Re Booth et al. and Huxter

[Indexed as: Booth v. Huxter]

16 O.R. (3d) 528
[1994] O.J. No. 52
Action No. 744/93

Ontario Court (General Division), Divisional Court
O'Brien, Moldaver, and H. Smith JJ.
January 14 and 25, 1994

Coroners -- Inquests -- Coroner having jurisdiction to make ruling of conflict of interest on part of counsel appearing at inquest and to disqualify counsel on that basis.

Coroners -- Inquests -- Metropolitan Toronto Police Services Board and five police officers who were present when deceased was shot granted standing at inquest into deceased's death -- Board and officers represented by same counsel -- Police officers denying existence of systemic issues arising out of circumstances surrounding death -- Board entrusted with public interest mandate to explore and respond to any systemic issues arising out of death -- Coroner having grounds to rule that counsel for Board and officers had conflict of interest which disqualified him from acting for Board.

The Metropolitan Toronto Police Services Board (the "Board"), and five police officers who were present when one of their number shot and killed D in the course of attempting to arrest him, were granted standing at an inquest into D's death. The Board, the Chief of Police and the officers were all represented by the same counsel, A. The coroner found that A had a disqualifying conflict of interest, as the police officers took the position that no systemic issues arose out of the circumstances surrounding D's death, while the Board was

entrusted with a public interest mandate to explore, expose and ultimately respond to any systemic issues arising out of the death. He prohibited A from continuing to act as counsel for the Board. A decided that, in light of that ruling, he could no longer continue to act for the officers. The officers brought an application for judicial review, seeking to quash the order of the coroner removing A as counsel for the Board.

Held, the application should be dismissed.

Per Moldaver J. (O'Brien J. concurring): The coroner was entitled to find the existence of a conflict of interest in the circumstances, both actual and apparent. As there was evidence to support that conclusion, the reviewing court cannot substitute its own views for the coroner's. Moreover, he was correct in holding that the conflict of interest was disqualifying in nature, going as it did to the heart of the lawyer-client relationship. If only the private interests of the clients were involved, a different conclusion might have been reached had mutual waivers been executed. However, the coroner's ruling was designed, in large measure, to ensure the public's confidence in the administration of justice and to avoid the appearance of impropriety. Given the public interest mandate of the Board and its stated desire to delve into the systemic issues arising out of D's death, it was difficult to see how any member of the public could feel confident that counsel for the Board would pursue these objectives fearlessly and with undivided loyalty, when bound at the same time by an identical duty towards the officers.

The coroner had jurisdiction to remove A as counsel for the Board under s. 50(1) of the Coroners Act, R.S.O. 1980, c. 93, which provides that a coroner may make such orders or give such directions at an inquest as he considers proper to prevent abuse of its processes. Apart from s. 50(1), the coroner had jurisdiction to remove A pursuant to s. 41(1) and (2)(a) of the Act. Section 41 should be interpreted to mean that every person with standing at an inquest has the right to be represented by counsel who can act professionally. In this case, the coroner concluded that A could not act professionally on behalf of both the officers and the Board.

Per H. Smith J. (dissenting): There was no disqualifying conflict, either actual or apparent, between the positions or perspectives of the officers and the Board, such that they could not both be represented by A. The officers and the Board occupied significantly different positions within the police system. The officers were not experts in the area of systemic policies and training and were not in a position to assert recommendations on those points. Moreover, the officers recognized that, as individual employees of the police force, they were obliged to accept the best training offered to them as set by the Board as policy-maker for the force. As A pointed out to the coroner, the officers had a common interest with the Board in welcoming the adoption of any training, policy or procedure that could assist the force and its members in preventing deaths in similar circumstances in the future.

More importantly, the clients themselves did not object to both being represented by A. Under those circumstances, it could not be said that there was a conflict of perspective, much less a conflict of interest necessitating disqualification of counsel. A lawyer may act for two parties with a conflicting interest where there has been adequate disclosure and consent of the clients.

The jurisdiction of the coroner to make a disqualifying order only arises if such order prevents an "abuse of process" as that term appears in s. 50(1) of the Coroners Act. On the facts of this case, there was no basis for a finding of abuse of process.

Section 41 of the Act had no application to this case. It was not relied on or considered by the coroner, and it would be inappropriate for the court to make a jurisdictional ruling based on a provision not relied upon or even considered by the parties before it. In any event, s. 41 does not confer upon the coroner the jurisdiction to make the disqualifying order.

The coroner accordingly exceeded his jurisdiction in making the disqualifying order, and the ruling should be quashed.

Cook v. Young, Ont. H.C.J., MacFarland J., November 8, 1989; R. v. Speid (1983), 43 O.R. (2d) 596, 8 C.C.C. (3d) 18, 37 C.R. (3d) 220, 7 C.R.R. 39, 3 D.L.R. (4th) 246 (C.A.), consd

Other cases referred to

Beckon (Re) (1992), 9 O.R. (3d) 256, 93 D.L.R. (4th) 161 (C.A.); Black Action Defence Committee v. Huxter, Coroner (1992), 11 O.R. (3d) 641 (Div. Ct.); Canadian Newspaper Co. v. Isaac (1988), 63 O.R. (2d) 698, 48 D.L.R. (4th) 751, 27 O.A.C. 229 (Div. Ct.); Fong v. Chan (1993), 39 A.C.W.S. (3d) 1104 (Ont. Gen. Div.); Goldberg v. Goldberg (1982), 141 D.L.R. (3d) 133, 31 R.F.L. (2d) 453 (Ont. Div. Ct.); MacDonald Estate v. Martin, [1990] 3 S.C.R. 1235, 77 D.L.R. (4th) 249, 70 Man. R. (2d) 241, 48 C.P.C. (2d) 113, [1991] 1 W.W.R. 705, 121 N.R. 1; Manville Canada Inc. v. Ladner Downs (1992), 63 B.C.L.R. (2d) 102, 88 D.L.R. (4th) 208, [1992] 2 W.W.R. 323 (S.C.) [affd (1993), 76 B.C.L.R. (2d) 273, 100 D.L.R. (4th) 321, [1993] 5 W.W.R. 36 (C.A.)]; People First of Ontario v. Porter, Regional Coroner Niagara (1991), 5 O.R. (3d) 609, 85 D.L.R. (4th) 174 (Div. Ct.), revd on other grounds (1992), 6 O.R. (3d) 289, 87 D.L.R. (4th) 765 (C.A.); R. v. Silvini (1991), 5 O.R. (3d) 545, 68 C.C.C. (3d) 251, 9 C.R. (4th) 233, 50 O.A.C. 376 (C.A.); Stanford v. Regional Coroner, Eastern Ontario (1989), 38 C.P.C. (2d) 161, 38 Admin. L.R. 141, 33 O.A.C. 241 (Div. Ct.)

Statutes referred to

Coroners Act, R.S.O. 1980, c. 93, ss. 2(1), 31(1), (2), (3), (4), 37(2), 41(1), (2)(a), 50(1) -- now R.S.O. 1990, c. C.37
Judicial Review Procedure Act, R.S.O. 1980, c. 224, s. 6(2) -- now R.S.O. 1990, c. J.1

Rules and regulations referred to

Rules of Professional Conduct of the Law Society of Upper Canada, Rule 5

Authorities referred to

Ontario Civilian Commission on Police Services, Report of an Inquiry

APPLICATION for judicial review of the ruling of a coroner removing counsel at an inquest on the basis of a disqualifying conflict of interest.

Ronald Craigen and Robert MacKinnon, for applicant officers.

A. Reddon and G. Burt, for the doctors.

Thomas C. Marshall, Q.C., for respondent.

Julian N. Falconer and Richard Macklin, for Urban Alliance on Race Relations.

Peter J. Pliszka, for Myrtle Donaldson.

MOLDAVER J. (O'BRIEN J. concurring): -- This application raises the question of conflict of interest in the context of a coroner's inquest.

On November 1, 1993, during the course of an inquest into the death of Lester Donaldson, the respondent coroner, Dr. Robert Huxter, made a ruling removing Mr. Todd Archibald as counsel of record for the Metropolitan Toronto Police Services Board (the "Board").

