclose Inquest Brief

The Alliance argues the decision ought to be quashed in any event because the coroner refused to disclose the O.P.P. investigation upon which he relied in coming to this conclusion. However, from a review of the proceedings, it is clear that both the Alliance and BADC were aware of the existence of an inquest brief and the presence of an O.P.P. investigation conducted for Dr. Huxter pursuant to the Act before they made their submissions. Indeed, a reading of the legislation makes the use of pre-inquest investigatory reports clear. Nevertheless, they chose to make their presentations on the issue of standing without requesting access to this material and without justifying to Dr. Huxter beforehand the need behind such a request. Their decision to proceed in the manner they did may have been premised on the belief that the O.P.P. report likely added little to what already was publicly known as a result of the criminal proceedings and the disposition of complaint to the Police Complaints Commissioner. We simply do not know.

In my view, therefore, this is not a case where the decision-maker's reliance on undisclosed information only became apparent after the decision was made. Counsel for BADC made reference to the O.P.P. report in his initial submissions and did not seek its disclosure. Dr. Huxter also made reference to this report in his ruling of August 26, 1992. All this took place well before the Alliance made its related application for standing. Thus, the Alliance knew or ought to have known of the report, particularly in light of the structure of the Act which mandates the undertaking of such in-

vestigations and provides limited access to at least some pre-inquest data (s. 18(2)). It therefore consented to the lack of disclosure before making its submissions and thereby waived any right of access to this material it might otherwise have had. The request for the material was after the Alliance made its submissions and was entirely too late. Accordingly, it need not be determined in this case whether any or all data gathered in the investigation stage prior to an inquest ought to be disclosed to someone who has not yet been granted standing and, if there should be disclosure, under what conditions of confidentiality.

(iii) Cross-cultural Sensitivity

I now turn to the Alliance's claim for standing on the issue of cross-cultural sensitivity in police dealings with the mentally challenged. Dr. Huxter acknowledged the Alliance's interest and expertise in this issue but concluded cross-cultural sensitivity would likely be only a peripheral aspect of the inquest. This led him to the conclusion the Alliance lacked a substantial interest in the inquest. Again, the test is one of manifest or serious error in principle which prevents a party from participating in an inquest as it would otherwise be entitled.

The indication before the coroner was that at least one witness would testify on the issue of cross-cultural sensitivity in dealing with the mentally ill and the need for police training in this respect. A person does not require a substantial and direct interest in all or even most of the issues thought likely to arise at an inquest to be granted standing. This is clear from s. 41(2)(c) which explicitly envisages that the interest of a person granted standing may be limited and, for that reason, the right of cross-examination may be limited. Furthermore, in making an assessment a person's interest pursuant to s. 41, a coroner must have regard to both functions of an inquest and particularly to an inquest's role in allaying public concerns as described by the Supreme Court of Canada in Faber, supra, and elaborated upon in People First, supra.

In my opinion, Dr. Huxter took too narrow a view of the Alliance's interest in the Donaldson inquest and, in so doing, committed a serious error in principle which excluded the Alliance from any participation in the proceedings. The Alliance has significant expertise in cross-cultural sensitivity as it relates to mental health issues and it has the clear confidence of many visible minority groups including the black community. Given the black community's evident general interest in this inquest and the implication to be drawn from s. 41(2)(c) as discussed above, it was a serious error in principle to characterize the cross-cultural/mental health aspect of the proceedings as peripheral.

Cross-cultural sensitivity in the delivery of mental health services is an issue which was not inquired into by any previous proceeding or investigation related to Lester Donaldson's death. Thus, the relevance of this issue is in marked contrast to that of race as a direct factor. It is also an issue, the dimension of which, is not readily discernable at first impression. Mr. Stephen Lewis, in an affidavit previously referred to, eloquently makes this point. In my view, Dr. Huxter wrongly pre-determined the importance of this issue. In the circumstances of this case, it is for the jury to decide after hearing all the evidence and the Alliance should be granted standing to participate in that issue. The Alliance's interest is substantial and direct given its almost unique expertise in a potentially significant issue and the fact that it represents a community having a direct interest in any preventive recommendations in this area.

