CORONERS' COURT

IN THE MATTER OF The *Coroners Act*, R.S.O. 1990, c.37

AND IN THE MATTER OF The Inquest Touching Upon the Deaths of

Jethro Anderson, Reggie Bushie, Robyn Harper, Kyle Morrisseau, Paul Panacheese, Curran Strang, and Jordan Wabasse

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RULING ON THE MOTIONS concerning the scope of the Inquest

from the Families, Nishnawbe-Aski Nation, Northern Nishnawbe Education Council,

and the Provincial Advocate for Children and Youth

BEFORE
DR. DAVID EDEN
PRESIDING CORONER

ON APRIL 14, 2015 AT THE THUNDER BAY COURTHOUSE

COUNSEL TO THE CORONER

MS. KAREN SHEA, MR. TREVOR JUKES and MS. AMY LEAMEN

REPRESENTATIVES OF PARTIES

MS. CHRISTA BIG CANOE MS. KATE BRINDLEY	for the families of Jethro Anderson, Reggie Bushie, Robyn Harper, Kyle Morrisseau, Paul Panacheese, and Jordan Wabasse ("The Families[1]")
MR. ETIENNE ESQUEGA	for the Northern Nishnawbe Education Council ("NNEC")

[1] The family of Curran Strang opted not to seek standing and were not represented at this hearing.

MR. BRIAN GOVER MR. EDWARD MARROCCO	for the Thunder Bay Police Board, Chief, Deputy Chief, former Chief Herman, and Police Service ("TBPS")
MR. STEPHEN WOJCIECHOWSKI	for the City of Thunder Bay ("TB")
MS. CHANTELLE BRYSON	for the Provincial Advocate for Children and Youth ("PACY")
MR. JULIAN FALCONER MS. MEAGHAN DANIEL	for the Nishnawbe-Aski Nation ("NAN")
MR. KENT ELSON	for the Ontario First Nations Young Peoples Council of the Chiefs of Ontario ("OFNYPC") (written submissions only)
MR. GREGORY TZEMENAKIS	for the Attorney-General of Canada, on behalf of Her Majesty the Queen in right of Canada, as represented by Aboriginal Affairs and Northern Development Canada ("AANDC")
MS. KATHERINE ROWEN	for the Thunder Bay Police Association ("TBPA")

CORONER'S CONSTABLE

Const. Jim Murphy, Toronto Police Service

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(I) OVERVIEW

1. This inquest concerns the deaths of seven Aboriginal youths, Jethro Anderson, Reggie Bushie, Robyn Harper, Kyle Morrisseau, Paul Panacheese, Curran Strang, and Jordan Wabasse.

2. The overriding public-safety purpose of this inquest is the prevention of deaths of First Nations youths who must live off-reserve to attend high school. The hearing was called in order to hear motions concerning the wording of the scope of the inquest.

3. *Governing Statute, Rules of Procedure, Definitions*

i. Unless otherwise specified or implicit in the context, any reference in this ruling to "the *Act"* or to a section of the *Act* is with regard to the *Coroners Act*, R.S.O. 1990, c.37; and, a "Rule" is with regard to the *Chief Coroner's Rules of Procedure,* July 1, 2014, revised January 2015.

ii. The terms "relevant/relevance" and "material/materiality" are as defined by the Ontario Court of Appeal in *R. v. Candir* (2009), 250 C.C.C. (3d) 139 (Ont. C.A.) (hereinafter referred to as "*Candir*") at paragraphs 47-49.

iii. Certain terms referenced in submissions and in this ruling, for example "subject student" and "discrimination", are defined in the scope which was provided to parties in November 2014 ("the November scope").

Events at inquest prior to this motion

4. At this point in the inquest, standing has been granted to nine parties, all of whom have been in possession of the inquest brief for several months. Pursuant to Rule 3.3, the scope of the inquest was established and provided to persons with standing in November 2014. The parties had provided input before the drafting of the November scope, and, upon its distribution, were invited to suggest further changes. Areas of potential change were discussed among Coroner's Counsel and the parties before and after the motions were served. Those discussions were extensive and productive, and resulted in clarification and consensual resolution of many matters.

5. It is expected that, following the determination of the outstanding issues of scope at this hearing, Coroner's Counsel and parties will continue with discussions regarding evidentiary and other matters, many of which logically depend upon the determination of the scope. Following resolution of those additional matters, it is the hope of all concerned that the inquest will convene before a jury and hear evidence this fall.

6. The motions on scope heard on April 14 were made by:
    i. The Families and Nishnawbe-Aski Nation (jointly),
    ii. The Northern Nishnawbe Education Council, and,
    iii. The Provincial Advocate for Children and Youth.

7. These motions and responses are detailed and multifaceted, as would be expected given the extensive and complex subject matter of this inquest. The motion materials and submissions speak for themselves. The proposed amendments to scope and respective findings in this ruling are as follows:

8. For the reasons given below, the motions of the Families and NAN, NNEC, and PACY are allowed, in part. The amended scope is provided at Appendix 1. To the extent that there may be any difference between the specific amendments cited in this ruling, and the text of the amended scope in Appendix 1, the latter shall govern.

(II) LEGAL ISSUE TO BE DETERMINED

9. Scope defines the evidentiary boundaries of the inquest. In the words of the Divisional Court, "The *Act* requires questions and cross-examination to be relevant in light of the scope of the inquiry. A coroner is required to determine the scope of the inquiry based on a prior involvement with the subject matter of the inquest" (*Black Action Defence Committee v. Huxter,* [1992] O.J. No. 2741 (hereinafter referred to as "*BADC v. Huxter*")).

