RULING ON THE MOTIONS FOR ADJOURNMENT BY THE PROVINCIAL ADVOCATE FOR CHILDREN AND YOUTH & THE ANDERSON FAMILY at the Inquest into the Deaths of Diane ANDERSON, Jahziah WHITTAKER and Tayjah SIMPSON

Heard in Court at 180 Dundas Street West on May 19th 2011

Background:

Ms Fraser for the Provincial Advocate for Children and Youth [hereinafter PACY] and Mr. Rowe, counsel for the family brought applications pursuant to s. 41(2)(b) to call witnesses at this inquest. The applications were heard on Monday May 16th, and Tuesday May 17th, 2011, and the ruling was provided later that evening, with reasons to follow.

On May 18th, Ms Fraser and Mr. Rowe indicated that they would be seeking judicial review of my ruling and would be seeking an adjournment to allow their clients to pursue the judicial review.

PACY seeks a judicial review of the decision to deny their request to call the following witnesses pursuant to s. 41(2)(b) of the *Coroners Act*.: Dr. Grace GALABUZI, Mr. Alex LOVELL , Mr. Byron GRAY, and an appropriate witness from the Employment and Social Services Department in Toronto [hereinafter ESSD]. Ms. Fraser also seeks a review of a party's general right to call witnesses under s. 41(2)(b).

The family seeks judicial review of the ruling denying their application to expand the scope and focus of the inquest, to re-call Sophia Anderson and Steve Flores and to call Joanne Smith (of ESSD) pursuant to s. 41(2)(b) of the *Coroners Act*.

It was decided however that the motions for adjournment would be heard [without prejudice to Mr. Rowe or Ms. Fraser] on Thursday May 19th, so that counsel would have the benefit of the reasons. The reasons were emailed to all counsel in the evening of May 18th, and the motion for adjournment was therefore heard on the morning of Thursday May 19th, 2011.

The Provincial Advocate's & the Family's Motions:

Ms. Fraser, on behalf of PACY submits that it is imperative that the rulings preventing PACY from calling witnesses be judicially reviewed as they create some serious issues of public interest. Specifically, Ms. Fraser contends that a judicial review should be conducted for the following reasons:

1) PACY's inability to call witnesses to present evidence from their unique perspective prevents the jury from being fully informed and therefore is not in the public interest.

2) The Coroner made an error in fact in that the coroner did not find a connection between the evidence of the witnesses to be called and the subject matter of the inquest.

3) The Coroner made a jurisdictional error law in finding that the nature of the evidence that can be called at an inquest pursuant to s. 41(2)(b) of the Coroner's Act, must be restricted by s.44 of the Coroners' Act which requires the witnesses to be connect to the purpose of the inquest.

Mr. Rowe on behalf of the family supports PACY"S intention to pursue a judicial review and further indicates that the family's inability to call/recall the 3 witnesses and expand the Scope of the inquest, as previously mentioned clearly demonstrates that the family will not have had a fair hearing and will not have had an opportunity to tell their story thereby irreparably compromising the entire hearing.

Mr. Rowe further indicates that the granting of the adjournment will support the family in their efforts to ensure a fair hearing; that they are properly heard and the public interest mandate is fulfilled.

Ms. Fraser further indicated that she had was advised by the registrar of the Divisional Court that a full three judge panel would be available in mid June to consider the judicial review. With the need for transcripts of the inquest to be submitted this was the earliest time the review could be contemplated. Mr. Rowe further notes that a

longer adjournment [than mid June] might be required so that he can get leave to appeal from Legal Aid.

Similarly, Ms. Fraser further advised that Wednesday May 25th was the earliest opportunity for Ms. Fraser to appear before a judge of the Divisional Court to seek a stay of proceedings. Consequently, Ms. Fraser urged the Coroner to adjourn the proceedings until the judicial review could be heard, or in the alternative, until a stay application could be heard. The alternative would require a cancellation of the half day set aside on May 25th to begin submissions.

PACY & the family cautioned that if the adjournment was not granted, and the inquest concluded, if the judicial review was ultimately successful, the inquest might have to be repeated.

