Case Name:

Hudson Bay Mining and Smelting Co. v. Cummings

Between
Hudson Bay Mining and Smelting Co., Limited, (applicant) appellant, and
Robert G. Cummings, (respondent) respondent

[2004] M.J. No. 425

2004 MBCA 182

247 D.L.R. (4th) 554

[2005] 3 W.W.R. 572

190 Man.R. (2d) 231

6 C.P.C. (6th) 314

135 A.C.W.S. (3d) 245

Docket No. AI04-30-05834

Manitoba Court of Appeal

Monnin, Steel and Freedman JJ.A.

Heard: May 11, 2004.
Judgment: November 22, 2004.

(37 paras.)

[Editor's note: An Addendum was released by the Court January 19, 2005; see [2005] M.J. No. 15.]

Coroners -- Inquests -- Evidence -- Powers of judge re evidence -- Discovery -- Production and inspection of documents -- Jurisdiction of judge or court respecting.

Appeal by Hudson Bay Mining and Smelting from an order that denied it production to certain documents. An explosion occurred at a mine owned by Mining. An employee died from injuries sustained in the explosion. An inquest was held under the Fatality Inquiries Act. The respondent Cummings was a provincial court judge who was appointed as the presiding judge. The Crown counsel had access to statements made by persons during the course of the investigation. He conducted his own interviews of many persons who were potential witnesses at the inquest. The interviews were recorded and transcribed. Mining applied for an order for the Crown counsel to provide to all persons who had standing at the inquest copies of his transcripts. Cummings

dismissed this application. Mining applied to set aside that decision. The motions judge agreed with the Crown that the inquest judge lacked jurisdiction under the Act to make the requested order. Provincial court judges lacked inherent jurisdiction that would otherwise have given them the power to make this order.

HELD: Appeal allowed. The matter was returned to the court below for a determination on the merits of the application. When a provincial court judge conducted an inquest under the Act he acted qua judge and not as a persona designata. All judges, even those of a statutorily created provincial court, had wide incidental powers only when they acted as judges and not when they acted as personae designata. Although provincial court judges only had the jurisdiction conferred on them by statute they possessed powers intrinsic to all judges when they carried out their functions. This included all powers which were necessarily incidental to carrying out their functions. These powers were ancillary to the jurisdiction set out in a statute. They were found by necessary implication in the legislation. The inquest judge was mandated to investigate the cause of death and to issue a report that contained recommendations. He had a broad mandate. This mandate included the jurisdiction to order the disclosure sought. Making such an order was truly necessarily incidental to his jurisdiction as an inquest judge. It was required as a practical necessity so that the judge could accomplish the very wide purposes contained in the Act.

Statutes, Regulations and Rules Cited:

Constitution Act, 1867, s. 96.

Court of Queen's Bench Act, C.C.S.M., c. C-280, s 30.

Fatality Inquiries Act, C.C.S.M., c. F-52, ss. 28(1), 28(2), 30(1), 33(1), 33(1)(a).

Law Enforcement Act, C.C.S.M., c. L-75, s. 1(2).

Provincial Court Act, C.C.S.M., c. C-275, s. 7.

Provincial Police Act, C.C.S.M., c. P-150.

Counsel:

W.J. Burnett, Q.C., M.L. Harrison and J.G. Edmond for the Appellant

M.S. Minuk and C.A. Everard for the Respondent

M.A. Webb for the Government of Manitoba, Department of Labour and Immigration, Workplace Safety and Health Division

J.B. Harvie for the United Steelworkers of America - Local 7106

The judgment of the Court was delivered by

FREEDMAN J.A.:--

ISSUE

1 This appeal involves a single question: Does a provincial judge conducting an inquest have the jurisdiction to order production of certain documents? For the reasons which follow, my conclusion is that the judge does have such jurisdiction.

FACTS

2 In August 2000, an explosion occurred at the smelter in Flin Flon, Manitoba, owned by the appellant (HBM & S). An employee died from injuries sustained in the explosion. Investigations were commenced, including by a provincial government department, by a joint union-management committee, and by the Province's Chief Medical Examiner.

3 The Chief Medical Examiner then determined that an inquest should be held under The Fatality Inquiries Act, C.C.S.M. c. F52 (the FIA). Pursuant to the FIA, the respondent, a judge of the Provincial Court of Manitoba, was directed to hold the inquest. Martin Minuk (Mr. Minuk) was appointed as counsel for the Crown. Mr. Minuk had access, as did all parties with standing at the inquest, to statements made by persons during the course of the investigations. He and an assistant conducted their own interviews of many persons who were potential witnesses at the inquest. The interviews were recorded and then transcribed.