10. Relevance was usefully defined by the Ontario Court of Appeal in *Candir*, *supra* at paragraphs 47-48, which includes the following core concept:

> Relevance exists as a relation between an item of evidence and a proposition of fact that the party adducing the evidence seeks to prove or disprove by the introduction of the evidence.

11. Evidentiary relevance at an inquest is governed by Section 44 which states, in part:

> 44. (1) Subject to subsections (2) and (3), a coroner may admit as evidence at an inquest, whether or not admissible as evidence in a court,
> (a) any oral testimony; and
> (b) any document or other thing, **relevant to** the **purposes of the inquest**.. [emphasis added]

Purposes of the inquest

12. Relevance in S.44 is to "the purposes of the inquest", which are defined at Section 31:

> **Purposes of inquest**
> **31.** (1) Where an inquest is held, it shall inquire into the circumstances of the death and determine,
> (a) who the deceased was;
> (b) how the deceased came to his or her death;
> (c) when the deceased came to his or her death;
> (d) where the deceased came to his or her death; and
> (e) by what means the deceased came to his or her death. R.S.O. 1990, c. C.37, s. 31 (1).

Idem

(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). R.S.O. 1990, c. C.37, s. 31 (2).

Authority of jury to make recommendations

(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. R.S.O. 1990, c. C.37, s. 31 (3).

...

13. It follows that, in order for an area of evidence to be added to the scope of an inquest, an adequate factual relationship must be demonstrated between the proposed area of evidence and the propositions of fact properly before the jury under S.31(1) or 31(3).

14. The reason that a scope is required at an inquest, but not at a trial, was elucidated in *BADC v. Huxter, supra*:

> The applicants protested this determination on the basis that it was for the jurors to decide the cause of Lester Donaldson's death in the same way a civil jury trial would be conducted. However, in a civil trial there are pleadings against which to test the relevance of tendered evidence and, in a civil trial, the trial judge has played no earlier investigational role. The statute clearly confers on an inquest an inquisitorial form and assumes that the coroner will come to that inquest armed with the facts as then known.

15. The scope guides assessment of evidentiary relevance during the inquest, and must be useful for that purpose. It should be a high-level summary, worded as precisely and concisely as possible. Ambiguous or vague terms should be avoided. Scope is not intended to be, and cannot be, an exhaustive list or catalogue of every evidentiary item the inquest will hear.

16. As Coroner's Counsel pointed out, much of what was argued here was wording. Some of the motions concerned matters which were already within scope. These motions were, in

part, a demand that the scope must reflect and confirm the specific concerns and positions of the parties. But, as noted above, scope is a boundary against which evidentiary relevance is assessed, not a catalogue of all relevant evidence or the concerns and positions of specific parties.

Legal test for inclusion in scope

17. In *Toronto Civic Employees Union v. Dr. A. E. Lauwers,* 2011 ONSC 1317, Div. Ct. File# 164/10 (hereinafter referred to as "*Hearst"*), the Divisional Court identified three factors to be assessed by the Coroner prior to adding an area of inquiry to the scope of the inquest, which can be summarized as follows:

i. *Relevance*: Is the area of inquiry causally relevant to the circumstances of the death, to the standard of proof required? The Divisional Court stated that there must be a factual, causal connection between the issue and the death. The standard of proof for inclusion of an area of inquiry in the scope was "by no means high", and was not required to meet, for instance, the balance of probabilities test. The court also confirmed its previous ruling in *BADC v. Huxter, supra* that "opinion, conjecture, and conclusion" did not meet the requisite standard of proof. In *Hearst*, the court agreed with the coroner that the available evidence met the standard of proof for causal relationship between the strike and the death.

ii. *Materiality*: Is the area of inquiry material[2] to the statutory purpose of the inquest? In *Hearst*, the court assessed the proposed area of inquiry against subsections 31(1) and 31(3), and held that there was a factual basis for preventive recommendations under S.31(3).

iii. *Jurisdiction*: Does the coroner possess jurisdiction to inquire into the area? In *Hearst*, the court found that the coroner possessed jurisdiction to inquire into the exercise of the right to strike, but lacked jurisdiction to inquire into whether or not emergency responders should have the right to strike.

18. For brevity, I will refer to this as the "the *Hearst* analysis"; and to its three components as "relevance," "materiality," and "jurisdiction".

[2] *Candir, supra* at paragraph 49. This concept is sometimes called "legal relevance."

19. For utmost clarity, I am not saying that *Hearst* was intended by the Divisional Court as a complete and exhaustive authority regarding all of the factors to be taken into account in decisions relating to scope. It is possible that other factors may apply. It was acknowledged during arguments, for instance, that an area which is already in scope does not need to be separately listed. Satisfaction of the *Hearst* analysis is necessary, but may not be sufficient, to include an area in scope.

20. I find that, with respect to the issue before me, *Hearst* and other case law provides clear and useful direction from the courts on the principles governing application of the coroner's discretion in establishing scope, and the limits of the coroner's discretion in that task.

Is partial satisfaction of Hearst analysis adequate?

21. It was also argued by counsel at this hearing that, in effect, the three factors of the *Hearst* analysis are separate and independent, and that the coroner has discretion to include in scope an area which fails to meet one or more of the *Hearst* factors.

22. In *BADC v. Huxter, supra*, where the issue was the inclusion of racism in the scope, the Divisional Court denied the application, because relevance was not demonstrated to the required standard of proof, even though the court found that racism would have satisfied the materiality and jurisdiction factors if relevance had been proven.