(iv) Standing: Direct "or" Substantial?

The Alliance also argued that the test for standing set out in s. 41(1) of the Coroners Act can be met by either a substantial or a direct interest in the inquest. While the English version contains the phrase "substantially and directly interested in the inquest", the French text is expressed as "consid´ erablement ou directement interessée à l'enquête". It was therefore submitted that the conjunction "and" in English was capable of meaning "or" and, having regard to the French text of the statute, this less demanding meaning ought to prevail.

Subject to the French Language Services Act, R.S.O. 1990, c. F.32, all public bills must be introduced and enacted bilingually. Consequently, the English and French versins of Ontario's statutory law are equally authoritative. This has been the ase for federal statutes for some time: see R. v. Dubois , [1935] S.C.R. 378 at pp. 382, 401-03, [1935] 3 D.L.R. 209 at pp. 210-11, 227-30. Where one version of a statutory provision is ambiguous and the other linguistic version is clear, the ambiguous provision may be resolved in accordance with the certainty of its linguistic counterpart. However, this comparative interpretive exercise must always have regard to the legislative purpose and the context of a statute. Indeed, even in the case of divergent meanings, a statute's purpose and its context are of central importance. As expressed by Michael Beaupr´ e in his text Interpreting Bilingual Legislation (Toronto: Carswell, 1986), at p. 28:

> Thus we conclude that the search for "context" is still at the root of even a bilingual approach to the interpretation of legislation. Just as it is normal to resolve ambiguity by resort to all aspects of context, which are ordered according to traditional canons, so context is an essential vehicle in the resolution of apparent divergency between English and French texts of the law. Just as we expect provisions to be read together, and not in a vacuum before meaning can be ascertained objectively, so is it natural to expect reference to be made to both language versions and reconciliation to be sought where necessary. This is the major premise of Dubois and its line of cases.

Thus, in a case of clear conflict between linguistic versions, the version to be selected should be the one most consonant with the context and purpose of the statute. In such a circumstance, the principle of equal authority gives way in order to effectuate a uniform administration of our laws. The question arises, is the case at hand one of clear conflict or merely one of ambiguity?

The Shorter Oxford English Dictionary vol. I (Clarendon Press: Oxford, 1973) defines "and" as a conjunction constituting the opposite of "or". The same dictionary defines "or" as co-ordinating two or more words, phrases or clauses, between which there is an alternative. Similarly, the definition of the conjunction "ou" in the French language signifies only alternatives with the result that we are presented with a clear conflict between linguistic versions: see Collins-Robert, French-English, English-French Dictionary (Don Mills: Collins Publishers, 1978). Furthermore, throughout the remainder of s. 41 where the English version of the Act reads "and" the French version reads "et" and where the English version reads "or" the French version reads "ou". Accordingly, we need to look closely at each version of s. 41(1) in the light of the context and purpose of the statute.

One can envisage cases where organizations or persons may have a substantial interest in the preventive function of an inquest but lack a direct connection to the deceased. Conversely, it is possible a person may have a direct interest in an inquest that is not substantial. In either instance, it is not unreasonable to accord a right of participation. In particular, the public interest or preventive function of an inquest is an important underlying purpose of the statute which justifies choosing the

less onerous French version. Those with only a direct interest may lack the resources or inclination to pursue the preventive objectives of modern inquests: see Manson, supra.

The wording of the French version of s. 41(1) therefore represents a further ground for finding the Alliance should be accorded standing at this inquest. It has demonstrated a substantial interest in the Donaldson inquest by reason of its expertise and community role in the provision of culturally sensitive mental health services. However, the issue of cultural sensitivity is unlikely to be the main issue under investigation and as such need not be permitted to dominate the inquest: see Bunt, supra, p. D-3.