The Children's Aid Society [hereinafter CAS], The Toronto Fire Service [hereinafter TFS], and the Toronto Community Housing Corporation [hereinafter TCHC] opposed the Motion for Adjournment but did not oppose the alternative request of not sitting on Wednesday May 25th as planned. Similarly, the CAS workers and the Toronto District School Board [hereinafter TDSB] supported the alternative request by Mr. Rowe and Ms. Fraser but did not support the adjournment. Coroner's Counsel opposed the motion for adjournment and the alternative motion to cancel the May 25th sitting day.

Ms. Hofbauer for the CAS indicated that although the judicial review could be done in June it means that the inquest would not be able to resume until the fall with all the schedules involved. This would mean the whole process would be jeopardized and the jury would have problems recalling all the evidence and thus not be able to make meaningful recommendations.

Mr. Gourlay for the TFS concurs with Ms Hofbauer's position regarding the delay of process and opposes the Motion to Adjourn. The fact that the Jury has heard evidence from 36 witnesses and the 43 exhibits tendered in evidence is a significant factor to be considered in any decision to adjourn to June.

Mr. Lukasiewicz for TCHC supported TFS's and CAS's positions and emphasized that there would be prejudice to all parties if the inquest were adjourned, as it could not practically resume until the fall. A possible solution would be a single judge to review instead of a full 3-panel review, but given our current scheduling issues, that would still mean resuming in the fall.

Mr. Lukasiewicz further submits that the Coroner did not exceed his jurisdiction as the ruling was made within the parameters of s. 31(1) and s.41.(1) of the Coroners Act, the Coroner's right to define the Scope and Focus of an inquest.

Coroners Counsel Ms. Edward advised that the authority for the Coroner to grant an adjournment is section 46 of the Coroners Act

> ***46.*** *An inquest may be adjourned from time to time by the coroner of his or her own motion or where it is shown to the satisfaction of the coroner that the adjournment is required to permit an adequate hearing to be held.*

The coroners rulings denying PACY's and the Family's request to call further witnesses, speaks to the fact that there has been an adequate hearing of the inquest at this point and no further evidence is required for the inquest. Consequently, there is no basis for an adjournment at this point.

Ms Edward indicated that she supports the submissions made by CAS, TCHC and TFS and that a further consideration in granting the adjournment is the significant inconvenience to the jury and the loss of the public interest in calling this discretionary inquest.

Ms. Edward further advises that although she appreciates PACY's and the Family's request for adjournment and the alternative relief and their view of the inquest to date, that is not the Coroner's paramount concern. The Coroner's responsibility is to ensure a comprehensive & adequate hearing, and to complete the inquest in a timely manner so that the jury's recommendations can in fact address the public interest identified in calling this discretionary inquest.

Mr. Butt for Victim Services had indicated in an email to Ms. Edward that he opposed the motion to adjourn and made the following points which Ms. Edward read in to the record.

1. The time needed for a JR and the difficulty of working with the schedules of the Coroner, Coroner's counsel and so many parties means adjourning now will put the inquest on hold for weeks if not months. This is unfair to the jury.

2. Such a long hiatus will adversely affect the jury's recollection and consideration of the evidence and as such will compromise the outcome of the inquest itself.

3. Scheduling challenges have already meant a two week interruption between the bulk of the evidence and the present sitting week. This interruption should not be extended.

4. This inquest has already been delayed considerably.

5. A long delay would mean additional preparation and expense for my client, which it simply cannot afford. I have previously gone on record about the adverse impact of previous delay on my client who does not have anything close to the financial resources of all the other parties.

6. A long delay in receiving recommendations will adversely affect my client's ability to plan this year.

7. The cumulative effect of these reasons not to adjourn is greater than the sum of their parts.

The remaining Party, the Office of the Fire Marshall [hereinafter OFM], took no position on the motion. They did however agree with the suggestion of starting motions on May 27th 2011.

Analysis and Ruling

In my previous ruling I indicated that my decision was based on the following sections of the Coroners Act

What coroner shall consider and have regard to

20. *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 and, without restricting the generality of the foregoing, shall consider,*

(a) Whether the matters described in clauses 31 (1) (a) to (e) are known;

(b) the desirability of the public being fully informed of the circumstances of the death through an inquest; and

(c) the likelihood that the jury on an inquest might make useful recommendations directed to the avoidance of death in similar circumstances.