From the outset of the inquest, Mr. Archibald had been acting as counsel not only for the Board but also the Chief of Police of the Metropolitan Toronto Police Force and the five police officers (the "applicant officers") who had been present on the night of August 8, 1988, when one of their number shot and killed Mr. Donaldson in the course of attempting to effect his lawful arrest. The coroner's decision to remove Mr. Archibald as counsel for the Board stemmed from his conclusion that Mr.

Archibald could no longer jointly represent the interests of both the Board and the applicant officers due to a disqualifying conflict of interest.

Although his ruling only prohibited Mr. Archibald from continuing to act as counsel for the Board, Mr. Archibald nevertheless took the position that in view of the Coroner's ruling, he could no longer continue to act for either the Board or the applicant officers. It is that response which has prompted the present application, wherein the applicant officers seek to quash the order of the coroner removing Mr. Archibald as counsel for the Board.

BACKGROUND FACTS

The facts giving rise to the coroner's ruling may be stated briefly.

The inquest into Mr. Donaldson's death commenced on August 24, 1992. On August 26, 1992 the coroner granted standing, inter alia, to the Board and the applicant officers, both of whom were then represented by Mr. Archibald.

The inquest jury first began to hear evidence at the end of March 1993. At the time of the impugned ruling, four of the applicant officers had testified and a fifth, Sergeant Niels Sondergaard, had given his evidence in chief and was in the process of being cross-examined.

The motion to disqualify Mr. Archibald from continuing to represent the joint interests of the Board and the applicant officers arose on September 9, 1993. It was brought by counsel acting on behalf of the Urban Alliance on Race Relations for Metropolitan Toronto (Justice) (the "Alliance"). That organization had earlier been granted standing as a result of a decision of the Divisional Court: see Black Action Defence Committee v. Huxter, Coroner (1992), 11 O.R. (3d) 641 (Div. Ct.). Counsel on behalf of Mrs. Donaldson, who had also been granted standing at the inquest, supported the Alliance motion.

In essence, the moving parties submitted that Mr. Archibald

could no longer continue to represent both the applicant officers and the Board in view of the collective position taken by the officers as to the absence of any systemic issues arising out of the circumstances surrounding Mr. Donaldson's death. That position, it was urged, could not be advanced by a single counsel, who, at the same time, had an equal duty to represent the interests of the Board, a body entrusted with a public interest mandate to explore, expose and ultimately respond to any systemic issues arising out of the death.

To this point in time in the inquest, the Board had been maintaining a relatively low profile. Mr. Archibald had been focusing his attention upon the interests of the applicant officers. However, it was known to all that upon the completion of Sergeant Sondergaard's evidence, the focus of the inquest would shift to matters of public interest. To this end, it was expected that a number of expert witnesses would be called to testify about police training and techniques in the context of such matters as cross-cultural sensitivity and ways of responding to the mentally ill.

Faced with the motion to disqualify Mr. Archibald, and the impending shift in the focus of the inquest, the coroner directed a series of questions to Mr. Archibald designed to determine:

(a) whether or not the Board wished to take an active role in the inquest and if so what that role encompassed;

(b) what, in fact, was the position of the applicant officers regarding systemic issues arising out of the particular circumstances giving rise to Mr. Donaldson's death;

(c) whether or not a conflict of interest, either actual or apparent, existed as between the applicant officers and the board; and

(d) if such conflict did exist, whether or not the interests of the respective parties could be adequately preserved and advanced by a single counsel.

A combination of Mr. Archibald's responses to those and follow-up questions along with the coroner's assessment of the collective perspective taken by the officers in their evidence, led the coroner to conclude that Mr. Archibald could no longer continue to represent the Board due to conflict of interest, both actual and apparent.

POSITION OF THE PARTIES

On behalf of the applicant officers, it was submitted that:

(a) there was no evidence upon which the coroner could find a conflict of interest as between the Board and the applicant officers;

(b) even if such evidence did exist, the nature of the conflict was not such as to warrant Mr. Archibald's disqualification; and

(c) in any event, the coroner had no jurisdiction under s. 50(1) of the Coroners Act, R.S.O. 1980, c. 93 (the "Act"), to make the impugned order.

These submissions were supported by counsel representing five doctors who had been involved in the medical treatment of Mr. Donaldson, all of whom had been granted standing by the coroner.

On behalf of the respondent coroner, it was submitted that:

(a) there was evidence upon which the coroner could find both actual and apparent conflict of interest as between the Board and the applicant officers;

(b) the coroner did not err in law in concluding that the conflict was disqualifying in nature; and

(c) the coroner did have the power to make the impugned order as a necessary incident of his jurisdiction under s. 50(1) of the Act.

These submissions were supported by counsel for Mrs. Donaldson and the Alliance.

Before turning to the issues, I would note that this court was not provided with the entire transcript of the proceedings before the coroner. Instead, only portions were submitted, which the parties relied upon in support of their respective positions. Additionally, a joint submission was filed in which all of the parties agreed that the applicants were not relying upon delay or any inherent prejudice which might flow from the delay occasioned by the timing of the motion before the coroner to disqualify Mr. Archibald.

ISSUES

The following issues require determination:

(1) Was it open to the coroner, based upon the evidence and information before him, to find the existence of an actual or apparent conflict of interest on the part of Mr. Archibald in his continued joint representation of the applicant officers and the Board?

(2) If so, was the coroner correct in holding that the conflict of interest was disqualifying in nature?

(3) If so, did the coroner have the jurisdiction to order Mr. Archibald's removal as counsel for the Board?

Issue 1

Based on the evidence before him, it was open to the coroner to find that the applicant officers were fixed in their collective view that, irrespective of any training, education, or specialized policing techniques then existing or proposed in matters such as cross-cultural sensitivity or methods of responding to the mentally ill, there is nothing that they could or would have done differently on the night in question which might have avoided the death of Mr. Donaldson.

On the other hand, based upon the submissions of Messrs. Archibald and Bell, in their capacity as counsel for the Board, it became apparent to the coroner that the Board might well wish to explore, through cross-examination and later, by way of proposals to the jury, recommendations which could undermine the position adopted by the applicant officers.

The coroner arrived at his conclusion despite assurances from Mr. Archibald that (a) no conflict of interest existed as between the police officers and the Board; and (b) no conflicting recommendations would be put to the jury.

In my opinion, irrespective of Mr. Archibald's assurances, it was open to the coroner, acting reasonably and dispassionately, to conclude as he did that (a) there already existed on the record before him evidence and information from which it could be inferred that the position of the officers might well come into conflict with that of the Board regarding systemic issues surrounding the death of Mr. Donaldson; and (b) there existed the real prospect that, as the inquest proceeded, the gap between these positions would widen: R. v. Speid (1983), 43 O.R. (2d) 596, 8 C.C.C. (3d) 18 (C.A.), and R. v. Silvini (1991), 5 O.R. (3d) 545, 68 C.C.C. (3d) 251 (C.A.).

In deciding as he did that Mr. Archibald could no longer act for the Board, the coroner was not dictating or attempting to dictate how the respective parties should question prospective witnesses or what, if any, recommendations either should ultimately urge upon the jury. Instead, he was merely enabling the parties to further their respective interests and to advance their objectives by recognizing that such interests and objectives could only be fully protected and advanced through separate representation.

In doing so, it seems to me that the coroner quite properly recognized that the applicant officers had a very substantial interest in preserving or attempting to preserve their personal and professional reputations, within the police force and the community, in proceedings that were both public and widely publicized. On the other hand, the coroner also perceived that the Board had a very strong interest in seeking to preserve and

maintain its public interest mandate by taking steps to ensure, so far as possible, the most up-to-date and enlightened policies, procedures and training methods for the members of the Metropolitan Toronto Police Force.

Counsel for both the applicants and the doctors sought to challenge the coroner's ruling, inter alia, on the basis that the very essence of a conflict of interest was missing here.