4 The inquest commenced with "standing" hearings in July 2003, and the substantive proceedings commenced in January 2004. Soon after, HBM & S filed a motion before the inquest judge seeking: "An Order that Martin S. Minuk, Agent for the Attorney General of Manitoba ("Inquest Counsel"), provide to all persons with standing copies of the transcripts of his tape-recorded interviews of potential witnesses."

5 The inquest judge delivered reasons, explaining in some detail why he was dismissing the motion. HBM & S then applied to the Court of Queen's Bench for an order setting aside that decision. The Queen's Bench motions judge delivered brief oral reasons (17 March 2004) in which she did not deal with the application on its merits. Instead, she agreed with Crown counsel that the inquest judge lacked the jurisdiction to make the requested order. She said:

> It is clear that Provincial Judges are appointed provincially and that they have no inherent jurisdiction. Whatever jurisdiction they have derives from statute. The Fatal [sic] Inquiries Act sets out a list of powers invested in Provincial Judges conducting inquests. These include the power to decide who gets standing, to limit cross-examination, to hold in-camera hearings and to subpoena witnesses.
>
> Counsel for HBMS argues that because there is jurisdiction to order material via subpoena procedures, that the same end result occurs so we should not get bogged down in trivial procedural quibbles, and that production is necessary for natural justice.
>
> In my view, issues of natural justice do not arise unless jurisdiction is first established. It might be that Judge Cummings could get to the documents requested pursuant to Section 30(1) of The Fatal [sic] Inquiries Act and the subpoena powers. I don't know if he could or if he would in these circumstances, but that issue is not before me.
>
> I am satisfied that the Provincial Judge had no jurisdiction to simply order production of this material as was demanded by HBMS. In my view he acted properly and was correct in dismissing that request. Because he had no jurisdiction to order production, I feel it appropriate to dismiss the application pre-emptorily.

6 HBM & S now appeals from that decision.

RELEVANT LEGISLATION

7 The relevant provisions of the FIA are found in the appendix to these reasons. The relevant provision of The Provincial Court Act, C.C.S.M. c. C275 (the PCA) is found in para. 22 of these reasons.

POSITIONS OF THE PARTIES

8 In their arguments before us, counsel addressed the issue from several perspectives:

(i) HBM & S argued that the inquest judge has the power to control the procedures at the inquest, and has a duty to ensure that the relevant evidence is produced. It said that the disclosure sought is often routinely provided, and other inquest judges have ordered such disclosure. See, for example, the decision, on a procedural question, of Sinclair A.C.J.P.C. (as he then was), sitting as an inquest judge, in The Manitoba Pediatric Cardiac Surgery Inquest (13 January 1998) (Man. Prov. Ct.) (at pp. 18 - 19, 25):

> While it is clear that the criminal role of coroners [sic] inquests has been displaced (see Faber v. The Queen [[1976] 2 S.C.R. 9]), the common law otherwise applicable to inquests has not been totally abolished in Manitoba, unlike the situation in Ontario. It is not correct therefore, in my view, to state that the only jurisdiction available to Provincial Judges presiding at inquests is what can be found within the four corners of the legislation, for the legislation is remarkable in its silence where inquest proceedings are concerned.
>
> In view of the fact that the fundamental purpose of the inquest is to determine the circumstances surrounding the deaths of those who are the subject of the inquest, I am of the view that if the provision in question frustrates the objectives of the inquest and the duty of the presiding judge, then the judge must consider the need to balance the declared purpose of the inquiry with the objective of the provision in question. I am satisfied from the trend in recent case law (see Hamulka [(1985), 35 Man.R. (2d) 189 (C.A.)]) that the need for disclosure and truth finding overrides any purported public interest in maintaining the secrecy of the standards committee process. ...

HBM & S also raised issues of procedural fairness and natural justice.

(ii) Crown counsel argued that the inquest judge has "no inherent original jurisdiction" and needs express statutory authority to do what is requested. The PCA confers no such jurisdiction, nor does the FIA. The FIA does give the inquest judge power to do a number of things in an inquest but does not go so far as to authorize him to order the disclosure sought, which, in any event, goes far beyond the procedural fairness argued by HBM & S. Unlike in some other jurisdictions, a Manitoba inquest judge has no investigatory powers.

