

## The Police Shooting of Lester Donaldson

Urban Alliance on Race Relations, created in 1975 in response to incidents of violence against Black and South Asian citizens in Metropolitan Toronto, has had a special interest in the Lester Donaldson shooting. The incident sparked racial tensions between the police and the community that had not been seen before in Toronto. Subsequently, Urban Alliance played a useful role throughout by communicating with the police, the community, and the media, as well as participating in the coroner's inquest. What follows is a description of the events that took place concerning the shooting.

### 1. Facts:

Lester Donaldson was born in Jamaica on November 22nd, 1943. After moving to England at the age of 16, he came to Canada in 1968. There he lived and worked until 1974 when he returned to Jamaica for three years. After returning to Canada, in August of 1978 Lester was diagnosed by a psychiatrist as a paranoid schizophrenic. He complained of hearing voices and thought that there was a transmitter inside his head. He was also very delusional at times.

Early in 1981, Lester was charged with two drug-related

offences under the Narcotic Control Act and the Criminal Code. He was sentenced to two years probation which required that he report to a probation officer and attend the Clarke Institute for examination and treatment. In October of 1982, he was again convicted of a drug-related charge and sentenced to sixty days in custody, which he served on weekends.

During the next year, Lester was known to have attended the Toronto General Hospital requesting removal of the transmitter from his head. He was also found loitering in a pharmacy with the same request. In August of 1983, Lester was accused of assault and sexual assault on a young female and when the officers arrived at his home to arrest him, he attempted to stab one of them. Subsequently, he was charged with attempted murder.

In April of 1988, Lester was suspected of a break and enter, and during a chase with police officers, he attacked an officer with a shovel. He was shot in the thigh by the police and charged with break and enter and assault with a weapon. Against medical advice, Lester refused to undergo subsequent treatment to rehabilitate his leg.

On August 7th, 1988, police attended the building where Lester Donaldson lived regarding complaints of tampering with fuse boxes, cutting wires and playing with lights, etc. Lester was suspected of these incidents, but the police had no contact

with him that evening. Two days later, there was another complaint that found the police officers at Lester's place on 192 Lauder Avenue. The address was recognized from the earlier incident. Police entered Lester's room and stayed for twenty minutes when Lester produced a small paring knife and a confrontation took place between Lester and the five police officers who were present. Lester was shot by one of the officers from a distance of four feet, and died at Toronto Western Hospital when resuscitative measures failed.

## 2. The Criminal Trial:

Police officer David Deviney was tried on a charge of manslaughter in November, 1990, in connection with the death of Lester Donaldson. Police officers Booth, Reed, Lawlor, Alonzi, and Soondergard testified as Crown witnesses, and were therefore never cross-examined. Officer Deviney was acquitted in the decision.

The charge was laid on the advice of a Crown Attorney outside of Metro T.O. and based on an O.P.P. investigation into the matter.

## 3. The Aftermath:

The Lester Donaldson shooting was not entirely an isolated event. In 1978 Andrew Evans was shot and killed by police, and in 1979 Albert Johnson suffered the same fate. Both were Black men, and in both instances community tensions surrounding the incidents were high.

After the Donaldson shooting, the newspapers were filled with stories surrounding the police force's take on the incident and the Black community's perception of the incident. Tensions were extremely high as allegations passed from one side to the other over whether race was a motivating factor in the shooting.

Myrtle Donaldson, Lester's wife, filed a complaint with the Public Complaints Investigation Bureau, accusing the police of using excessive force and improperly discharging a firearm. She did not contend that race was a factor.

Another Black man, Wade Lawson, was shot and killed by a police officer in December of 1988, causing even more community concern over the relations between police officers and the Black community. Relations were still volatile, as there were several community demonstrations and protests. And when Officer Deviney was eventually charged with manslaughter, about 2500 police officers themselves demonstrated, claiming that the charge was only a political response to the vocal Black community. The officers demanded the resignation of Attorney General Ian Scott,

but he did not succumb to the pressure.