In this vein, it was submitted that allegations of conflict of interest are, by definition, predicated upon the existence of a legal interest such as legal status; a right or duty or some entitlement as between the parties. No such interest, it was urged, could be found here since a coroner's inquest did not involve a lis or dispute between any parties. Moreover, in view of s. 31(2) of the Act, no party was or could be at risk of an adverse finding either criminally or civilly. At most, all that could be said was that the officers and the Board might have different perspectives or opinions, neither of which amounted to a legal interest.

My reasons for rejecting these submissions are twofold.

First, I see no reason why the word "interest" should be defined so narrowly. Such an interpretation would appear to fly directly in the face of the very basis upon which the officers and the Board obtained standing at the inquest. Pursuant to s. 41(1) of the Act, both parties were allowed to participate only after satisfying the coroner that each had a substantial and direct interest in the inquest (see Mr. Archibald's submissions re standing, Respondent's Record, Vol. 1, Tab 3, pp. 25-29). The separate interests of the officers and Board were acknowledged by the coroner in his ruling on the matter of standing, where he said:

> An application was made by Mr. Archibald on behalf of the Metropolitan Police Force and the individual officers from that force that will be called to this inquest. He knows that the inquest will be reviewing police procedure, training, courses in their contact with respect to the handling of mentally ill individuals. He submits that the applicants

deserve standing from the private law approach.

I find that the Metropolitan Toronto Police Force qualifies for standing for all aspects of this inquest. Not only will the conduct of the force's individual officers come under some scrutiny, any recommendations that may arise from this inquest may directly affect the policy, training and conduct of the force.

(See Ruling of Coroner, Respondent's Record, Vol. 1, Tab 4.)

In view of this, it hardly lies with the officers or Board to now suggest that they have no interest at stake which would attract the conflict of interest doctrine.

Secondly, I consider the proposed interpretation of the word "interest" to be somewhat nave and unrealistic. I have already touched upon the reasons for concluding that each of the Board and the officers has a very real and significant interest in the proceedings. The integrity, reputation, competence and professionalism of each has been placed under the spotlight of public scrutiny. To somehow suggest that such matters do not constitute interests worthy of preservation is to take a myopic view of the situation. One need only look to the laws of libel and slander to realize the importance of a person's reputation within our society. Here, the reputations of the officers and the Board are, in no small measure, under scrutiny.

For these reasons, I am satisfied that the coroner was entitled to find the existence of a conflict of interest as between the parties, both actual and apparent. It cannot be said that there was a complete absence of evidence supportive of his conclusion. That being so, it is not for this court to interfere with the coroner's findings. It is now well-established that the standard of review does not involve a power in this court to substitute its own view for that of the coroner, on the basis only that this court, in the position of the coroner, would or might have reached a different conclusion: Stanford v. Regional Coroner, Eastern Ontario (1989), 38 C.P.C. (2d) 161 at p. 172, 33 O.A.C. 241 (Div.

Ct.).

I would therefore answer the first issue in the affirmative.

Issue 2

Was the coroner correct in holding that the conflict of interest was disqualifying in nature?

At p. 10 of his ruling, the coroner found that the conflict was disqualifying in nature for the following reasons:

> The conflict between the perspective of the police officers on the one hand, leaves no room for recommendations arising out of the circumstances, as far as their conduct is concerned. Whereas the Board may well find room for such recommendations. It would be an abuse of my process to allow both perspectives to be brought before this jury by a single counsel.

(See Application Record, Tab 2, p. 15)

As I read this extract, it seems apparent that the coroner was concerned about both the private interests of the officers and the Board as well as the public interest in maintaining the integrity of the process.

From the private interest perspective, in view of his findings, the coroner was clearly concerned about Mr. Archibald's ability to act with undivided loyalty towards both the officers and the Board. The serious nature of such a conflict was not lost on the coroner. This type of conflict goes to the very heart of the lawyer-client relationship.

In the case of R. v. Silvini, supra, Mr. Justice Lacourcire succinctly described the potential poisonous effects that can arise in the case of joint representation of conflicting interests. At p. 550 O.R., p. 258 C.C.C., he said:

> In a case of joint representation of conflicting interests, defence counsel's basic duty of undivided loyalty and

effective assistance is jeopardized and his performance may be adversely affected. That is, he may refrain from doing certain things for one client by reason of his concern that his action might adversely affect his other client.

I recognize immediately that these thoughts arose in the context of a criminal case, where every accused is afforded the constitutional right to make full answer and defence. Nevertheless, in my opinion, the concerns expressed by Mr. Justice Lacourcire find their place generally in the rules of professional conduct prescribed by the Law Society of Upper Canada. Those rules are not confined to criminal matters. They apply with equal force to any situation where the interests of one client conflict or are likely to conflict with those of another. Particularly, I have in mind Rule 5 and the first three commentaries thereafter. The rule and the relevant commentaries read as follows:

Conflict of Interest

Rule 5

The lawyer must not advise or represent both sides of a dispute and, save after adequate disclosure to and with the consent of the client or prospective client concerned, should not act or continue to act in a matter when there is or there is likely to be a conflicting interest.

COMMENTARY

Guiding Principles

1. A conflicting interest is one which would be likely to affect adversely the lawyer's judgment on behalf of, or loyalty to a client or prospective client, or which the lawyer might be prompted to refer to the interests of a client or prospective client.

2. The reason for the Rule is self-evident; the client or the client's affairs may be seriously prejudiced unless the lawyer's judgment and freedom of action on the client's

behalf are as free as possible from compromising influences.

3. Conflicting interests include but are not limited to the financial interest of the lawyer or an associate of the lawyer, and the duties and loyalties of the lawyer to any other client, including the obligation to communicate information.

While not binding on the courts, the rules and commentaries found in such ethics codes serve as guide posts, containing as they do important statements of public policy regarding the conduct of barristers and solicitors: MacDonald Estate v. Martin, [1990] 3 S.C.R. 1235 at pp. 1243-44, 77 D.L.R. (4th) 249 at pp. 255-56.

While it is true that Rule 5 leaves room for joint representation of conflicting interests, this is so only where the clients have provided express waivers. Not unexpectedly, no such waivers exist here, particularly in view of Mr. Archibald's position that no conflict exists as between his clients.

The fact that the applicant officers are seemingly content with the state of joint representation is no answer. Again, to quote from Mr. Justice Lacourcire in Silvini, supra, at p. 553 O.R., p. 261 C.C.C.:

Since defence counsel did not recognize that he had a conflict of interest, it is difficult to see how a layman could have any appreciation of the potential conflict: see Hoffman v. Leeke, 903 F.2d 280 (4th Cir. 1990), at p. 288. Accordingly, the appellant could not voluntarily, knowingly, and intelligently have waived his right to independent, loyal counsel.

In view of the serious nature of the conflict as found by the coroner, and its potential adverse effects on the private interests of the respective clients, I have not been persuaded that the coroner erred in treating it as disqualifying in nature.

In this regard, dealing only for the moment with the private interests of the clients, I might well have come to a different conclusion had mutual waivers been executed, particularly in view of the nature of the interests of each; the nature of the proceedings; the general right of the parties to counsel of their choice and the fact that the motion to disqualify emanated from third parties.

As noted, I have limited the waiver hypothetical to the private interests of the parties. The reason for this is found in the following extract from Goldberg v. Goldberg (1982), 141 D.L.R. (3d) 133 at pp. 135-36, 31 R.F.L. (2d) 453 (Ont. Div. Ct.), where Callaghan J. (now C.J.O.C.) stated:

> Of more importance, however, is the fact that the principles involved herein are designed not only to protect the interests of the individual clients but they also protect the public confidence in the administration of justice. This is particularly so when the litigation involves a family dispute. Furthermore, when the public interest is involved, the appearance of impropriety overrides any private interest claimed by waiver.

(Emphasis added)

That brings me to the second ground upon which the coroner based his decision to disqualify, namely, the public interest.

I begin this portion of my analysis with a quote from People First of Ontario v. Porter, Regional Coroner Niagara (1991), 5 O.R. (3d) 609 at pp. 618-19, 85 D.L.R. (4th) 174 (Div. Ct.), reversed on other grounds (1992), 6 O.R. (3d) 289, 87 D.L.R. (4th) 765 (C.A.), where the court described with clarity and precision the ever-increasing public interest component of coroners' inquests:

> The public interest in Ontario inquests has become more and more important in recent years. The traditional investigative function of the inquest to determine how, when, where, and by what means the deceased came to her death, is no longer the predominant feature of every inquest. That narrow

investigative function, to lay out the essential facts surrounding an individual death, is still vital to the families of the deceased and to those who are directly involved in the death.