23. In the same manner, *Hearst, supra*, cites with approval *Canadian Pacific Ltd. v. Campbell*, [1985] B.C.J. No. 1397 (B.C.S.C.), (hereinafter referred to as "*CP v. Campbell*"); *Canadian Pacific Ltd. V. British Columbia (Coroner),* [1992] B.C.J. No. 672 (B.C.S.J.), (hereinafter referred to as "*CP v. BC*")[3]. In both of those cases, the courts excluded from scope an area

[3] These and *Wastech* are British Columbia case law, and are therefore not binding on an Ontario inquest. However, I find them highly persuasive because:

i. The relevant sections of the respective provincial legislation are worded almost identically,
ii. The British Columbia courts cited Ontario inquest case law in their decisions,
iii. The decisions, and relevant to the determination before me, and,
iv. These decisions have been cited by Ontario courts with approval, including *Hearst, supra*.

of inquiry on the basis that it failed the relevance test, even though it would have met the materiality and jurisdiction tests if relevance had been shown.

24. In *Wastech Services Ltd. v. H. Patrick Costello, 1996 435 (B.C.S.C.) (hereinafter referred to as "Wastech")*, the deceased had been buried in debris, but the exact mechanism by which this event had occurred could not be ascertained. The employer argued that the jury should not hear evidence on preventive recommendations, because the exact mechanism was unknown. The court found against the employer, because the fact that the worker had died because of burial in debris was an adequate factual foundation to hear evidence for recommendations to prevent future deaths in similar circumstances. The jury's authority to make preventive recommendations did not require determination of the exact mechanism leading to the death, so long as the recommendations could prevent deaths in similar circumstances.

25. Wastech is distinct from *CP v. BC* and *CP v. Campbell,* because in the latter two cases, the courts disallowed inquiry into areas which were causally unrelated to the death. For instance, in *CP v. BC*, the court excluded ambulance delay from the scope of the inquest, because earlier ambulance arrival could not possibly have prevented the death. The determinative issue for the coroner and the court to decide was "Did ambulance delay play a role in this death?" not, "Is ambulance delay a public safety issue?"

26. Wastech provides useful guidance on the necessary evidentiary basis for recommendations at an inquest, but does not constitute direction from the court to hear evidence that is not relevant and material to the circumstances of the deaths and statutory purposes of the inquest.

27. In *People First of Ontario v. Porter, Regional Coroner Niagara (Div. Ct.),* 5 O.R. (3d) 609, [1991] O.J. No. 3389 (overturned on other grounds) at paragraph 46, the Divisional Court emphasised the critical importance of ensuring that the inquest remains within its statutory purpose:

> Although an inquest has many of the trappings of the adversary process it is not a trial and there is no *lis* between the parties.

> As Chief Justice McRuer said, an inquest is not a preliminary round to the determination of civil liability. See Huynh v. Jones (1991), 2 O.R. (3d) 562 at p. 565, 46 O.A.C. 152 (Div. Ct.). Although an inquest has some of the trappings of a royal commission it retains its essential quality of an investigation conducted by a medical man (or woman) into the death of individual members of the community. It must never be forgotten by the parties at every inquest that the central core of every inquest is an inquiry into how and by what means a member of the community came to her death. Notwithstanding the emerging public interest in the jury recommendations in the modern Ontario inquest, an inquest is not a trial; an inquest is not a royal commission; an inquest is not a public platform; an inquest is not a campaign or a lobby; an inquest is not a crusade.

28. This principle is also expressed by the Ontario Court of Appeal in *Beckon v. Young* (1992) 9 O.R.(3d) 256 (O.C.A.) (hereinafter referred to as "*Beckon*"): "The legal basis of a coroner's inquest is in the Coroners Act and it has no other basis."

29. Although it has been vigorously argued that an inquest can hear evidence which is not material, I find that there was no plausible legal foundation for this argument. It is my finding that a presiding coroner does not have discretion to explore areas of evidence which are not material to the statutory purpose of the inquest.

30. For the above reasons, I am satisfied that the three *Hearst* factors are conjunctive; that is, all three factors must be satisfied before an area of inquiry can be added to the scope.

Can the Hearst analysis be bypassed?

31. It was also argued that the factors set out by the Divisional Court in *Hearst* could be bypassed in certain circumstances.

Faber

32. *Faber v. The Queen*, [1976] 2 S.C.R. 9 (hereinafter referred to as "*Faber*") was cited in support of inclusion of several of the requested areas in scope even if they failed the *Hearst*

analysis. *Faber* includes among the functions of an inquest (at the bottom of p. 30):

> (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.

33. Counsel argued that the effect of *Faber* was that widespread public concern about a public safety issue is grounds for inclusion of that issue in the scope of an inquest, regardless of its relevance to the facts of the death or materiality to the inquest's statutory purpose. *BADC v. Huxter, CP v. Campbell,* and *CP v. BC* , all decisions which post-date *Faber,* definitively rebut this argument. For instance, in *BADC v. Huxter,* the Divisional Court was clear that widespread and deeply-felt concern about the role of racism in the death of Lester Donaldson did not require inclusion of that issue in the inquest, absent an adequate evidentiary basis connecting racism to the death.

Section 20

34. It was also argued that Section 20 of the *Act* states "when making a determination whether an inquest is necessary or unnecessary, the coroner shall have regard to whether the holding of an inquest would serve the public interest." Because public interest is mentioned in S.20, it was argued, the presiding coroner has authority to expand scope to any matter which it would be in the public interest to examine − notwithstanding its relevance to the facts of the death and materiality to the purposes of the inquest.