Perhaps the apex of the tensions was felt in 1992, where riots in Downtown Toronto were generally regarded as being a result of discontent over police-race relations.

#### 4. The Coroner's Inquest:

Under the Coroners Act, s.10(4), where a person dies in the custody of a peace officer, an inquest is mandatory. But under s.27(3) of the Act, the inquest cannot commence before the disposition of any criminal charges which arise out of the death. Nevertheless, after the criminal trial concerning Officer Deviney was finalized, the inquest took place under the direction of Dr. Robert Huxter, who was appointed by the Chief Coroner Dr. James Young.

#### 5. BADC, UARR v. Huxter - The Application for Standing:

At the Coroner's inquest, two community organizations applied for standing under the Coroner's Act - the Black Action Defence Committee ("BADC") and the Urban Alliance on Race Relations (Justice), which represents the Urban Alliance on Race Relations ("UARR"). But both were denied standing by Dr. Huxter, and subsequently filed an application to the Divisional Court of Ontario for judicial review of those and other decisions.

Standing was however granted to a number of other parties: the deceased's family; physicians who treated the deceased; the Ministry of Health; the Police Complaints Commissioner; the five Police Officers who were in the deceased's room on the night he was shot; and the Metro Toronto Police Services Board; the Chief of Metro Toronto Police.

Subsections 41(1) and (2) of the Coroners Act state:

(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;

(b) call and examine witnesses and present his argument and submissions;

(c) conduct cross-examination of witnesses at the inquest relevant to the interest of the person with standing and admissible.

(a) BADC:

BADC was formed as a result of the Lester Donaldson shooting with the goal of forming a fair and just system of policing in Ontario and Canada. It was submitted that since the Crown Attorneys and the police had such a close association, the viewpoint of an association such as the BADC was integral to the inquest. Counsel for the BADC also submitted that the coroner had a residual discretion to allow parties who were not qualified under section 41.

At the initial ruling by Dr. Huxter, BADC was not granted standing. He stated:

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...

Moreover, in the criminal process which preceded this inquest, which was a public forum, race was not addressed as an issue....This inquest is not a public

platform or a Royal Commission and cannot assess direct and substantial interest in a vacuum.

(b) UARR:

UARR is a non-profit multi-racial organization, created in 1975 to promote racial diversity within Metropolitan Toronto. It publishes a newsletter, an annual report, and an international journal entitled "Currents - Readings in Race Relations". Some of the publications have dealt specifically with issues of mental health services such as: "The Canadian Task Force on Mental Health Issues Affecting Immigrants and Refugees", "Minority Access to Services", and "Health Care and Aging in a Multiracial Society". Counsel for UARR argued that it was critical to the inquest that community suspicion be quelled and confidence be restored. In addition, counsel argued that a witness was going to testify on "the importance of cultural sensitization in race relations training for the police."

Widespread community concern over the factor of race was the first of two grounds on which the application by UARR was based. Dr. Huxter dismissed this ground as being similar to the BADC application. The second ground of UARR's application for standing concentrated on the issue of the need for cross-cultural sensitivity training in dealing with the mentally ill. On this



ground, Dr. Huxter also denied standing:

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..

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.

In addition to these submissions, BADC and UARR each raised other issues. BADC argued that they should be granted standing on the basis of "apprehended bias." Based on the affidavits of Abua 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, the BADC submitted that race must be a factor to be considered in Mr. Donaldson's death. Each of the affidavits were reviewed carefully by Dr. Huxter but were dismissed as either mere opinions or unsubstantiated. An excerpt from Dr. Huxter's decision is reproduced:

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.

and later:

The applicant before me wishes to be able to explore, to look for issues 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....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.