A separate and wider function is becoming increasingly significant; the vindication of the public interest in the prevention of death by the public exposure of the conditions that threaten life. The separate role of the jury in recommending systemic changes to prevent death has become more and more important. The social and preventive function of the inquest which focuses on the public interest has become, in some cases, just as important as the distinctly separate function of investigating the individual facts of individual deaths and the personal roles of individuals involved in the death.

It can scarcely be doubted that the Lester Donaldson inquest contains a strong public interest component. The circumstances surrounding his death have given rise to a great deal of public controversy. From day one to the present, the media have paid close attention not only to the ensuing legal proceedings but also to the wider systemic issues arising out of the circumstances surrounding Mr. Donaldson's death.

At the forefront of these wider issues are matters such as policing techniques, training and education in areas such as cross-cultural sensitivity and methods of responding to the mentally ill. Not unexpectedly, these issues form the centrepiece of the Lester Donaldson inquest.

With this in mind, I return to the situation confronting the coroner at the time he made his ruling. Here, it becomes vitally important to reflect upon the roles which the applicant officers and the Board themselves sought to play at the inquest and the positions which each sought to advance.

To begin with, this was not a case where either party was prepared to remain mute at the inquest and simply engage in a watching brief. Both parties wished to actively participate.

Furthermore, based upon the evidence and information before him, the coroner concluded that the parties were not necessarily ad idem on the systemic issues surrounding Mr. Donaldson's death. Indeed, the coroner concluded just the opposite, namely, actual and apparent conflict not merely as between two parties with only private interests but as between two parties, one of which was impressed with a very strong public interest mandate.

The coroner had before him the Ontario Civilian Commission on Police Services, Report of an Inquiry dated August 1992. That report made it perfectly clear that the interests of a Police Services Board differ widely from those of the police force and its individual officers. Excerpts from that report have been incorporated at pp. 18-19 of the factum filed on behalf of the respondents Myrtle Donaldson and the Alliance. They need not be repeated. Suffice it to say that the Police Services Board is meant to act as the civilian overseer of the police on behalf of the community. The Board exists to ensure that the policing services provided meet community standards.

Having regard to the foregoing factors, in their totality, it seems apparent to me that the coroner's ruling was designed, in large measure, to ensure the public confidence in the administration of justice, and to avoid the appearance of impropriety. Given the public interest mandate of the Board and its stated desire to delve into the systemic issues arising out of Mr. Donaldson's death, how could any member of the public, including but obviously not limited to Mrs. Donaldson and the members of the Alliance, feel confident that counsel for the Board would pursue these objectives fearlessly and with undivided loyalty, when bound at the same time by an identical duty towards the applicant officers?

In my view, it cannot be said that the coroner erred in responding to this question as he did.

For these reasons Issue 2 must also be answered in the affirmative.

Issue 3

Did the coroner have the jurisdiction to order Mr. Archibald's removal as counsel for the Board?

The coroner grounded his jurisdiction to remove Mr. Archibald under s. 50(1) of the Act. That provision reads:

> 50(1) A coroner may make such orders or give such directions at an inquest as the coroner considers proper to prevent abuse of its processes.

Clearly, it was necessary for the coroner to anchor his decision to some provision of the Act, since he no longer retained any residual common law jurisdiction: see s. 2(1) of the Act.

Counsel on behalf of the applicants and the doctors forcefully submitted that however wide the parameters of s. 50(1) were, they were not broad enough to include the jurisdiction to remove counsel for conflict of interest. Indeed, it was urged that s. 50(1) had nothing to do with matters such as conflict of interest but instead, it related solely to situations where a party was attempting to use the inquest for oblique, improper or collateral purposes.

By way of example, counsel pointed to the following extract from the case of Canadian Newspaper Co. v. Isaac (1988), 63 O.R. (2d) 698 (Div. Ct.) at p. 702, 27 O.A.C. 229 at p. 232, where Campbell J. said:

> Section 50(1) of the Coroners Act empowers the coroner to make such orders or give such directions at an inquest as he considers proper to prevent abuse of its processes. Although that provision gives power to prevent abuse of processes -- a classic example would be the vexatious calling of witnesses for a collateral or improper purpose or the flouting by indirect means of a coroner's ruling -- it does not speak to the creation of a power to withhold the identity of a witness.

That case involved a ruling by the coroner which permitted a

witness to testify anonymously. Absent such a ruling, the Crown would not have called the particular witness, despite the cogency of his evidence.

As I read the decision, there were essentially two issues: (a) did the coroner have the jurisdiction to make the order; and (b) if so, was he correct in law.

Mr. Justice Campbell concluded that despite the absence of an express provision in the Act, the coroner did have the jurisdiction to make the order in question "as part of his express statutory power to exclude evidence and as part of the implicit power necessarily incidental to his power to call witnesses and hear evidence" (p. 703 O.R., p. 233 O.A.C.). However, as Campbell J. noted, such limited jurisdiction could only be exercised in the rarest of circumstances, where the coroner could be satisfied, inter alia, "that the very object sought to be achieved by the inquest would be otherwise defeated" (p. 704 O.R., p. 233 O.A.C.). Campbell J. also concluded that the coroner had not erred in law in ruling as he did.

I do not read Campbell J.'s reasons as limiting the coroner's jurisdiction under s. 50(1) of the Act solely to infractions involving oblique or collateral attacks on the process. Put somewhat differently, I do not read his decision as having foreclosed the coroner's jurisdiction under s. 50(1) to consider conflict of interest issues which strike at the very integrity of the process.

Hughes J., with whom Austin J. agreed, wrote very brief concurring reasons as follows [at p. 705]:

> I agree with my brother Campbell's disposition of this matter and with all his reasons therefor, but with great respect I would not hold that the coroner's action was justifiable in law. I would dismiss the applications simply on the grounds that now to require the name of the witness in question to be disclosed after the promise of anonymity has been acted upon would bring the administration of justice into disrepute.

Although it was urged by the applicants and doctors that the words of Hughes J. were to be taken as meaning that the coroner had no jurisdiction to make the impugned anonymity order, I do not share this interpretation. In my view, Hughes J. was simply expressing his view that in making the ruling he did, the coroner erred in law. This is a far cry from suggesting that the coroner lacked jurisdiction to make the ruling at all.

Regardless, the applicants and doctors firmly maintained their position that the coroner lacked jurisdiction to remove counsel for a conflict of interest under any circumstances. Any such order, it was contended, could only be made by the Ontario Court (General Division) upon application.

The respondents took the position that the coroner's power to remove counsel in the face of a disqualifying conflict of interest was one which could be reasonably inferred as necessarily incidental to his ability to prevent an abuse of his process. In support, the respondents relied upon the thoughts expressed and cases referred to in a passage from Adams J.'s majority judgment in Black Action Defence Committee v. Huxter, Coroner, supra, at pp. 684-85.

For reasons which follow, I find it unnecessary to resolve the "necessarily incidental" argument.

At the outset, I find it difficult to accept the applicants' submission that under no circumstances, irrespective of the nature or type of disqualifying conflict, could the coroner make a removal order under s. 50(1) of the Act to prevent an abuse of his process. Minimally, it seems to me that where the conflict involves the public interest, such that counsel's continued joint representation would tend to undermine the public confidence in the administration of justice and the integrity of the process, the coroner should be able to act under s. 50(1) to cure the defect.

Earlier in these reasons, I explained why it was open to the coroner to conclude that Mr. Archibald's continued representation of the Board, as well as the individual

officers, might well undermine or be seen to undermine the public confidence in the integrity of his process. I need not repeat those reasons but simply refer to them as the means by which the coroner obtained jurisdiction under s. 50(1) to remove Mr. Archibald.