(iii) The government, represented here by the Department of Labour and Immigration, said that while the inquest judge does not have jurisdiction to order production of documents, he does have the power to compel production by the issuance of a subpoena duces tecum (s. 30(1) of the FIA). On the present issue, the government supported the argument of HBM & S saying that inquest counsel "should disclose" the documents sought.

(iv) United Steelworkers of America - Local 7106 (the Union) is the certified bargaining agent for most, if not all, of the persons whose interview details are sought. It argued issues relating to the condition of confidentiality attached to the interviews, and it supported the position of the Crown. It said the inquest judge has only the jurisdiction expressly conferred on him by statute. It also argued an issue of costs (see para. 37 below).

DECISION

1

The Inquest Judge Qua Judge

9 When a provincial judge conducts an inquest under the FIA, does he or she have, as necessarily incidental to the express powers set out by statute, the implied power to make the order of production

requested?

10 As a preliminary matter I want to make clear my view that, when conducting an inquest under the FIA, a provincial judge is acting qua judge, and is not acting as persona designata.

11 This issue received little attention in argument. Indeed, all parties seemed to acknowledge that the inquest judge acted qua judge. Yet a number of cases involving non-judicial conductors of inquests, such as coroners, were cited to us. This alone suggests that there may be some benefit in articulating clearly why it is that an inquest judge acts qua judge. All judges, including judges of a statutorily created provincial court, generally have wide incidental powers, but only when they are acting as judges, and not when they act as personae designata.

12 This is not the place for a detailed analysis of the concept of persona designata, principally because it is now, at least in this province, largely of historical interest only. The concept, in brief, developed by judges over centuries, refers to a person described as an individual, as opposed to a person ascertained as a member of a class (see Herman et al. v. Canada (Deputy Attorney General), [1979] 1 S.C.R. 729).

13 In recent years, the Supreme Court of Canada has effectively entombed the concept of persona designata, so far as judges are concerned, subject to any express statutory preservation. In Herman, Laskin C.J.C. said (at pp. 731-32):

> ... [I]t is high time to relieve the Courts of the interpretative exercises that have been common in this country when they think that a decision has to be made whether a statutory jurisdiction has been vested in a Judge qua Judge or as persona designata. More than fifty years ago, D.M. Gordon, one of Canada's outstanding scholarly practitioners, wrote in the Canadian Bar Review (see (1927), 5 Can. Bar Rev. 174, at p. 185) that "the whole persona designata conception could be scrapped without the slightest inconvenience or the least distortion of legal principles". I agree completely with this sentiment.
>
> .... Nowadays, the vesting of statutory functions in Courts or other tribunals is commonplace, and nothing of substance is added in trying to apply a distinction between ordinary curial duties of a Judge and statutory duties. I do not think, therefore, that Hynes v. Swartz [[1938] 1 D.L.R. 29 (Ont. C.A.)], is any longer acceptable in drawing a distinction between powers exercisable by a Judge under The Ontario Judicature Act and powers vested in a Judge by another public Act, a regulatory statute respecting a profession.

14 In the same case, Dickson J. (as he then was), with whom the remaining members of the court concurred, said (at p. 749):

> ... As a rule, one would expect that a judge enforces or applies legislation as an unexceptional function performed within his ordinary jurisdiction. From time to time, however, a judge may be utilized outside that jurisdiction for the purpose of giving effect to exceptional statutory tribunals or functions.
>
> Prima facie, Parliament should be taken to intend a judge to act qua judge whenever by statute it grants powers to a judge. He who alleges that a judge is acting in the special capacity of persona designata must find in the specific legislation provisions which clearly evidence a contrary intention on the part of Parliament. The test to be applied in considering whether such a contrary intention appears in the relevant statute can be cast in the form of a question: is the judge exercising a peculiar, and distinct, and exceptional jurisdiction, separate from and unrelated to the tasks which he performs from day-to-day as a judge, and having nothing in common with the court of which he is

> a member?

15 Dickson J. later said in Minister of National Revenue v. Coopers and Lybrand, [1979] 1 S.C.R. 495 (at p. 509):

> ... A judge does not become persona designata merely through the exercise of powers conferred by a statute other than the provincial Judicature Act [R.S.O. 1970, c. 228] or its counterpart.