The second UARR issue arose out of a request made to the coroner to disclose the Inquest Brief which was provided to parties with standing at the inquest. Counsel wished to review

the O.P.P. report relied upon by the coroner in his ruling, which was said to be included in the brief. UARR submitted that Dr. Huxter breached his "duty of fairness" and denied the Alliance natural justice by relying on the O.P.P. and the Public Complaints Commissioner's investigations and not allowing this material to be reviewed by UARR.

Supporting their application were records of further correspondence between the Chief Coroner, the Deputy Attorney-General, and the Metropolitan Toronto Police Services Board. This material related to the efforts of the Chief Coroner and the Deputy Attorney-General to implement a summary inquest in place of a full inquest. Among the reasons given for this proposed recommendation were the heightened cost and time of a full inquest, the fact that the facts of the incident were already made public through the criminal trial, and the fear of increasing racial tension. Because the terms of the proposed recommendations could not be agreed upon, a summary inquest was not ordered, but there was clearly pressure put on the Police Services Board to comply.

BADC and UARR submitted that a recommendation by the Chief Coroner that a summary inquest be ordered, in part because of the fear or rising tension over the 'race' factor, was designed to avoid their involvement in the proceedings. Furthermore, it was

argued that since Dr. Huxter worked directly under the Chief Coroner, there was a reasonable apprehension of bias on the part of the Dr. Huxter. Dr. Huxter would be biased as to whether race was a factor in the death because his supervisor had tried to eliminate race as a factor. The relief requested was that Dr. Huxter, or any other coroner in Ontario not be allowed to preside over the inquest, and the task be performed by a provincial judge.

In addition, both the BADC and UARR argued that notwithstanding the Coroners Act, section 41, Dr. Huxter had a residual discretion to grant standing and that he failed to properly exercise this discretion.

In summary the issues before the Ontario Court of Justice (Divisional Court) were:

- (1) the application for standing by BADC,
- (2) the application for standing by UARR,
- (3) the apprehension of bias on the part of Dr. Huxter, and
- (4) the exercise of residual discretion on the part of Dr. Huxter.

Justice Adams (Montgomery J. concurring) wrote the decision for the Court.

a) standing:

The functions of a coroner's inquest were outlined in *Faber v. The Queen et al.*, [1976] 2 S.C.R. 9, 30:

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.

It was also recognized by the court that the Coroners Act enshrines a right to standing, but it also realizes that a

coroner is not going to begin an inquest with a "clear mind" in the same manner as a judge beginning a jury trial.

The court referred to *Stanford v. Regional Coroner Eastern Ont.* (1989), 38 C.P.C. 161, 38 Admin.L.R. 141, 153 for the law on the standard of judicial review when discussing a coroner's decision on standing:

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 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.

...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 in 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...

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.... 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.

In *Re People First of Ontario et al and Bennett et al* (1991), 85 D.L.R. (4th) 174, 184, the court stated that public interest advocacy groups with no real connection to the deceased were being granted standing to fulfil the inquest's preventive function. However the court continued to emphasize the difference between Royal Commissions and inquests, and stressed the role of the Crown Attorney as guardian of the public interest.

b) apprehension of bias:

*Re Evans et al and Milton et al* (1979), 24 O.R. (2d) 181, 220 (Ont.C.A.) established that if it appears that there is a reasonable apprehension of bias before a coroner's inquest, the coroner will be disqualified. The test was set out in *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:

...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."

That case also stated that even though a tribunal may only have a quasi-judicial function, it must act in accordance with rules of natural justice, "not necessarily the full range of such rules that would apply to the Court, but certainly to a degree that would reflect integrity of its proceedings and impartiality in the conduct of those proceedings".

c) residual discretion:

Stanford suggested that a coroner's discretion was not ousted when the Coroners Act was enacted in 1971. However, *Beckon v. Young* (1992), 9 O.R. (3d) 256 (Ont. C.A.) stressed that the powers of the coroner come from the statute. The Act could not be interpreted to give more powers to the coroner than those



in the statute.