Apart altogether from s. 50(1) of the Act, I have concluded that the coroner had the jurisdiction to remove Mr. Archibald pursuant to s. 41(1) and (2)(a) of the Act. Those provisions read:

> 41(1) On the application of any person before or during an inquest, the coroner shall designate him 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;

I find support for my conclusion in the unreported decision of MacFarland J. in Cook v. Young, unreported, November 8, 1989 (Ont. H.C.J.).

That case involved an application before a single judge of the former High Court of Ontario pursuant to s. 6(2) of the Judicial Review Procedure Act, R.S.O. 1980, c. 224. The moving party was seeking to overturn Coroner Young's refusal to disqualify a certain counsel from representing the interests of several police officers as well as the Midland Police Force at an inquest into the death of Tracy Cook. The matter arose this way.

At the standing stage of the inquest, a third party applied to the coroner for an order seeking to disqualify counsel from representing the interests of the individual officers and the Midland Police Force, on grounds of potential conflict of interest.

In deciding the issue, Coroner Young referred to the reasons

of Dubin J.A. (now C.J.O.) in the case of R. v. Speid, supra, where, at p. 600, His Lordship said:

> Mr. Speid has a right to counsel. He has a right to professional advice, but he has no right to counsel who, by accepting the brief, cannot act professionally. A lawyer cannot accept a brief if, by doing so, he cannot act professionally, and if a lawyer so acts, the client is denied professional services.

Immediately thereafter the coroner made the following observations which I adopt:

> Does this situation apply to inquests? As we heard in submissions, inquests are different, in focus, scope and rules from any other proceeding. But the same rules of fundamental or natural justice and fairness must be observed and must be seen to be operating at an inquest. Quite rightly it has been pointed out that inquests do not find fault or legal responsibility, rather they are fact-finding exercises. However, disputes regarding evidence, which might impact, for example on reputation of an individual, can arise at an inquest. Therefore, it seems to me that a potential conflict in a lawyer's position is a valid consideration, although because of the non-fault-finding and unique nature of an inquest, the test to remove such a lawyer might well be of a higher nature.

Coroner Young then referred again to the reasons in Speid, supra, and quoted the following extract from p. 598:

> In assessing the merits of a disqualification order, the court must balance the individual's right to select counsel of his own choice, public policy and the public interest in the administration of justice and basic principles of fundamental fairness. Such an order should not be made unless there are compelling reasons.

He then concluded his reasons by noting that there did not exist before him compelling reasons to disqualify the counsel in question since, at that point in the proceedings, the issue

of conflict remained both speculative and hypothetical. No concrete examples of conflict then existed. However, the coroner reserved to himself the right to revisit the matter should the need arise during the course of the proceedings.

On the application for judicial review, after summarizing the reasons of the coroner, Madam Justice MacFarland made the following apposite remarks (pp. 1-2):

> In my view, there is no evidence that the coroner acted in any way other than judicially in determining the question of standing. He clearly had jurisdiction to make the decision he did under s. 41.

(Emphasis added)

I agree completely with MacFarland J.'s assessment that the coroner had jurisdiction under s. 41 to rule on issues of conflict of interest. While that provision clearly entitles a person with standing to be represented by counsel, I see no reason why it should be interpreted to include counsel who cannot act professionally.

I would interpret s. 41 to mean that every person with standing at an inquest has the right to be represented by counsel who can act professionally. That is the principle which Dubin J.A. clearly enunciated in Speid, supra, and I see no reason to depart from it in the context of s. 41 of the Act.

Obviously, in the case at hand, the coroner concluded that Mr. Archibald could not act professionally on behalf of both the officers and the Board in view of a conflict of interest both private and public in nature and of sufficient severity to warrant his disqualification.

I am therefore satisfied that even if my assessment of the coroner's jurisdiction under s. 50(1) of the Act is incorrect, the coroner nonetheless possessed the power to order Mr. Archibald's removal pursuant to s. 41.

For these reasons, I have not been persuaded that the coroner

erred in exercising his discretion to remove Mr. Archibald as counsel of record for the Board. I am however of the view that the coroner did err in his further ruling that Mr. Archibald could remain as counsel for the applicant officers. It seems to me that having found the conflict that he did, the coroner should have ordered Mr. Archibald's removal as counsel for both parties. That however does not present a problem since Mr. Archibald has already quite properly arrived at a similar conclusion.

In result, I would dismiss this application.

Given the public nature of the inquest and this application, I would make no order as to costs.

H. SMITH J. (dissenting): -- This is an application by the applicants P.C. Jeff Booth, P.C. William Lawler, P.C. David Deviney, Brian Reed and Sgt. Niels Sondergaard for an order quashing the ruling of the coroner, Dr. R. Huxter, dated November 1, 1993. The coroner ruled that the applicants' counsel, Mr. Archibald, was disqualified from continuing to represent both the five named applicant officers and the Police Services Board (the "Board") at the inquest, because of an actual and apparent conflict of interest, and removed Mr. Archibald as the Board's counsel.

The reasons of Moldaver J., concurred in by O'Brien J. (released January 14, 1994), dismissed the application. I respectfully disagree. I would grant the application to quash the coroner's ruling.

The coroner's ruling was based on the conclusion that the "perspectives" of the five named officers were in conflict with that of the Board. He concluded that it would be an "abuse of process" to allow "conflicting perspectives" to be brought before the inquest jury by a single counsel and made an order disqualifying Mr. Archibald from acting for the Board. Given the removal order, Mr. Archibald, then very properly in my view, withdrew as counsel for the applicant officers.

Having reviewed the evidence before this court, I come to the inescapable conclusion that there is no disqualifying conflict, either actual or apparent, between the positions or perspectives of the applicant officers and the Board, such that they both cannot be represented by Mr. Archibald. I further find that the jurisdiction of the coroner to make a disqualifying order only arises if such an order prevents "an abuse of process", as that term appears in s. 50(1) of the Coroners Act, R.S.O. 1990, c. C.37 (the "Act").

Since, as I have stated, there is no disqualifying conflict that arises, the coroner exceeded his jurisdiction in making the disqualifying order.

Standard of Review

There is no privative clause in the Coroners Act. The Divisional Court has held that while the coroner enjoys special expertise in medical matters, he or she has no particular legal expertise: Stanford v. Regional Coroner, Eastern Ontario (1989), 38 C.P.C. (2d) 161 at pp. 173-74, 33 O.A.C. 241 (Div. Ct.).

While the Divisional Court has acknowledged the importance of allowing a coroner to conduct an inquest without intermittent interference from the judiciary, the court should step in where a coroner has committed an error in principle or a jurisdictional error: People First of Ontario v. Porter, Regional Coroner Niagara (1991), 5 O.R. (3d) 609, 85 D.L.R. (4th) 174, reversed on other grounds (1992), 6 O.R. (3d) 289, 87 D.L.R. (4th) 765 (C.A.). On such matters, the coroner must be "correct".

Issues in This Matter

The issues that must be determined to dispose of this judicial review are:

1. Did Mr. Archibald have an actual or apparent conflict of interest in acting for both the applicant officers and the Police Services Board at the inquest?

2. If there was "a conflict of interest", was it of a disqualifying nature?

3. Did the coroner have the jurisdiction to order Mr. Archibald's removal as counsel for the Board?

Brief Background

This coroner's inquest began on August 24, 1992. On August 26, 1992, the coroner granted standing, inter alia, to the Board and the applicant officers both of whom chose to be represented by Mr. Archibald. The calling of evidence before the inquest jury commenced in March of 1993. The inquest jury last sat on September 9, 1993 when the impugned motion to disqualify Mr. Archibald from representing both the Board and the applicant officers was brought by the Urban Alliance. The coroner's ruling on the motion to disqualify was rendered November 1, 1993. Thus, after almost 18 months, the inquest has not yet produced findings or recommendations. Following the coroner's ruling as stated, Mr. Archibald then withdrew as counsel for the applicant officers. The officers now seek to quash the coroner's ruling.

Does a Conflict Exist?

The coroner's ruling occurred at a point in the proceedings where four of the five police officers have completed their testimony. The fifth officer has been examined in chief but has not yet been cross-examined. The officers' testimony thus far indicates that, given their experiences in the training they have had to date, there was nothing else they could have done to avoid the tragic death of Lester Donaldson and that their actions were appropriate in the circumstances. The police officers' testimony addresses the questions surrounding how the deceased came to his death. The officers' testimony has been instrumental in dealing with the first part of the inquest which fulfils the traditional investigative function.