16 Finally, for these purposes, there is the Supreme Court's decision in Minister of Indian Affairs and Northern Development v. Ranville et al., [1982] 2 S.C.R. 518, where Dickson J. said (at pp. 525, 527):

> I was rather of the opinion that this troublesome notion of persona designata had been given its quietus in the recent Herman decision. The Chief Justice's aversion in Herman to the concept of persona designata could not have been more evident ...
>
> ... I would declare that whenever a statutory power is conferred upon a s. 96 judge or officer of a court, the power should be deemed exercisable in an official capacity as representing the court, unless there is express provision to the contrary.

17 I refer also to s. 30 of The Court of Queen's Bench Act, C.C.S.M. c. C280: "Where an adjudicative jurisdiction is assigned by statute to a judge or officer of the court, the jurisdiction is given to the court."

18 The cases cited, and others, involve federally appointed judges (commonly referred to as "s. 96 judges"), yet the principle that persona designata applies in a case only if a statute expressly so states has, in my opinion, equal application to provincially appointed judges. If a statute of this province confers a power on such a judge, then, in the absence of a clear statutory provision to the contrary, that power is conferred on the judge qua judge, and not personally, as persona designata. Two provincial statutes (there may be others) specifically do confer powers on a judge as persona designata. The Law Enforcement Review Act, C.C.S.M. c. L75 contains s. 1(2) which reads: "A provincial judge acts as persona designata and not as a court when performing a duty or exercising a power under this Act." Similarly, s. 25(3) of The Provincial Police Act, C.C.S.M. c. P150, speaks to a judge conducting an inquiry and reads as follows: "A provincial judge acts as persona designata and not as a court when making an inquiry and a report under this section."

19 No similar provisions are found in the FIA.

20 I am satisfied that in the case before us, the judicial burial of persona designata has been effective, and that when conducting the inquest, the inquest judge acts qua judge, and thus has all the powers of a provincial court judge.

2

The Powers of the Inquest Judge

21 Generations of law students have been taught that, "Only superior court judges appointed under s. 96 of the Constitution Act, 1867 have inherent jurisdiction" (Kourtessis v. M.N.R., [1993] 2 S.C.R. 53 at 66). But the phrase "inherent jurisdiction" is, at least in certain contexts, inherently confusing; it is susceptible of more than one meaning. See M.S. Dockray, "The Inherent Jurisdiction to Regulate Civil Proceedings" (1997), 113 Law Q. Rev. 120 at 122:

> ... The phrase has been used in English cases in at least three different ways: (i) it has been used to describe the general powers of the old superior courts which the Supreme Court inherited on its creation, (ii) the phrase has also used to mean powers which a court possesses simply by virtue of being a court, or perhaps by virtue of being a court of a specific kind. In this sense, inherent powers are intrinsic features of a body which is constituted as a court. Finally, (iii) inherent powers have been said to be incidental

> powers which arise either out of or because of the work which the court undertakes. ...

22 The Provincial Court of Manitoba continued as a court of record by the PCA is, to use the historic epithet, an "inferior" court, or, a term I find more suitable, a statutory court. The principal source of jurisdiction of the judges of that court is found in s. 7 of the PCA:

> Jurisdiction
>
> 7 Every judge has jurisdiction throughout Manitoba and
>
> (a) shall exercise all the powers and perform all the duties conferred or imposed upon a judge by or under any Act of the Legislature or of the Parliament of Canada;
> (b) has all the power and authority now vested by or under any Act of the Legislature in a magistrate, two justices of the peace sitting together or a juvenile, youth or family court or a judge thereof;
> (c) may exercise all the powers and perform all the duties conferred or imposed on a magistrate, provincial magistrate or one or more justices of the peace under any Act of the Parliament of Canada;
> (d) may exercise the jurisdiction conferred upon a magistrate under Part XIX of the Criminal Code (Canada); and
> (e) is ex officio a justice of the peace and commissioner for oaths.

23 Unlike judges of a superior court, the judges of the Provincial Court have only such jurisdiction as is conferred on them by statute. But, as the article by Dockray makes clear, the judges of such a court have powers intrinsic to all judges when they carry out their functions, and specifically, all powers which are necessarily incidental to the carrying out of their functions. These are powers ancillary to the jurisdiction set out in a statute; they are powers found by necessary implication in the legislation.