### Application of the Case Law to the Facts

a) standing:

Justice Adams promptly dismissed race as a direct factor in the inquest. It was held that there was no serious error in principle in Dr. Huxter's holding that the applicants' evidence was "in the nature of opinion, conjecture, and conclusion." This finding was supported by the fact that Dr. Huxter was assisted by the transcript from the earlier criminal proceeding, and the investigation of the Police Complaints Commissioner.

Justice Adams also rejected the argument that the decision of the Dr. Huxter to deny standing should be quashed on the basis that the coroner refused to disclose the O.P.P. report which was also relied upon to conclude that race was not a factor. Justice Adams concluded that both the BADC and the UARR were aware, or ought to have been aware, of the existence of an O.P.P. investigation before they made their initial submissions. Since the initial submissions to Dr. Huxter were made without any request of the O.P.P. report, it was not appropriate for the applicants to be relying on Dr. Huxter's refusal of disclosure at this stage of the proceedings. Indeed, counsel for the BADC made

reference to the O.P.P. investigation in his initial submissions, but did not request disclosure.

The issue of "cross-cultural sensitivity" was approached by the court in a different manner. In his original decision, Dr. Huxter acknowledged UARR's expertise in this area, but held that this aspect would only be peripheral to the inquest. Therefore, he reasoned, there was no substantial interest in the inquest. Adams J., referring to section 41(2)(c) of the Coroners Act, decided that a person need not have "substantial and direct interest in all or even most of the issues thought likely to arise at an inquest" to be entitled to standing at the inquest. Applying that logic to the facts, Adams J. stated:

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 subsection 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....

[T]he relevance of this issue is in marked contrast to that of race as a direct factor...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.

The court also agreed with UARR that standing should be granted because even though the applicable section states that the interest must be "substantial and direct", that may be read as "substantial or direct". The French translation of the same statute states the same requirement as "considerablement ou directement interessee a l'enquete". ("ou" translates to "or" in the Shorter Oxford English Dictionary). Throughout the rest of the statute, where the English version has "and", the French version reads "et". Therefore, the court concluded, UARR's interest need not be direct.

In contrast, the court held that BADC lacked both substantial and direct interest in the issues before the inquest into the death of Lester Donaldson. It wished to examine issues

of race, not cross-cultural sensitivity, which were already found to be irrelevant. Therefore, standing was not granted to either party on the issue of race, and was granted only to UARR on the issue of cross-cultural sensitivity.

b) the bias issue:

The involvement of Dr. Young, the Chief Coroner, and Mr. Code, the Deputy Attorney-General, were not seen by the court as being inappropriate. The court held that their efforts in dealing with the inquest in the manner they proposed were genuine attempts at lessening the adversarial nature of the inquest, without ignoring the interests of the Donaldson family. Adams J. stated:

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 racisms, 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" .

Similarly, Dr. Huxter's actions were found not to give rise to any apprehension of bias.

c) residual discretion:

Justice Adams declined to rule on the issue of a coroner's residual discretion, beyond that which is afforded the coroner in the statute. Since Dr. Huxter stated that the BADC application for standing would not have been decided any differently, even if there was a residual discretion, and UARR was granted standing on the issue of cross-cultural sensitivity, he felt it was unnecessary to deliver a decision with regard to the procedural powers of a coroner under, and beyond, the Coroners Act.

Summary of Results

Keeping in line with the increased prominence of public

interest advocacy groups, UARR was granted standing to participate in the Coroner's inquest into the death of Lester Donaldson, but only on the issue of cross-cultural sensitivity. Race was excluded from the inquest as an explorable issue. Subsequently, the BADC was denied standing altogether. The decision represents a positive step for public interest advocacy groups, but also indicates that the participation may be confined to a specific issue such as cross-cultural sensitivity in the delivery of health care services. The underlying fear is that the broader, larger issues of systemic racism may be ignored.