The second part of the inquest is about to begin, namely, the societal and preventative function directed at avoidance of

death in similar circumstances in the future.

The questions to be answered by the primary investigative part of the inquest are set out in s. 31(1) of the Act which provides:

> 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;
>
> (e) by what means the deceased came to his or her death.

It must be stressed that an inquest is not a vehicle for finding either civil or criminal liability. This is specifically provided for in s. 31(2) of the Act:

> 31(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).

The "perspective" of the Police Services Board, on the other hand, is that it wishes, in the second part of the inquest, to advance recommendations arising out of these facts that may help to fulfil the public interest mandate -- to avoid or prevent death in similar circumstances in the future! That is, the Board wishes to advance recommendations towards the goal of maximizing the efficacy with which police services can be delivered in similar circumstances in the future.

The Act contemplates this second prospective purpose of an inquest in s. 31(3):

> 31(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.

Note that, while s. 31(3) allows a jury to make recommendations about "any other matter arising out of the inquest", any and all recommendations of the jury are always "subject to subsection (2)". That is, the jury may not make any recommendations concerning either legal liability or any other conclusions of law as they relate to the first, fact-finding part of the inquest. A coroner is actually forbidden to receive such a recommendation by virtue of s. 31(4):

> 31(4) A finding that contravenes subsection (2) is improper and shall not be received.

I have set out these subsections at the outset because the scope of the coroner's inquest must always be kept in mind in order to properly dispose of the issues in this case.

At this point in the inquest, little evidence has been tendered on the Board's behalf. It is anticipated in the second part of the inquest, that the Board will take a more active role and may cross-examine expert witnesses with respect to police training and procedures, on issues of cross-cultural sensitivity, methods of responding to the mentally ill, Special Mental Health Squads, and the practices in other jurisdictions, etc. It is also expected that the Board will make recommendations with respect to such issues.

It is not surprising that this is the case. As members of the Force present during the events leading up to the death of Mr. Donaldson, the officers have been called by the coroner to assist in answering the factual questions set out in s. 31(1) of the Act. By contrast, it is anticipated that the board, occupying as it does the policy-making role in the police system, will take a much more active role in the proceedings once the inquest moves into its second phase of working towards recommendations "directed towards the avoidance of death in similar circumstances" in future.

In addition to the applicant officers and the Board, the

other parties with standing at the inquest include the Urban Alliance on Race Relations for Metropolitan Toronto (the "Alliance"), the mother of the deceased, Mrs. Donaldson, and five physicians who treated Mr. Donaldson after he was shot. The motion to disqualify Mr. Archibald was brought by the Alliance supported by Mrs. Donaldson. The application to quash the coroner's ruling was brought by the applicant officers, supported by the five physicians.

In order to decide whether to disqualify Mr. Archibald, the coroner posed a series of questions over several days.

Mr. Archibald's answers to the questions posed indicated that there is, at this time, neither an actual nor an apparent conflict. In response to the coroner's question as to the Board's "perspective" in this inquest, Mr. Archibald made several statements:

> Given the mandate set out in the Police Services Act, it is clear that the Board has an interest in assuring that all relevant policies and procedures, including training, are examined at the inquest and that all recommendations of concern to the Board are brought forward.
>
> It has been our position on behalf of the Police Services Board and will continue to be that position, on behalf of the Police Services Board, to ensure that all relevant policies and procedures, and training sir, are examined appropriately at the inquest, put before the jury for its consideration and wisdom and ultimately for the jury's determination as to what recommendations they wish to make, pursuant to section 31, subsection 3, of the Coroners Act.
> . . . ". . . recommendations directed to the avoidance of death in similar circumstances or respecting any other matter arising out of the inquest". . . .
>
> The Board is not and should not be obliged to monitor these inquest proceedings, to identify inappropriate action on the part of individual officers. . . .Section 61 of the Police Services Act provides the Chief of Police to deal with issues of misconduct. . . .

. . . the officers and the Board have a common interest in seeing that appropriate recommendations come out of the Jury's verdict towards the avoidance of death in similar circumstances . . . on issues of police training, procedure and policy.

Thus, the Board is interested in examining the policies, procedures and training of the police force at a systemic level.

The stated "perspective" of the officers was described by Mr. Archibald in the following terms:

> Given what happened, that they have lawfully abided by their training and procedure. Unfortunately the tragedy occurred nonetheless. It is important, sir, as I have already indicated, that the officers do not have the benefit of the expert evidence that will be called in the second half of the inquest. And they are not truly the experts on those areas. It is not their province to urge recommendations for changes, because they are not the experts on those issues.
>
> That is for the Chief of Police and for the Police Services Board. The officers are obliged to receive the best training in the area of service for the mentally ill and have a common interest with the Board and the Chief of Police, in welcoming the adoption of any training, policy or procedure that could assist the Force and its members to prevent deaths or that may prevent deaths in similar circumstances in the future.
>
> We reject the submission that the officers' testimony conflicts with the position of the Police Services Board . . .
>
> . . . there is absolutely no evidence of a conflict and if you accept our submission on behalf of our clients, sir, there is not even an apparent appearance of a conflict. And if you accept our submissions on behalf of our clients, sir, [Mr. Archibald's undertaking] nor will there be a conflict in the future. . . .

> Are the officers not entitled to have their views put to the experts in cross-examination? . . . and I've already answered that . . . Absolutely. Much like the experts are entitled to testify as to how they would have exercised their judgment differently and, of course, that will be cross-examined upon by all counsel for the betterment of ensuring all of the facts are put before the Jury at the end of the day for the Jury's wise counsel. . . .
>
> . . . and ultimately we submit to you with as much vigour as we possibly can that there is no conflict and no apparent conflict whatsoever on the evidence in this case, nor on the perspectives being brought to bear by the police officers and the Police Services Board in this inquest.

(Emphasis added)

These two perspectives clearly indicate that the applicant officers and the Board are not in conflict, notwithstanding the officers' position that they would not have approached this situation differently given their training to date.

First, from the excerpts above, it is clear that the officers and the Board occupy significantly different positions within the police system. As Mr. Archibald stated before the coroner, the officers are not experts in the area of systemic policies and training and, thus, are not in a position to assert recommendations on those points.

Secondly, the officers themselves recognize that, as individual employees of the Force, they are obliged to accept the best training offered to them as set by the Board, as policy-maker of the Force.

Finally, Mr. Archibald has explained the position of the officers to the coroner in no uncertain terms. It bears repeating:

> The officers . . . have a common interest with the Board and the Chief of Police, in welcoming the adoption of any

training, policy or procedure that could assist the Force and its members to prevent deaths or that may prevent deaths in similar circumstances in the future.

This position has been affirmed by the testimony of each officer.

While every officer who has completed his testimony stands behind his actions, so too have they each acknowledged on the witness stand that training involving the mentally handicapped and dealing with crisis situations in general, would be valuable.

Excerpts of the testimony of P.C. Deviney were produced for the court in support of the respondents' position that the officers are at loggerheads with what will be the position of the Board. The full transcripts were not provided for the court's examination. However, upon fuller examination of all the excerpts provided, P.C. Deviney's testimony demonstrates no such conflict to me.

The heated interchange between Mr. Falconer, representing the Alliance, and P.C. Deviney in cross-examination did result in P.C. Deviney taking the position that he felt it appropriate to treat all persons equally regardless of their culture. However, upon subsequent cross-examination by Mr. Archibald, P.C. Deviney clarified his position:

Q. [Mr. Archibald] Do you have any objection to [the training vignette] in regard to educating and training officers in regard to appreciating other cultures about courtesy, about approaching individuals from their culture from a courtesy point of view?