In contrast, BADC lacks both substantial and direct interests in this issue on the materials placed before Dr. Huxter and this court. Indeed, at no time did BADC contend it possessed expertise in the area. Rather, it wished to examine how the police may have harassed Lester Donaldson because of his race and thereby contributed to his mental illness. When one examines its submissions to Dr. Huxter, BADC primarily saw the inquest as an important occasion to review once again whether Lester Donaldson was killed by the police because he was black. This was the tenor of virtually all the affidavit evidence it submitted. This same evidence also demonstrated that BADC's expertise, to this point in time, has not included the delivery of mental health services which are cross-culturally sensitive. In my view, there was wisdom in Dr. Huxter's reasons where he stated:

> This inquest has issues before it that if properly explored, can result in tremendous good for all those involved in the administration of and the delivery of provisions of the Mental Health Act. If that good is to come out of this inquest, we must focus on those issues which arose out of the death.

Therefore, regardless of the interpretive ramifications of the French text of the Coroners Act, I see no manifest error in principle in Dr. Huxter's disposition of BADC's application.

At first glance, this result may strike one as anomalous in that BADC was formed in the wake of Lester Donaldson's death and has continued to be motivated by that incident. But, as previously reviewed, much has happened over the past four years. Crucial to these proceedings is the fact that there has been a criminal trial concerning Lester Donaldson's death as well as an inquiry by the Public Complaints Commissioner. Unfortunately, neither proceeding appears to have satisfied BADC and it is the resulting difference of opinion with Dr. Huxter over the scope of the inquest which provoked this application.

(v) The Bias Issue

These applications also allege apprehension of bias on the part of Dr. Huxter. In this respect, the applicants rely on Dr. Young's attempt to restructure the inquest process, the related intervention of Assistant Deputy Attorney General Code as well as the impugned conduct of Dr. Huxter.

The applicants point to the efforts of Dr. Young and Mr. Code as evidence of a concerted attempt to exclude their participation. Most of the material supporting this claim was provided to the applicants after the issuance of Dr. Huxter's contested rulings and pursuant to Mr. Justice Campbell's disclosure order. Nevertheless, this data became a central justification of the applicants' apprehension of bias argument before us.

The actions of Dr. Young and Mr. Code have been set out in full earlier in this judgment. I have also set out in considerable detail the background to these proceedings in order to put the applicants' submissions in context and I have done so notwithstanding the comments of my brother Montgomery J. concerning the appropriateness of reciting some of the material. I believe it is important, where the integrity of a process is put in issue, to appreciate what was placed before Dr. Huxter and this court as well as the general tone of the submissions. Upon reviewing all that was said and done, I have formed the view that Dr. Young's efforts were aimed at achieving a less adversarial inquest for the benefit of the Donaldson family and the families of the affected police officers. Having reviewed all of the material submitted to us, I am also satisfied it was Dr. Young's belief that recommendations emanating from a more collaborative investigatory process could prove more acceptable to affected interests.

I see Mr. Code's involvement having a similar purpose. When earlier newspaper headlines are examined, it would not be unreasonable to fear a formal inquest carried with it a significant potential for provoking community conflict notwithstanding its competing advantages. This fear may be paternalistic, but it cannot reasonably give rise to an apprehension of bias. Admittedly, Mr. Code was also concerned with the possible costs of a more formal process. In the circumstances of two preceding public inquiries into the death of Mr. Donaldson, the concern is neither surprising nor indicative of bias. The proposal, centring on a committee of experts that would consult broadly, was seen by both Dr. Young and Mr. Code as striking the best balance between the costs and benefits associated with a further formal review of Lester Donaldson's death. The Donaldson family's extensive participation in the crafting of this proposal and its overall support for the alternative process undermine the reasonableness of the applicants' positions.

On the evidence before us, I cannot agree the proposal's purpose was to exclude specifically BADC or the Alliance, no matter the unhappy choice of words employed by Dr. Young. When considered against the entire history of the proposal, the reference to BADC appears to have been intended only to illustrate the adversary nature of a formal inquest. Indeed, the forecast was not entirely inconsistent with the state of this inquest as it arrived before us. Similarly, Mr. Code's advocacy of the proposal must be seen in the broader context of a government that has made repeated efforts to identify and eradicate racism, be it direct or systemic, as briefly described at the outset of this judgment. Accordingly, it is my conclusion that none of the material relied on by the applicants could create a reasonable apprehension of bias in "an informed person, viewing the matter realistically and practically" which is the test as set out in Committee for Justice and Liberty v. National Energy Board , [1978] 1 S.C.R. 369, 68 D.L.R. (3d) 716.