35. Section 20 is the legal test for a coroner to call an inquest. I find that S.20 does not override S.44, S.31, and the related case law.

Concerns expressed in letter to Chief Coroner

36. It was argued by NAN that the Chief Coroner had called this inquest after receiving a letter from NAN. On this basis, NAN argued that the concerns expressed in the letter must be included in the scope of the inquest, or at least given special consideration.

37. Section 20 of the *Act* governs the exercise of discretion by the coroner in the calling of an inquest. The fact that an inquest is called does not represent an endorsement of the position of a private interest which made submissions about the desirability of an inquest. It also does not oblige the coroner to accept the position of the private interest, nor give the presiding coroner discretion to disregard the governing statute and case law in determining the scope.

Subsection 31(3)

38. Finally, it was argued that subsection 31(3) authorizes the inquest to explore areas which are not causally relevant to the circumstances of the death or material to the purposes of the inquest.

39. Subsection 31(3) reads:

> **Authority of jury to make recommendations**
> (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**. R.S.O. 1990, c. C.37, s. 31 (3). [emphasis added]

40. It was argued that the final phrase, "or respecting any other matter arising out of the inquest," represented a statutory basis for the inquest to hear evidence which, but for that phrase, would not be relevant and material to the inquest.

41. The jury's traditional common-law authority to make recommendations was repealed at S.2(1). Subsection 31(3) is the legal authority for an inquest jury to make recommendations, not an extension of the jury's common-law authority to make recommendations.

42. In *Beckon*, *supra*, for instance, the Court of Appeal struck down the previous common-law power of the jury to write a narrative.

43. Viewed in this context, the legislative intent of S.31(3) is clear: But for the phrase "… or respecting any other matter arising out of the inquest," the jury's authority would be limited exclusively to "recommendations directed to the avoidance of death in similar circumstances." S.2(1), per *Beckon, supra*, would disallow any other recommendations. The addition of the phrase authorizes the jury to make beneficial recommendations which would not strictly prevent death. In other words, S.31(3) is authority for the jury to act on evidence, not authority for the coroner to expand scope into areas outside the circumstances of the death and the statutory purpose of the inquest.

44. The Divisional Court stated in *BADC. v. Huxter, supra,* that only evidence within scope will be heard at an inquest. I find that Section 31(3) does not authorize the inclusion in scope of an area which does not satisfy the *Hearst* analysis.

45. It was argued more than once that certain issues cried out for examination at a public hearing. A coroner does not have jurisdiction to decide, in a general sense, which issues deserve public examination and which do not. The coroner's discretion to decide the scope of an inquest is derived from and governed by the *Coroners Act* and relevant case law. As Madame Justice McLachlin (as she then was) stated in *CP v. Campbell*:

> It may be that it is in the public interest that these matters be investigated. That investigation, however, is not the task of the coroner.

Relationship between scope, evidence and jury's findings under S.31

46. To summarize the *Act* and relevant case law:

i. The jury's findings of fact and recommendations must be based on evidence;
ii. Evidence heard at an inquest must be within scope; and,
iii. In order to be included in scope, an area of evidence must satisfy all 3 factors of the *Hearst* analysis: relevance, materiality and jurisdiction.

(III) ANALYSIS AND RULINGS

(i) Obstacles faced by subject students

47. The Families, NAN and PACY moved that the obstacles faced by the subject students should be added to the scope.

48. I find that this matter:

i. Satisfies the *Hearst* analysis, and,
ii. Is not implicitly within the November scope.

Deletion of Alcohol and Drugs

49. It was argued by NAN and the Families as part of this motion that use of drugs and alcohol be removed from the scope.

50. The potentially lethal effects of alcohol and drugs may be chronic or acute, direct or indirect, and may occur in the presence or absence of addiction.

51. One of the deaths (Robyn Harper) was, in the opinion of the pathologist, caused by the acute toxicity of alcohol. Five of the deaths (Jethro Anderson, Reggie Bushie, Kyle Morrisseau, Curran Strang and Jordan Wabasse) were associated with acute alcohol impairment. One of the deaths (Paul Panacheese) may have been related to chronic exposure to drugs and alcohol. Based on the material contained in the inquest brief some, if not all of these deaths could have been prevented if alcohol and drugs had not been used by the deceased. There is extensive medical research, and known effective treatment, for drug and alcohol use when it poses a risk to health or life.

52. Alcohol and drug use have a strong causal relationship with the deaths, and therefore evidence about them could be material to the development of practical and effective preventive recommendations which are within the jurisdiction of an inquest jury. They are not subsumed or implicit in another area of the scope. To remove them from the scope would be inconsistent with the facts as currently known.

Amendments to scope – Obstacles and challenges/Alcohol & Drugs

53. For the above reasons, I rule that the scope shall be amended as follows: Paragraph B4 is deleted, and replaced with the following:

Obstacles and challenges faced by subject students within their home communities, and within Thunder Bay prior to and during their enrolment at DFC or MLC. This includes, but is not limited to:

a. The unique life experience of subject students,
b. Discrimination against First Nations youths, and programs to prevent discrimination and/or reduce the harm caused by discrimination, and,
c. Alcohol and substance use, and programs to reduce resulting harm.

(ii) Delivery models for education of subject students

54. PACY moved that alternate delivery models for education of subject students should be added to the scope.

55. This matter is already within the scope at C3. It would appear that the concern of PACY was that alternate models used elsewhere in the world might be excluded on technical grounds because they were not used with the persons defined as "subject students". For clarity, evidence may be heard about education models employed elsewhere, insofar as it is relevant to the circumstances of the subject students and material to the purposes of the inquest.