Persons with standing at inquest

41. *(1) On the application of any person before or during an inquest, the coroner shall designate the person as a person with standing at the inquest if the coroner finds that the person is substantially and directly interested in the inquest. R.S.O. 1990, c. C.37, s. 41 (1); 1993, c. 27, Sched.; 1999, c. 12, Sched. P, s. 2.*

Rights of persons with standing at inquest

(2) A person designated as a person with standing at an inquest may,

(a) be represented by a person authorized under the Law Society Act to represent the person with standing;

(b) call and examine witnesses and present arguments and submissions;

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

Admissibility of evidence

What is admissible in evidence at inquest

44. (1) Subject to subsections (2) and (3), a coroner may admit as evidence at an inquest, whether or not admissible as evidence in a court,

(a) any oral testimony; and

(b) any document or other thing,

relevant to the purposes of the inquest and may act on such evidence, but the coroner may exclude anything unduly repetitious or anything that the coroner considers does not meet such standards of proof as are commonly relied on by reasonably prudent persons in the conduct of their own affairs and the coroner may comment on the weight that ought to be given to any particular evidence. R.S.O. 1990, c. C.37, s. 44 (1).

What is inadmissible in evidence at inquest

(2) Nothing is admissible in evidence at an inquest,

(a) that would be inadmissible in a court by reason of any privilege under the law of evidence; or

(b) that is inadmissible by the statute under which the proceedings arise or any other statute.

These statues governed my decision regarding the admissibility of the evidence proposed to be provided by the witnesses Ms. Fraser and Mr. Rowe wished to call to the inquest.

The major points of consideration are

1) The relevance of the proposed evidence.

2) Whether the proposed evidence will enable the jury to make "useful recommendations directed to the avoidance of death in similar circumstances."

The evidence the inquest has heard is the complete information the coroner felt was required for the jury to perform its function in coming to a Verdict and Recommendations based on the declared scope and focus of the inquest. Thus the jury has no further need to hear evidence that is outside the scope and focus of the inquest to perform its duties.

Adjournments

46. An inquest may be adjourned from time to time by the coroner of his or her own motion or where it is shown to the satisfaction of the coroner that the adjournment is required to permit an adequate hearing to be held. R.S.O. 1990, c. C.37, s. 46.

Section 46 of the Coroners Act indicates the requirements for the Coroner calling an adjournment "to permit an adequate hearing to be held." In this inquest, we have heard from the 36 witnesses over five weeks and we have 43 exhibits. Consequently, in my view there has been an adequate hearing at this inquest. All the required evidence has been heard by the jury, and as such I cannot justify granting an adjournment at this time.

The effect of a prolonged adjournment for a judicial review will cause the public interest in the proceedings to wane including the recommendations of the jury. The effect on the jury is of great significance as their ability to make useful recommendations is diminished.

The decision for a judicial review is that of the parties with standing who wish to request such a process and not the Coroners office. The inquest process has no influence on a judicial review process and as such the inquest will proceed.

The motion to adjourn the inquest is denied.

With respect to PACY's and the Family's alternative suggestion, I am advised by all counsel that given the competing schedules, the earliest we can proceed with submissions is the afternoon of May 25th at 2:30pm. The intention is to sit to 7 or 8pm on the 25th. We then have the full day of May 27th and potentially the full day of June 6th, 2011. After that, the next available date for all counsel is September 2011. Counsel have indicated their willingness to restrict their submissions to 30mins each in order to try to ensure we complete this inquest in the time allotted. While I appreciate counsel's efforts in this regard, and I appreciate that it is just a day reprieve that is being requested, it is not just any day given our time constraints on counsel availability. Consequently, I am not convinced that the reprieve sought will not irreparably damage our chances of completing this inquest by June 6th, 2011. If we cannot conclude matters by June 6th, 2011 we will in effect be required to go to September 2011. As Counsel are aware, despite the best efforts of all involved, we have been notoriously behind schedule on this inquest and our efforts to conclude the inquest by April 29th, 2011, or by the end of the week of May 16th, 2011, at the latest, have not been successful.

I am prepared however to start a little later on the 25th, to provide Ms. Fraser and Mr. Rowe with an opportunity to obtain a stay of proceedings. That should provide them with ample time to do so.

The inquest will resume on May 25th at 3.00 pm.