As for Dr. Huxter's conduct, I again can find nothing that could reasonably give rise to an apprehension of bias. He was not with Dr. Tepperman on March 21, 1990, no matter what weight we are prepared to give to the McKague affidavit. His impugned reference to BADC cannot reasonably be objected to. Any applicant's application for standing must withstand scrutiny as the case law amply demonstrates. In light of Dr. Huxter's determination of the scope of the inquest, it was not necessary for him to examine BADC's interest any further. Simply because a group may speak for a community in one forum or on one issue, does not determine its right to standing on all occasions. Dr. Huxter's rulings were made in good faith on the evidence before him. They cannot reasonably be the basis for an alleged bias, either actual or apprehended.

(vi) Residual Discretion

This result raises the issue of whether or not a coroner possesses a residual discretion to grant standing to BADC even though it has been found to lack the requisite interest in an inquest set out in s. 41(1). Campbell J. in Stanford , supra, was of the view that such a discretion exists because the new Act never expressly removed this earlier power. Craig J., who otherwise concurred with the reasons of Campbell J., refrained from addressing the issue because, in his view, it was unnecessary to decide. Since Stanford, the Court of Appeal in Beckon v. Young, supra, has emphasized the exclusive statutory source of a coroner's powers. Illustrative of this reality is the Coroners Act itself where subsection 2(1) provides:

> 2(1) In so far as it is within the jurisdiction of the Legislature, the common law as it relates to the functions, powers and duties of coroners within Ontario is repealed.

On the other hand, administrative tribunals have always been seen to be masters of their own procedures: see Selvarajan v. Race Relations Board, [1976] 1 All E.R. 12, [1975] 1 W.L.R. 1686 (C.A.); Komo Construction Inc. v. Quebec Labour Relations Board, [1968] S.C.R. 172, 1 D.L.R. (3d) 125 sub nom. R. v. Quebec Labour Relations Board, Ex p. Komo Construction Inc.; Knight v. Indian Head School Division No. 19, [1990] 1 S.C.R. 653, 68 D.L.R. (4th) 489. There are also examples of tribunals reasonably defining the presence of "implied" statutory power in order to fulfil their legislative mandates: see Huynh v. Jones, supra. Legislatures cannot always anticipate by explicit mandate every conceivable power an agency may require. Accordingly, there may be occasions where a power may be reasonably inferred as necessarily incidental to more general powers specifically conferred. Experience also suggests that the presence or absence of implied powers is best left for initial decision by the tribunal having direct responsibility for the administration of the statute. A court ought to be reluctant to express itself in the abstract on such a delicate issue unless it is absolutely necessary.

Indeed, the Court of Appeal's decision in People First is couched in tentative language and represents an example of judicial caution. The procedural rights accorded to parties granted standing and the correlative procedural powers of coroners were at issue in that case as they were in Beckon v. Young. The full extent of such rights and powers are not easily discerned in the context of a statute that explicitly measures a participant's right to cross-examine against that party's interest in the inquest: see s. 41(2)(c). Other procedural rights may or may not be so limited by implication from this express statutory acknowledgment. Much will depend on the circumstances of individual cases and the insights into administrative necessity gleaned from these concrete examples. This explains the Court of Appeal's reluctance in People First to express any more than a tentative view on a general issue with which it was not squarely faced.

In Beckon it was decided there was no power to require a jury to write a narrative. In People First it was decided that a party accorded standing is entitled to disclosure adequate to pursue its interest at an inquest. However, the full extent of procedural rights of parties with limited substantive interests and the correlative powers of coroners to police the conduct of an inquest were left to be dealt with on a case by case basis. Obviously, there is a balance to be struck between procedural fairness and administrative necessity. According overly robust procedural rights which overshoot the interests of a participant may either encourage a very conservative approach to standing or remove effective control over an inquest from the coroner. On the other hand, too limited a participation may breed cynicism and distrust.