(iii) Safety supports for subject students

56. PACY moved that access to safety supports for the subject students should be added to the scope.

57. The November scope includes, at C4, "Programs, regardless of provider, directed to the prevention of deaths." PACY's motion is in the same area of evidence, but is far broader. PACY states (at paragraph 83): "It does not appear from the Coroner's Brief that the youths

and subject students are assured this optimal level of dedicated daily care and support, or supported self-determination regarding their daily circumstances."

58. The motion calls for an inquiry into the overall quality and daily experience of education of subject students, rather than prevention of their deaths. This broad area of inquiry into designing an optimal education experience is worthwhile and would be central to a Royal Commission into Aboriginal Education, but is not relevant and material to the specific and much narrower legal mandate of an inquest (see, for instance, *Ontario (Provincial Advocate for Children and Youth) v. Ontario (Toronto Regional Coroner)*, 2011 ONSC 3354, Div. Ct. File# 255/11 & 257/11).

59. The motion is not allowed.

(iv) Lodging and accommodation of subject students

60. NNEC requested clarification regarding the scope of evidence contemplated under item B2, "Boarding and Supervision."

61. In my view, B2 includes supervision of students outside school hours while they are attending school in Thunder Bay. It also includes alternative models of lodging and accommodation, insofar as they are relevant to the circumstances of subject students and material to the purposes of the inquest.

(v) - Funding for education of subject students

62. NNEC requested clarification regarding the scope of evidence with respect to funding of education of subject students.

63. NNEC's position, quite reasonably, is that it can only provide services within the funding envelope available, and compliance with recommendations may require an increase in that funding envelope.

64. The November scope reflects that the jury may make recommendations to ensure the adequacy of funding.

65. At one extreme, it would be inappropriate for the jury to hear no evidence concerning funding. At the other extreme, it would be inappropriate for the jury to make a finding regarding the exact amount of funding NNEC should receive, or to design a line-by-line budget.

66. Funding is within scope. The extent to which the jury will hear evidence on funding will require evidentiary rulings on a case-by-case basis as evidence unfolds, taking into account the statute and relevant case law.

(vi) Treaty and Constitutional obligations

67. The Families, NAN and PACY all argued that treaty and constitutional obligations should be added to the scope.

68. There was no dispute about whether the jury should hear evidence concerning treaty and constitutional obligations. The debate was about whether treaty and constitutional obligations were implicitly included within the existing term "statutory framework."

69. After carefully reviewing the arguments, I am persuaded that "treaty and constitutional obligations" are sufficiently different from "statutory framework" in their meaning and importance to Aboriginal peoples. They merit separate mention.

70. C3 is amended to reflect this change, and will now read:

> The framework governing the current delivery of high school education to subject students, including the statutory framework, funding mechanisms, governance, constitutional and treaty

obligations, and accountabilities.

For clarity, this amendment does not extend the scope of the inquest to include any constitutional or treaty obligations beyond those which are relevant, material, and within the jurisdiction of the inquest.

71. There were concerns, not unfounded, that evidence called in this area during the inquest could potentially engage federal-provincial jurisdictional issues. While I am mindful of the validity of this concern, it is my finding that amendment of the scope to include "treaty and constitutional obligations" will not, in and of itself, cross that threshold. As previously stated, the issues relating to specific items of evidence cannot be decided or determined at this time. As presiding coroner, Dr. Carlisle wrote in his unreported decision *Motion to Limit Scope – Ashley Smith Inquest – Nov. 23, 2012* (at page 21):

> Having found that the "pith and substance" of the inquest is defined by an *intra vires* enactment of Ontario, and that the scope is an outline of the potential areas of evidence, I find that the challenge to the scope on constitutional grounds is anticipatory and premature. I am aware of the limits imposed by the constitutional cases and will respect them. The time to raise any constitutional challenge to the operation of the inquest is when evidence within the scope is offered. At that time there will be fuller or more complete knowledge of the issue and its context within the inquest and a full opportunity to object and be heard.

(vii) Quality of the Thunder Bay Police Investigation

72. The Families and NAN argued that "The Quality of the Thunder Bay Police investigation[4]" should be explicitly included in the scope, and worded exactly as such.

73. I have already ruled that the jury will hear evidence relating to police involvement in the circumstances of these deaths, where:

i. The death could reasonably have been prevented by different police actions, or,
ii. The quality and completeness of the evidence relevant to the jury's determinations was affected by issues in the police investigation.

[4] It was clarified during the oral hearing that the investigation performed by the Ontario Provincial Police on behalf of the coroner in preparation for the inquest was not the subject of this motion.

74. The moving parties argued at the oral hearing that their motion went well beyond those areas, and encompassed a broad examination of Thunder Bay police actions, and the assessment of allegations of incompetence.

75. The following items were not included in the motion. I will comment on some of these absences before applying the *Hearst* analysis:

i. An adequately precise definition of the term "quality;"
ii. The nature and extent of additional evidence required if the scope is amended as requested;
iii. Relevant legislation, standards, guidelines, and best practices governing police activities;
iv. An expert report identifying issues which could form the basis of jury recommendations; and,
v. Adequate detail regarding the relevance of the proposed area of inquiry to the propositions of fact properly before the jury.

Nature and extent of additional evidence not provided

76. Rule 3.4 governs motions to amend scope, and requires that the motion "describe the nature and extent of additional evidence, if any, that may be required if the scope is amended as requested." The motion materials do not set this out in any meaningful way.