A. I have no problems with that. My concern was for the officer's safety.

P.C. Deviney also indicated that training is helpful and that race relations training would be of value. Further cross-examination by one of the inquest jurors (who was permitted under s. 37(2) of the Act to put questions to witnesses), shed

additional light on P.C. Deviney's position:

> Q. [juror] I've heard things about different stress indicators which a mentally ill person might show that is, I guess, not so obvious. I think somebody was questioning on he [Mr. Donaldson] was starting to show his signs of mental illness when he went from speaking English to speaking Patwa. Okay? And that could be some kind of stress indicator. Could training on identifying those kind of stress indicators on a mentally ill person help?
>
> A. Oh, yes, it would help, most definitely.

Thus, the viva voce evidence tendered does not support a finding of a conflict. In the final analysis, the position of P.C. Deviney is that he is willing to be trained. Any such future training procedures or policies are within the mandate of the Board. The Board was granted standing so that its perspective or interest in these issues could be addressed at the inquest.

Mr. Archibald has made an explicit undertaking on the instructions of his clients, that these parties will not be making conflicting recommendations to the jury:

> . . . we do understand that your concern may well be whether counsel on behalf of the officers may take the position at the end of the day, based upon the evidence, no issues concerning recommendations arise in any of the areas: police training, policy and procedures. We can tell you, sir, that in our considered view such recommendations do arise on the evidence. You, sir, have no basis for concern. We can certainly undertake to you, sir, that we will not as counsel for our clients advance conflicting positions at the end of the day because as we have said all along, sir, and with emphasis again, their positions do not conflict.

No party with standing is required by the Act to examine witnesses, make submissions or make recommendations to the coroner's jury. Based on the positions of the parties set out earlier, it is not difficult to understand why there would be

no conflicting recommendations coming from the officers concerning future training, procedures or policy. Issues of that nature are simply not in the domain of the individual officers.

Most importantly, the clients themselves do not object to both being represented by Mr. Archibald. Under these circumstances, how can it be said that there is a conflict of perspective, much less a "conflict of interest" necessitating disqualification of counsel?

The majority has suggested that, absent a written waiver, these parties should not be taken as being able to truly consent to combined representation since they could not be expected to understand the conflict if their own counsel does not understand it. This argument, with the greatest of respect, seems circular to me and does not, on its own, support a finding of conflict any more than the evidence does.

The majority has also raised concerns that it is not only the recommendations that may lead to conflict but also the future cross-examination of expert witnesses who will be called to give evidence with respect to training and policies that might prevent death in similar circumstances in the future. It is, I think, the majority's concern that Mr. Archibald may be prevented from freely cross-examining an expert as counsel for the Board since, as counsel for the officers, he may have an interest in minimizing the value of an expert's testimony should that testimony put the officers' actions into a negative light.

This too, I fear, is a red flag which has been raised without merit. It must not be forgotten that the purpose of the inquest is confined to first, factually determining how Mr. Donaldson came to his death and, secondly, how death in similar circumstances might be avoided in the future. The factual component of the inquest is about to come to a close. It is only after the facts have been adequately addressed that any expert testimony leading to future recommendations will be tendered.

Thus, there is no danger that expert testimony vis--vis the most efficacious training and policies for police officers in future in similar circumstances, will conflict with the officers' testimony that they acted properly in the present circumstances. The officers' position is that their actions were correct given their experiences in the training they have had to date. The officers have not and are not in a proper position to offer advice on what type of training or procedures might be implemented in the future to improve the efficacy of the Force in similar circumstances. That information is not within their expertise as individual officers, nor within their role as members of the Force. They do not create, but simply implement as directed, the policies handed down to them. The "perspective or interest" of these officers, as parties with standing, is to see that the facts of their involvement in this fatal incident are placed fully and accurately before the jury.

Similarly, the expert witness called to address the issue of how death might be avoided in similar circumstances in the future will not and is not in a position to assess the actions of the officers in the current situation. As Mr. Archibald himself tried to impress upon the coroner:

> Sir, we will never know for sure at the end of this inquest what actions, if any, by the officers caused or didn't cause Mr. Donaldson's death or caused or didn't cause Mr. Donaldson to do anything. Not even the experts that will be called in the second half of the inquest . . . will be able to say with any kind of certainty that if certain steps were taken or if certain alternatives would have been taken that death would have been prevented.

(Emphasis added)

Finally, as Mr. Archibald stated at the conclusion of his examination by the coroner:

> Again, and it is worth repeating many times in my view, the officers and the Board have a common interest in seeing that appropriate recommendations come out of the Jury's verdict towards the avoidance of death in similar circumstances

> -- avoidance of death in similar circumstances and other helpful recommendations that arise naturally from the issues at the inquest, sir, on issues of police training, procedure and policy. . . .
>
> . . . we do not see an apparent conflict on behalf of our clients or between our clients. There is no apparent conflict for all the reasons I've already stated. I can go through it all again . . . but it's on the record. We reject the submission that the officers' testimony conflicts with the position of the Police Services Board. We've heard days of argument from opposing counsel on this issue and we submit to you . . . that at the end of the day in terms of your review of their arguments there is absolutely no conflict.

I must agree with the submissions of Mr. Archibald in this respect. There is no conflict, either actual or apparent, between the testimony of the officers and any future recommendations by the Board concerning the avoidance and prevention of death in similar circumstances.

Is the Conflict of a Disqualifying Nature?

Given my answer to the first question above, it is not necessary to address issues two and three. However, I feel compelled to comment briefly on both of these issues.

Even at its highest, assuming that the Board does wish to make recommendations with which the officers do not agree, this alone does not give rise to a conflict of a disqualifying nature.

The Supreme Court of Canada has acknowledged, in MacDonald Estate v. Martin, [1990] 3 S.C.R. 1235, 77 D.L.R. (4th) 249, that there are both "disqualifying" and "non-disqualifying" conflicts of interest. Non-disqualifying conflicts are also explicitly acknowledged in the rules of professional conduct prescribed by the Law Society of Upper Canada. Rule 5 provides:

> 5. The lawyer must not advise or represent both sides of a dispute and, save after adequate disclosure to and with

> consent of the client or prospective client concerned, should not act or continue to act in a matter when there is or there is likely to be a conflicting interest.

(Emphasis added)

Suffice to say that the rule acknowledges a lawyer's ability to act for two parties with a conflicting interest where there has been adequate disclosure and consent of the clients. The right of the client to counsel of choice is a fundamental right, zealously to be protected by the court, absent very compelling reasons!

Unlike Moldaver J., I am satisfied that the Police Services Board and the applicant officers are both comfortable and content to have Mr. Archibald represent their interests at the inquest. With their consent, after disclosure, Mr. Archibald has his clients' instructions and their confidence. While Mr. Justice Lacourcire's comments in R. v. Silvini (1991), 5 O.R. (3d) 545, 68 C.C.C. (3d) 251 (C.A.), concerning a client's ability to consent, are helpful in the context of criminal proceedings, they do not apply as easily to this case. The potential adverse effects on the interests of either the officers or the Board do not begin to approach those of an accused in a criminal proceeding.

In the case of R. v. Speid (1983), 43 O.R. (2d) 596 (C.A.) at p. 598, 8 C.C.C. (3d) 18 at p. 19, Dubin J.A. (now Dubin C.J.O.) stated:

> In assessing the merits of a disqualification order, the court must balance the individual's right to select counsel of his own choice, public policy and public interest in the administration of justice and basic principles of fundamental fairness. Such an order should not be made unless there are compelling reasons.

Generally, in my view, the cases of R. v. Speid, supra, and Silvini, supra, are not as helpful in deciding this case as they would be in deciding the question of conflict of interest in the criminal context.

In the criminal context, there is an overriding interest, both public and private, in an accused's constitutionally entrenched right to full answer and defence because of the accused's potential loss of liberty. By contrast, a coroner's inquest is forbidden by s. 31(2) of the Act to address any legal liability, either civil or criminal!