After a close review of the contested rulings, I have decided the issue of residual discretion need not be determined. Dr. Huxter ruled, with respect to the BADC application, that his decision would be the same whether or not he possessed a residual discretion. As I understand his rulings, it was only in relation to the Alliance's application that he felt the need to express himself on the absence of a residual power. Therefore, even if I disagreed with his conclusion in this respect, Dr. Huxter has already determined that he would not exercise his discretion, if it existed, in BADC's favour in the circumstances. Because a discretion, by definition, is for the coroner to exercise and not this court, there would be little point in remitting the issue to him. In my view, it is clear he would not exercise his discretion in BADC's favour and that determination could not be subject to jurisdictional challenge in the circumstances.

V ORDER

Dr. Huxter's interpretation and application of s. 41 reflects a jurisdictional error which requires intervention by this court. The most appropriate way to give effect to the correct interpretation of s. 41, having regard to all of the circumstances, is to direct Dr. Huxter to grant standing to the Alliance to participate in exploring the issue of cross-cultural sensitivity in police dealings with the mentally ill.

(a) Therefore, the Alliance's application for standing should be allowed.

(b) The application of BADC should be dismissed.

(c) There should be no order as to costs.

MONTGOMERY J. (dissenting in part):--Two applications are before the court for judicial review of the September 9, 1992 decision of Dr. Robert Huxter denying standing to the Black Action Defence Committee and the Urban Alliance on Race Relations for Metropolitan Toronto. The inquest into the death of Lester Donaldson seeks the following relief:

(a) An order prohibiting the inquest from proceeding to hear evidence until the disposition of these applications;
(b) An order setting aside the decisions of Dr. Huxter denying the applicants' requests for standing at the inquest;
(c) An order prohibiting Dr. Huxter from presiding as coroner to the inquest by reason of his actual and/or apprehended bias; and
(d) An order prohibiting any coroner employed in the Office of the Coroner for the Province of Ontario from presiding at the inquest by reason of an alleged actual and/or apprehended bias.

The Facts

On August 9, 1988, during an altercation with five members of the Metropolitan Toronto Police Force, Mr. Lester Donaldson was fatally shot by Police Constable David Deviney.

Police Constable Deviney was acquitted on criminal charges, arising from the killing of Lester Donaldson in November 1990, after a one-month trial before Chief Justice Callaghan and a jury.

Mr. Donaldson was a member of Toronto's black community and was 44 years old when he died. He was diagnosed as a paranoid schizophrenic in 1983 and had a history of conflict with the police

including an incident which led to Mr. Donaldson being shot by police four months prior to the fatal shooting.

The applicant, Black Action Defence Committee ("BADC"), was formed in the wake of the shooting of Lester Donaldson.

The Urban Alliance on Race Relations for Metropolitan Toronto (Justice) is an association created to act as spokesbody for the Urban Alliance on Race Relations (the "Urban Alliance") in all matters pertaining to justice issues. The Urban Alliance is a non-profit multi-racial organization that was founded in 1975, during a time of severe racial tensions in the Metropolitan Toronto area. The Alliance, is, at present, comprised of 258 persons who come from diverse cultural backgrounds and walks of life.

Dr. Huxter made the following observations about the Urban Alliance at the hearing:

> The Urban Alliance on Race Relations is a duly incorporated organized group.
>
> They have clearly stated aims and directions.
>
> They have a demonstrated expertise and experience in cross cultural issues.
>
> They enjoy acknowledgment and support in the community including other organizations and government.
>
> They have participated in studies, committees and co-joint groups and have addressed all levels of government.
>
> They have been honoured by the community in which they function.
>
> They publish quarterly a formal journal "Currents: Readings in Race Relations". These journals are a part of the on-going mandate of the Urban Alliance to "Promote a stable and healthy multiracial environment in the community".
>
> They are in a position to understand the issues of cross-cultural sensitivity in all communities within the community as a whole.
>
> They have participated in the issues of cross-cultural sensitivity in the area of policing and mental health.