77. The moving parties argue that all, or almost all police actions related in any way to these deaths would be subject to detailed scrutiny at the inquest. Policing is a technical field, and scrutiny would be with respect to yardsticks which include, but are not limited to statutes, regulations, standards, policies, procedures, best practices and training. This is no small task.

78. This motion, if granted, would substantially increase the amount of evidence to be heard, likely by months, and therefore the duration of the inquest. Furthermore, the gathering of the necessary additional evidence would inevitably delay the start of the inquest. The current plan is to start the inquest this fall, and for it to last 6 months. If this motion were

granted, the inquest would be unlikely to start before 2016, and to conclude before 2017.

79. All participants in this inquest, and particularly NAN and the Families, have expressed a strong desire to start the inquest as soon as possible. Based upon reports in the media and inquiries to the Chief Coroner's Office, it would appear that this sentiment is shared in the community and an expeditious hearing of this inquest is in the public interest. The breadth of this motion, the vagueness of the proposed wording, and the absence of an outline of the additional evidence all suggest to me that that the moving parties may not fully have appreciated the substantial effect of their motion on the starting date, length, and complexity of this inquest.

No expert report

80. Policing is a technical field, and the assessment of policing is not within the knowledge and experience of members of the general public. The motion and submissions made in court contained opinion from parties and their counsel, but such non-expert opinion is not useful in deciding technical matters. An expert report from an appropriately credentialed reviewer could have focused and grounded the issues, and would have been extremely helpful in evaluating this motion.

Hearst – Relevance

81. "Quality" is an extremely broad concept, and it is not defined in the motion. The fact that the motion calls for this term to be included in the wording of the scope, absent a precise definition, creates a substantial procedural problem. "The *Act* requires questions and cross-examination to be relevant in light of the scope of the inquiry" (*BADC v. Huxter*). Any evidentiary decision at the inquest which related in any way to any police action would require assessment with respect to its potential relevance to this undefined concept of "quality." It is difficult to envisage any police act which does not relate in some way to at least one of the meanings of the word "quality". In the assessment of evidentiary relevance, and without an adequately precise definition, the term "*quality of* police actions" is essentially equivalent to the term "*all* police actions."

82. The moving parties are requesting that the "quality" of the police investigation be assessed, but provide no evidentiary foundation based upon legislation, standards,

guidelines, or best practices against which to assess "quality." No objective test was offered. The term "incompetence" was used during oral submissions but, again, without reference to an objective test. "Public reassurance" was tendered, but that is an extremely difficult parameter against which to assess evidentiary relevance. The Court of Appeal has stated in *Candir, supra* that relevance is a relation between an item of evidence and a proposition of fact. The jury has authority only to make findings of fact and recommendations; it cannot make a finding of quality or incompetence. The motion does not adequately connect the proposed area of evidence to a proposition of fact properly before the inquest.

83. NAN argued the motion on the basis that a different response to the missing person report might have prevented one or more of these deaths. While that may or may not be true, it is irrelevant on the motion. Prevention of death through response to a missing person report is already within scope. The motion specifically requested that scope be expanded to include quality and competence of police acts beyond those causally related to the deaths.

84. The substance of the argument of NAN and the Families is that, because there would be some evidence in relation to the actions of the police before the inquest, all police actions must be scrutinized regardless of their relevance and materiality to the statutory purpose of the inquest. The proof offered for this motion was in the nature of opinion, conjecture, and conclusion. It did not satisfy the relevance component of the *Hearst* analysis.

Hearst - Materiality

85. The motion also failed to demonstrate that the jury's determination of "quality" would meet the *Hearst* test for materiality to the S.31 purposes of the inquest. For instance, the concept of quality as it is commonly understood includes, but is not limited to, compliance with legislation and standards. A finding by the jury that police had failed to meet legislated requirements or standards, or had acted incompetently, would run afoul of S.31(2), whether that finding was with regard to the entire police service or individual officers.

86. It was argued that there is precedent for a finding of incompetence or misconduct findings in the inquisitorial setting. Public inquiries, for instance, bear procedural similarity to inquests and have made findings of misconduct against individuals and agencies.

87. Public Inquiries are called under the *Public Inquiries Act* ("*PIA*"). The *PIA* authorizes commissions of inquiry to make findings of misconduct, and contains requisite procedures and protections of persons who are subject to adverse findings, for instance, at Section 17. There is no parallel authority in the *Coroners Act* for an inquest to make a finding of misconduct or incompetence; in fact, such a finding is explicitly excluded under Section 31(2).

88. If these deaths were the subject of a proceeding under the *Public Inquiries Act*, the inquiry could possess authority to inquire into and make findings of misconduct, subject to appropriate procedural protections for the persons at risk of a finding of misconduct. No such authority exists under the *Coroners Act.*

89. The moving parties also argued that the coroner has jurisdiction to explore this issue by virtue of *Faber.* As noted above, *Faber* is applicable to matters properly before the inquest, but neither overrides Sections 44 and 31, nor bypasses the analysis set out in *Hearst*.

90. The TBPS argued at the hearing that the scope should be "agency-neutral." I accept their position that actions should be assessed on the basis of the relevance and materiality of the action to the purposes of the inquest, rather than on the basis of the agency which performed the action.

Hearst analysis – Jurisdiction

91. Without pre-deciding the matter, there is potential for jurisdictional issues to arise if quality and competence of police services are before the inquest.

Hearst analysis - Finding

92. The proposed expansion of scope to include "Quality of the Thunder Bay Police Investigation" does not satisfy the *Hearst* relevance and materiality factors, and may engage jurisdictional issues.