In the civil context, there is no case in which counsel have been removed for conflict of interest, asserted by a third party, over the objection of both clients said to be in conflict: Fong v. Chan, unreported, April 29, 1993, O'Driscoll J. [summarized in 39 A.C.W.S. (3d) 1104 (Ont. Gen. Div.)]. In discussing the use of motions to remove counsel since the Supreme Court of Canada decision in MacDonald Estate v. Martin, O'Driscoll J. cited with approval the following passage of Esson C.J.S.C. in Manville Canada Inc. v. Ladner Downs (1992), 63 B.C.L.R. (2d) 102 at pp. 117-18, 88 D.L.R. (4th) 208 (S.C.):

> One litigant applies to deprive the opposing litigant of the services of the lawyer which it has chosen and which has represented it for years. Such a remedy necessarily imposes hardship and, given that the party deprived of its representative is an innocent bystander in an issue between its lawyer and the opposite party, some degree of injustice on the innocent party. The imposition of such hardship and injustice can only be justified if it is inflicted to prevent the imposition of a more serious injustice on the party applying. It follows that the injunction should be granted only to relieve the applicant of the risk of "real mischief," not a mere perception.
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> . . . . .
>
> Since MacDonald Estate v. Martin, the application to disqualify has become a growth area as it began to do 20 or so years ago in the United States where it seems to have reached the stage of being a common feature of major litigation.

(Emphasis added)

There is no conflict of such nature as to be a disqualifying

conflict in the present case. Neither the Alliance nor Mrs. Donaldson has demonstrated "a private interest" that would be infringed should Mr. Archibald continue to act for both the applicant officers and the Board.

I am certainly mindful of "the public interest" in these proceedings which is substantial. This was underscored by the Divisional Court in People First of Ontario v. Porter, supra, at p. 620, wherein the court stated:

> 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.
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> . . . . .
>
> 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.

(Emphasis added)

These passages indicate the Divisional Court's understanding that it is the role of the coroner and his or her counsel to protect the public interest in seeing that the mandate of the inquest is fulfilled. The "perspective or interest" of a party given standing, on the other hand, is to add a separate perspective or dimension on the issue on which standing was granted. In every respect, it is the Crown counsel representing the coroner who carries "the public interest" burden.

The coroner, under s. 50(1) of the Act, to prevent an "abuse

of process", made the disqualifying order. Whether or not such an order falls within the powers afforded him under s. 50(1) is the last issue.

Did the Coroner have the Jurisdiction under s. 50(1) of the Act to order Mr. Archibald's Removal as Counsel for the Board?

The coroner based his ruling on the powers vested to him under s. 50(1) of the Act. That provision reads:

> 50(1) A Coroner may make such orders or give such directions at an inquest as he considers proper to prevent abuse of its processes.

In deciding that he had the jurisdiction to make a disqualification order, the coroner's ruling relied on People First of Ontario v. Porter, supra, at p. 644, in recognizing that it is the coroner's task to ensure that the relevant and necessary evidence comes out for public scrutiny.

> It is an impossible task to satisfy everyone and the standard of public confidence must be that of scrutiny by a fair-minded and dispassionate member of the public alive to the need to get on with the task of assembling and presenting the essential evidence for consideration by the jury.

As the coroner himself acknowledged, however, this statement was made with respect to his jurisdiction to elicit evidence. People First does not assist on the issue that the coroner under s. 50(1) of the Act only has jurisdiction to make an order to prevent an abuse of its processes.

What is the alleged "abuse of the inquest process" that the coroner is preventing by his disqualification ruling?

In the civil context, an abuse of process is a proceeding which is frivolous, vexatious or oppressive. There is said to be an abuse of process when an adversary, through the malicious or unfounded use of a regular legal proceeding, obtains some advantage or uses the legal process for a purpose other than the purpose intended by law.

Canadian Newspaper Co. v. Isaac (1988), 63 O.R. (2d) 698, 27 O.A.C. 229 (Div. Ct.), appears to suggest that a coroner must be satisfied "that the very object sought to be achieved by the inquest, would be otherwise defeated", unless the order issued. Section 50(1) of the Act only grants jurisdiction to make an order to prevent an abuse of process.

A perceived conflict of interest, one that, in my view, is not supported by the facts in this case, cannot cloak the coroner with jurisdiction under s. 50(1) to make the disqualification order so issued.

I agree with Justice Moldaver in finding it difficult to accept the applicant's argument that under no circumstances could the coroner make a removal order under s. 50(1) of the Act to prevent an abuse of process. I only say that, in the facts of this case, there is no basis for an abuse of process finding, nor is there a threat of abuse in future to be prevented by this order. Therefore, the coroner exceeded his jurisdiction in making such an order under the authority of s. 50(1).

Given that the powers afforded to a coroner under s. 50(1) relate to abuse of process and abuse of process only, it is my view that the comments of Adams J. in Black Action Defence Committee v. Huxter, Coroner (1992), 11 O.R. (3d) 641 (Div. Ct.), concerning "necessarily incidental" powers are not applicable to the case at bar.

The Applicability of Section 41 of the Act?

I am similarly not persuaded that s. 41 of the Act has any application here. Section 41 simply affords the coroner jurisdiction to grant parties standing in this inquest. Moreover, this section of the Act was not relied on in support of the jurisdictional argument by any of the parties before the coroner or this court on this judicial review. The coroner himself did not even consider s. 41 in his own discussion of jurisdiction. The only jurisdictional basis asserted for the coroner's ruling was the power granted by the legislature to

the coroner under s. 50(1) to prevent "an abuse of its processes".

It would be inappropriate in my view for this court to make a jurisdictional ruling based on a provision not relied upon or even considered by the parties before it.

If I am wrong in this respect, it is my view that s. 41 does not confer the coroner with jurisdiction to make the disqualifying order in any event.

In Cook v. Young, unreported, November 8, 1989 (Ont. H.C.J.), MacFarland J. did affirm that the coroner acted judicially in determining the question of standing in that case. However, the matter before the coroenr in that case was whether or not the Midland Police Force should be granted standing, a matter that clearly fell within the coroner's jurisdiction under s. 41.

Within the context of an application for standing, as in Cook, supra, the coroner concluded that standing should be granted to the Force and that the counsel representing the individual officers could also represent the Force. Under those circumstances, MacFarland J. stated at pp. 1-2:

> In my view, there is no evidence that the coroner acted in any way other than judicially in determining the question of standing. He clearly had jurisdiction to make the decision he did under s. 41

(Emphasis added)

I read this passage to mean only that it was open to the coroner to address the issue of appropriate counsel for a party within an application for standing at a coroner's inquest. In my view, this is precisely the kind of "necessarily incidental" power that was referred to by Adams J. in B.A.D.C. v. Huxter. This makes eminent good sense. The question of who will represent a party given standing is necessarily incidental to the question of what perspective that party may bring to the proceedings and, thus, whether that party should have standing!

It does not mean that a coroner perpetually has the power under s. 41 to make disqualification orders throughout the proceedings. Section 41 is limited to the extent that it addresses only whether a party may have standing. It cannot be read to provide continuing power to the coroner to disqualify counsel at any subsequent point in the proceeding that is wholly unrelated to the issue of standing.

I note that the coroner in Cook concluded that there was no compelling reasons to disqualify the counsel in question since, at that point in the proceedings, the issue of conflict remained both speculative and hypothetical. This position was affirmed by Justice MacFarland.

Jurisdiction to Make a Removal Order

It should not be overlooked that the coroner's inquest is a statutory tribunal and, as such, has no inherent jurisdiction. Section 2(1) of the Act explicitly repeals the effect of the common law" as it relates to the functions, powers and duties of coroners within Ontario". The Ontario Court of Appeal has recently confirmed that the effect of s. 2(1) is to limit any and all powers of the coroner to those specifically conferred under the Act: Re Beckon (1992), 9 O.R. (3d) 256, 93 D.L.R. (4th) 161 (C.A.). Thus, the coroner's jurisdiction to make his disqualification ruling could only derive from s. 50(1) of the Act.

Conclusion

I find that the coroner erred in ruling that therewas a disqualifying conflict in Mr. Archibald appearing for the applicant officers and the Board. I find that the coroner had no jurisdiction to make the order of removal except to prevent an abuse of process and there was no basis for a finding of an abuse of process on these facts. In my view, the coroner went beyond his powers under s. 50(1) of the Act, and exceeded his jurisdiction in making the disqualifying order. As a result, I would quash the coroner's ruling of November 1, 1993. Given the public nature of the inquest and this application, I would make no order as to costs.

Application dismissed.