One of the prime focuses of the inquest will be to examine and make recommendations with respect to the police response, in Ontario and elsewhere, to the mentally ill, in respect of training, policy, procedures and practical intervention. As well, the inquest will review various provisions of the Mental Health Act , R.S.O. 1990, c. M.7.

Bias

In their notices of application, dated September 30, 1992, the applicants requested for the first time an order disqualifying either the Office of the Coroner for the Province of Ontario, or all co-

roners employed in the Office of the Coroner for Ontario pursuant to s. 3(7) of the Coroners Act, R.S.O. 1990, c. C.37, be disqualified on the grounds of actual or reasonable apprehension of bias.

The bias issue is based essentially on the ground that pre-inquest discussions amongst the Chief Coroner, the Donaldson family and the police was an attempt to focus an inquest in such a way as to exclude race as an issue to be considered.

It was the coroner's intention to attempt to get a draft agreed statement of fact to put before the jury and to get the jury to recommend a review of position and investigative procedures when the mentally ill were involved in an inquest. It was proposed that the jury would be asked to make a recommendation that the Office of the Coroner review all aspects of the Mental Health Act and police training in dealing with the mentally ill.

Collaterally it would reduce the inquest to one day rather than a possible four-month hearing. The support for the proposed recommendation is evidenced in a letter from the lawyers of the Donaldson family, Fasken, Campbell, Godfrey:

> I was distressed to receive your letter of January 20, because it puts at risk the progress that appears to have been achieved during the past 9 months in discussions between my client and the Office of the Chief Coroner.
>
> During that period the paramount objective has been to arrive at an approach to the Inquest that will serve the public interest in the most responsible and constructive way possible. The jury recommendations that you have seen are the product of considerable thought and detailed discussions.

In support of bias, the Alliance examined Ms. Laura Rowe, a member of the Police Services Board, apparently in her personal capacity under rule 39.03, and made requests of Dr. Huxter for production of all documents in the possession of the Chief Coroner in respect of the pre-inquest discussions with the Donaldson family and the police.

On motion by the Alliance, Mr. Justice Campbell directed production to the applicants of certain correspondence in the possession of the Chief Coroner having to do with the pre-inquest discussions with the Donaldson family and the police. As requested 26 letters and four drafts of the proposed recommendation were produced.

In addition, during the motion before Mr. Justice Campbell on October 24, 1992, counsel for Dr. Huxter undertook to consult the Chief Coroner and Dr. Huxter to inquire as to whether the Chief Coroner sought to dictate or otherwise influence the decisions Dr. Huxter was required to make in respect of the applications for standing by the applicants, and if there was any documentation in relation to such efforts to produce them.

As undertaken, Dr. Huxter's counsel made the inquiries and by letter advised the applicants' counsel that the Chief Coroner had not attempted in any way to influence the decisions that Dr. Huxter made on their applications for standing.

In addition, Mr. Justice Campbell ordered the police to provide particulars of the communications passing between its counsel and either the Chief Coroner or his counsel in respect of the proposed recommendations. These particulars were provided.

The examination of Laura Rowe confirms that Dr. Huxter was not consulted about, nor did he play any part in the development of the proposed recommendations.

The attempt by the Chief Coroner, the Deputy Attorney General and the family of the deceased to agree on a joint statement of fact to the inquest jury failed because of legal advice given to the Police Services Board about the pending civil suit by the Donaldson family. As a result, Dr. Huxter was appointed to conduct the inquest in the regular manner.

There is no evidence that in entering into the pre-inquest discussions the Chief Coroner, the Donaldson family or the police sought to come to a focus for or to approach the inquest in a way which would exclude any issue arising from the circumstances of the death of Lester Donaldson. The Chief Coroner's answers to BADC counsel confirm that his purpose in entering into discussions with the Donaldson family and the police was to find the most appropriate focus and process for the inquest. As well, they confirm that the Chief Coroner at no time consulted with Dr. Huxter or involved him in the discussions concerning the proposed recommendation.