Logical placement of "response to missing student" in the scope

93. It was also pointed out in arguments by NNEC and others that the wording of the November scope at B2 grouped together two dissimilar areas of evidence. B2(a)-(c) were about facets of the high school program, whereas the area of evidence at B2(d) "Identification of, and response to a missing student" involved the response of multiple persons and agencies to a life-threatening crisis. I agree that this structure "mixed apples with oranges" and that the formatting of the scope should distinguish between those two areas. I have therefore amended the November scope by deleting B2(d), and adding B3, which reads: "Identification of, and response to a missing student, including but not limited to the respective roles of boarding parents, school, police, families and others."

94. For utmost clarity, police actions which could prevent deaths of subject students were within scope before this hearing, and they remain within scope after this ruling. That has not changed. The motion that is denied is for this inquest to undertake a broad, comprehensive inquiry into the quality and competence of the Thunder Bay Police.

(viii) Racism

95. Discrimination, including but not limited to discrimination on the basis of race, was already within the scope of the inquest. The motion here seeks to add the word "racism" explicitly to the scope.

96. No one is disputing that the students experienced racism, and no one is disputing that the inquest will hear evidence on racism. Racism is properly before the inquest. But scope is an evidentiary boundary-line, not a catalogue of evidentiary topics. The issue in this motion is whether racism, should be listed apart from discrimination, and thereby given prominence over discrimination on other grounds.

97. *R. v. Gladue* [1999] 1 SCR 688 (hereinafter referred to as "*Gladue*"), S.15 of the *Charter*, and the Ontario *Human Rights Code* RSO 1990, c H.19 ("*Code*") were cited in support of the proposition that the word "racism" should be explicitly included in the scope.

Gladue

98. It was argued that *Gladue* requires a coroner to take judicial notice of racism. *Gladue* states, at paragraph 83, "In all instances it will be necessary for the judge to take judicial notice of the systemic or background factors and the approach to sentencing which is relevant to aboriginal offenders." Those systemic and background factors are described elsewhere in the ruling, including paragraphs 67-69, and 80-81. They are extensive, and go well beyond the specific issue of racism. The overarching principle in the Supreme Court's guidance (at paragraph 81) is that "… the analysis … must be holistic…. There is no single test that a judge can apply."

99. Both *Gladue* and *R.v. Ipeelee* 2012 SCC 13 speak to the importance of taking into account Canada's treatment of Aboriginal people.

> Courts have, at times, been hesitant to take judicial notice of the systemic and background factors affecting Aboriginal people in Canadian society (see, e.g., *R. v. Laliberte*, 2000 SKCA 27, 189 Sask. R. 190). To be clear, courts must take judicial notice of such matters as the history of colonialism, displacement, and residential schools and how that history continues to translate into lower educational attainment, lower incomes, higher unemployment, higher rates of substance abuse and suicide, and of course higher levels of incarceration for Aboriginal peoples. These matters, on their own, do not necessarily justify a different sentence for Aboriginal offenders. Rather, they provide the necessary *context* for understanding and evaluating the case-specific information presented by counsel. [para.60]

100. *Gladue* was represented by the moving parties as a ruling from the Supreme Court which gave racism a special status as a factor to be taken into account in a court proceeding. It does not. To the contrary, *Gladue* mandates a holistic and open-minded approach to the identification of factors which negatively affect Aboriginal peoples.

101. Although *Gladue* and *Ipeelee* are both criminal sentencing cases, I agree that there is a need to take into account the systemic and background factors at this inquest, subject to the statutory purpose of the inquest and the evidentiary requirement of relevance,

materiality and jurisdiction. I note that the scope presently includes, amongst other issues, the legacy of residential schools, limited treaty/constitutional rights, obstacles to attainment of high school education by Aboriginal youths living in remote reserves, and, of course, discrimination.

The Charter and the Ontario Human Rights Code

102. S.15 of the *Charter* includes the right to be free from "discrimination based on" specific banned grounds. The Ontario *Human Rights Code* includes in its preamble "to recognize the dignity and worth of every person and to provide for equal rights and opportunities without discrimination that is contrary to law," and, at S.1, "without discrimination because of" specific banned grounds. Both the *Charter* and the *Code* target discrimination on any banned grounds, not exclusively or primarily racism.

103. Discrimination, whether on race or other grounds, is already within scope. The question before me is whether one particular basis for discrimination should be given precedence in the wording of the scope. The statute and case law does not require it.

104. Even though not required by law, it could be possible that racism should be included because of the specific circumstances. There are fact situations in which racism-based discrimination could be seen as the sole or predominant form of discrimination involved. I have considered that, and find is not the case here. The evidence in the brief and in the motion materials shows that the deceased faced discrimination on a number of grounds, often mingled, which included not only racism, but also age, gender, cultural background[5] and likely other factors. The jury needs an adequate understanding of the effects of discrimination faced by subject students, and should not presume that discrimination was exclusively or primarily on the basis of race.

105. Accordingly, I am not satisfied that the moving parties have demonstrated that the focus of the evidence at this inquest should shift from the overall effects of discrimination on the deceased to an inquiry into one specific basis, among others, upon which that

[5] For instance, the evidence supports that subject students were treated in a discriminatory fashion not only on the basis of their physical appearance (the essence of racism) but also, as PACY pointed out, because of their very different life experience compared to, for instance, First Nations youths raised in an urban environment.

discrimination occurred.