The pre-inquest discussions with the most obviously interested parties were an attempt to arrive at a consensus on the most appropriate approach to the issues arising from the circumstances of Lester Donaldson's death.

In my view, it was not an "improper purpose" to attempt a concise and short hearing because it would save a great deal of public expense. The Donaldson family would be saved the expense and the anxiety that goes with a long public hearing.

Under the Coroners Act it is the coroner who is in charge of conducting proceedings and fashioning the conduct of those proceedings. The coroner and his counsel shape the scope of the inquiry. The Ontario Provincial Police did an investigation for the coroner separate and apart from that done in the prosecution of Constable Deviney.

In my view, the pre-inquest discussions cannot form a ground for either actual or reasonable apprehensions of bias on the part of the Chief Coroner and/or all coroners in Ontario. The Chief Coroner did not discuss details of the proposed joint recommendations with Dr. Huxter. Further, Dr. Huxter has neither said nor done anything which would give rise to a reasonable apprehension of bias. I arrive at this conclusion having applied the test stated by Chief Justice Laskin [quoting from the judgment appealed from (1975), 65 D.L.R. (3d) 660 (sub nom. Re Canadian Arctic Gas Pipeline Ltd.) at p. 667], speaking for the majority, in Committee for Justice and Liberty v. National Energy Board , [1978] 1 S.C.R. 369 at p. 386, 68 D.L.R. (3d) 716 at p. 728:

> It is true that all of the circumstances of the case, including the decisions in which Mr. Crowe participated as a member of the study group, might give rise in a very sensitive or scrupulous conscience to the uneasy suspicion that he might be unconsciously biased, and therefore should not serve. But that is not, we think, the test to apply in this case. It is, rather, what would an informed person, viewing the matter realistically and practically -- and having thought the matter through -- conclude. Would he think that it is more likely than not that Mr. Crowe, whether consciously or unconsciously, would not decide fairly?

Scope of Judicial Review

Errors made within a tribunal's jurisdiction are only reviewable if they are patently unreasonable, while errors going to jurisdiction are always reviewable.

Campbell J. in reviewing standing at an inquest addressed the test in Stanford v. Regional Coroner, Eastern Ontario (1989), 38 C.P.C. (2d) 161, 38 Admin. L.R. 141 (Ont. Div. Ct.), at p. 173 C.P.C., p. 154 Admin. L.R.:

> The coroner is faced with a very difficult task and must be afforded a sufficient degree of insulation from review. He must have the power to keep the inquest from turning into a circus and the power to prevent every busybody from using the inquest as a platform for their particular views. Applications for judicial review should be discouraged as they detract from the coroner's ability to control the proceedings, and they produce delay.

and at p. 174 C.P.C., p. 155 Admin. L.R.:

> The power to review a coroner should, however, be exercised with a real degree of judicial restraint, just like the review of decisions made by prison authorities and tribunals.
>
> Although s. 41 provides mandatory standing without any discretion once substantial and direct interest is found to exist, the application of the test involves a measure of discretion in each case, as Eberle J. pointed out, because the test is expressed in open-ended language.
>
> For the reasons noted above, coroners must be given considerable leeway if they are to discharge their difficult responsibilities effectively. To avoid mere second-guessing of coroners on questions of standing, it is important that the courts exercise real restraint in reviewing the decisions of coroners on standing.
>
> Section 41 of the Act reads:
>
> 41(1) On the application of any person before or during an inquest, the coroner shall designate the person as a person with standing at the inquest if he finds that the person is substantially and directly interested in the inquest.

In considering standing Campbell J. further stated at p. 175 C.P.C., p. 156 Admin. L.R.:

> It will be a question of degree in each case and the coroner must have a wide ambit of discretion in the application of the test, in the sense that he is applying a degree of judgment to a question of mixed fact and law that pre-[ljsents no simple mechanical solution.