106. While the motion is not allowed as phrased, it raises an opportunity to clarify the scope. The term “discrimination” is defined in the scope, but contains neither examples of grounds upon which discrimination may occur nor guidance that more than one ground may be involved. It would therefore be useful to provide a list of grounds, so long as that list is not seen as exhaustive or as ranking the relative significance of grounds in any particular order. The scope is amended by adding the sentence: “Discrimination may be on the basis of one or more factors, including but not limited to: race, cultural background, age, and gender” to the definition of discrimination. For greater clarity, cultural background includes the unique life experience of Aboriginal youths from remote reserves which was argued by PACY.

107. I thank all Counsel for their submissions.

Dated at the City of Hamilton, this 6th day of May, 2015

Dr. David Eden

Presiding Coroner

Appendix 1

Factual Scope of the Inquest into the deaths of:

Jethro Anderson
Curran Strang
Paul Panacheese
Robyn Harper
Reggie Bushie
Kyle Morrisseau and
Jordan Wabasse

Effective May 6, 2015

This scope is established by the Coroner pursuant to Rule 3.3 of the *Chief Coroners Rules of Procedure*, July 1 2014, and is subject to amendment under Rule 3.4.

Background of the Inquest:
Each year, youths from small, remote First Nations must leave their families and communities to move to Thunder Bay in order to pursue high school educational opportunities. This inquest will examine the circumstances of seven youths who died while attending high school in Thunder Bay, and is intended to prevent future deaths of such students.

For most children in Ontario, high school is a short walk or bus ride away, and children return to their families each day after school. For remote First Nations, high school means living away from family and community in a city which is distant not only geographically, but also culturally. And, as in these seven cases, some First Nations children never return to their families at all. This inquest will examine the reasons why the death rate of remote First Nations students differs from other Ontario high school students, and what can be done to ensure their safety.

An inquest must, by law, focus on fact-finding about deaths, and recommendations directed to the avoidance of future deaths. An inquest is not a Royal Commission, which has a much broader mandate. The Coroner and Coroner's Counsel are aware that there are significant issues, such as the details of the content of the high school curriculum of First Nations youths, which will not be explored at this inquest. The fact that such issues cannot be heard at an inquest is due to the legal foundation and purpose of an inquest, and should not be taken to mean that such issues are unimportant or unworthy of public debate.

Note: The meanings of certain words are specified in the Definitions which follow.

A. ***Statement of Scope***

This inquest shall

1. Inquire into the circumstances of the deaths and determine, in each case,
    a. who the deceased was;
    b. how the deceased came to his or her death;
    c. when the deceased came to his or her death;
    d. where the deceased came to his or her death; and
    e. by what means the deceased came to his or her death, and,

2. Hear evidence directed to the prevention of future deaths of youths from remote First Nations during the course of their high school education in Thunder Bay ("subject students")

B. ***Anticipated Areas of Evidence***

Insofar as it is relevant to the matters set out in (A) above, the jury will hear evidence concerning the following matters regarding the deceased and subject students:

1. Selection and intake of students including application process and needs assessment;

2. Boarding and supervision, including:
    a. Policies and procedures;
    b. Physical accommodations and amenities; and,
    c. Qualifications and training of persons supervising subject students;

3. Identification of, and response to a missing student, including but not limited to the respective roles of boarding parents, school, police, families and others;

4. Programs, regardless of provider, directed to the prevention of deaths;

5. Obstacles and challenges faced by subject students within their home communities, and within Thunder Bay prior to and during their enrolment at DFC or MLC. This includes, but is not limited to

    a. The unique life experience of subject students,

    b. Discrimination against First Nations youths, and programs to prevent discrimination and/or reduce the harm caused by discrimination, and,

    c. Alcohol and substance use, and programs to reduce resulting harm.

C. *Contextual evidence*

In addition, the jury will hear limited contextual evidence in the following areas, insofar as it is a necessary foundation for other evidence and potential recommendations:

1. A brief overview of the history of secondary school education to subject students, including the Indian Residential School System and its continuing impact on First Nations;

2. The framework governing the current delivery of high school education to subject students, including the statutory framework, funding mechanisms, governance, constitutional and treaty obligations, and accountabilities;

3. Different models for delivery of high school education to subject students, taking into account:

    a Effectiveness in minimising preventable deaths.

    b. Rates of graduation and, for non-graduates, highest grade completed;

4. Adequacy of resources to support a potential recommendation.

D. ***Not within scope***

The following areas of evidence are not within the scope except where it provides a necessary foundation for other evidence and potential recommendations:

1. Curriculum content;
2. Measures of academic achievement other than those specified in C(3)(b);
3. Specific funding requirements;
4. Provision of medical care by emergency medical services to Paul Panacheese and Robyn Harper.

Definitions

"deceased" means one or more of the seven deceased persons who are the subject of this inquest.

"DFC" means Dennis Franklin Cromarty High School.

"discrimination against First Nations youths" means any practice or behaviour, whether intentional or not, which has a negative impact on one or more First Nations youths, and is based on the fact that the individual is a First Nations youth, except where the conduct is permitted by law. Discrimination may arise due to unequal treatment, or from the same treatment which has an unequal effect. Discrimination may be on the basis of one or more factors, including but not limited to: race, cultural background, age, or gender. For clarity, this definition includes harassment directed at the individual on the basis that the individual is a First Nations youth.

"MLC" means Matawa Learning Centre.

"remote First Nation" means a First Nations community which does not have year-round road access and is served by DFC or MLC, and includes the First Nations communities of the deceased.

"subject student" means a youth from a remote First Nation who is enrolled in high school

"youth" means a person who is 13 to 21 years of age.

"other youth" means a youth who is not a subject student.