> Mere concern about the issues to be canvassed at the inquest, however deep and genuine, is not enough to constitute direct and substantial interest. Neither is expertise in the subject matter of the inquest or the particular issues of fact that will arise. It is not enough that an individual has a useful perspective that might assist the coroner. The interest of an applicant for standing in the recommendations of the jury must be so acute that the interest may be said to be not only substantial, but also direct.

I agree with the principle set out in People First of Ontario v. Porter, Regional Coroner Niagara (1991), 5 O.R. (3d) 609, 85 D.L.R. (4th) 174 sub nom. People First of Ontario v. Niagara (Regional Coroner) (Div. Ct.) at p. 617 O.R., p. 182 D.L.R. (reversed on other grounds (1992), 6 O.R. (3d) 289, 87 D.L.R. (4th) 765 (C.A.)), that a decision of a coroner will not be reviewed where there is no evidence on the record to suggest that the coroner acted "improperly, unfairly, or unreasonably".

I also agree with the court's decision in the same case, at p. 622 O.R., p. 187 D.L.R.:

> Although an inquest has some of the trappings of a Royal Commission, it retains its essential quality of an investigation conducted by a medical man (or woman) into the death of individual members of the community. It must never be forgotten by the parties at every inquest that the central core of every inquest is an inquiry into how and by what means a member of the community came to his/her death. Notwithstanding the emerging public interest in the jury recommendations in the modern Ontario inquest, an inquest is not a trial; an inquest is not a Royal Commission; an inquest is not a public platform; an inquest is not a campaign or a lobby; an inquest is not a crusade.

The applicant, BADC, seeks standing on the ground that a black man was killed and there is a body of opinion that argues race was a factor. In support, reliance is placed on opinions expressed in several affidavits suggesting race was a factor.

The coroner quite properly, in my view, concluded the affidavits to be inadmissible. I have had the benefit of reading the reasons of the majority. While I agree with them in the rejection of the applicants' argument on bias and BADC's application for standing, I cannot refrain from comment on the references to inadmissible affidavit evidence in extenso. The court should not encourage the use of that type of evidence. It should not be dignified by detailed recantation.

None of the affidavits of either applicant contain any empirical evidence that race was a factor in the shooting. Supposition and opinion, no matter how honestly and strongly held are not sufficient to meet the test of relevance and fall short of establishing a basis to bring the applicants within s. 41 as having "a substantial and a direct interest" in the inquiry.

In fashioning the conduct of the inquiry, clearly the duty of the coroner, he concluded that race was not a factor and that the focus of the inquest would be the mental health aspect of the deceased.

The coroner has had the benefit of an O.P.P. investigation prior to the month-long trial on a charge of manslaughter against Constable Deviney. All the evidence of that investigation was before the coroner as well as the trial evidence. A separate investigation was done by the O.P.P. for the coroner on all the facts.

None of these inquiries have produced any evidence that race was a factor. In the event that some evidence of race as a factor does come to light during the inquest, the Crown has a duty to introduce

it. Further, the coroner has made it clear that if such evidence was introduced he would be open to fresh applications from the applicants for standing.

The application of BADC is therefore dismissed.

The only additional ground to support the application for standing of the Urban Alliance is its cross-cultural background in dealing with minorities who suffer from mental illness or defect. It is proposed that Crown counsel will call a body of material opinions that can properly and adequately address that subject.

This court said in People First at p. 620 O.R., pp. 185-86 D.L.R.:

> The great value in the separate perspective of the public interest interveners does not warrant any usurpation of the role of the Crown Attorney as the overall advocate for the public interest in the role of counsel to the coroner. It is for coroner's counsel to ensure that all the evidence essential to an understanding of the deaths is brought forward, and the coroner has an overall supervising responsibility to see this function is fully and openly performed.

The additional ground does not, in my view, create a basis for standing. I cannot agree with the majority that there was any jurisdictional error made by the coroner.

For these reasons both applications are dismissed.

I would make no order as to costs.

Application for standing of one applicant
allowed; other application dismissed.