24 A recent and persuasive articulation of this principle can be seen in McNally v. Bass et al. (2003), 223 Nfld. & P.E.I.R. 322, 2003 NLCA 15 (at para. 29):

> Even for those courts with no inherent jurisdiction, in the sense of original jurisdiction, there was a recognized power to control their own procedure. The Court of Appeal for New South Wales concluded in Bogeta Pty. Ltd. v. Wales, [1977] 1 N.S.W.L.R. 139 (C.A.), at p. 149:
>
> > The general principle, where a court is properly seized with a matter, and there is no procedure laid down which enables it to deal with the particular problem facing it, that it should devise its own procedure is, in my opinion, applicable to all courts of Petty Sessions in this day and age. Historically, inferior courts have been allowed to devise their own procedures.
>
> The reasoning behind this view was expressed by Baron Alderson in Crocker v. Tempest (1841), 7 M. & W. 501; 151 E.R. 864 (Exch.):
>
> > The power of each Court over its own process is unlimited; it is a power incident to all Courts, inferior as well as superior; were it not so, the Court would be obliged to sit still and see its own process abused for the purpose of injustice.

See also the observations of Arbour J. in United States of America v. Shulman, [2001] 1 S.C.R. 616, 2001 SCC 21 (at para. 33):

> Not only is the Court of Appeal a forum of original jurisdiction for Charter purposes under

> the Extradition Act as a result of the 1992 amendments, but it also has, like all courts, an implied, if not inherent, jurisdiction to control its own process, including through the application of the common law doctrine of abuse of process.
>
> [Emphasis added]

25 Subject to any express statutory provision, the judges of the Provincial Court have the power to control their own procedures. In Doyle v. The Queen, [1977] 1 S.C.R. 597, Ritchie J. said (at p. 602):

> Whatever inherent powers may be possessed by a superior court judge in controlling the process of his own Court, it is my opinion that the powers and functions of a magistrate acting under the Criminal Code are circumscribed by the provisions of that statute and must be found to have been thereby conferred either expressly or by necessary implication.
>
> [Emphasis added]

26 In R. v. Duncan (1995), 130 D.L.R. (4th) 99, leave to appeal to the Supreme Court of Canada dismissed, [1995] S.C.C.A. No. 252, the British Columbia Court of Appeal held that the power to confer intervener status was not ancillary to a provincial court judge's power under the Criminal Code. In the course of her reasons, Prowse J.A. said (at paras. 34, 42):

> In my view, however, the proposed interveners are not asking the Provincial Court to adapt an existing procedure but, rather, to create a new procedure not found in the Code and which, on its face, is antithetical to the notion of a criminal trial as a process involving only two parties? the Crown and the accused. While superior courts have been held to have the power to grant intervener status, either by virtue of their inherent jurisdiction, or pursuant to legislative authority, there is no such authority to grant intervention in the Provincial Court, and I am not prepared to infer it.
>
> Finally, while I rely on the passage in Doyle to which I have referred in arriving at my conclusion, I wish to make it clear that there are undoubtedly other cases in which procedural matters not expressly set forth in the Code can be said to be necessarily incidental or ancillary to express powers contained in the Code or other statutory enactments. This is not one of those cases.
>
> [Emphasis added]

27 She referred to a 1994 decision of her court (R. v. O'Connor (No. 1) (1994), 89 C.C.C. (3d) 109 at 149 which held (at para. 38):

> ... Disclosure orders by a trial judge are made in the ordinary course of exercising the jurisdiction which all trial judges have to make all orders necessary to the effective management of the court's process and the fair trial of the accused. ...

28 Finally, I refer to the Supreme Court's decision in R. v. 974649 Ontario Inc., [2001] 3 S.C.R. 575, 2001 SCC 81, where, in considering the jurisdiction of a justice of the peace, for a unanimous court, the Chief Justice said (at paras. 70-71):

> It is well established that a statutory body enjoys not only the powers expressly conferred upon it, but also by implication all powers that are reasonably necessary to accomplish its mandate: Halsbury's Laws of England (4th ed. 1995), vol. 44(1), at para. 1335. In other words, the powers of a statutory court or tribunal extend beyond the express language of its enabling legislation to the powers necessary to perform its intended functions: Bell Canada v. Canada (Canadian Radio-Television and Telecommunications Commission), [1989] 1 S.C.R. 1722.

> Consequently, the function of a statutory body is of principal importance in assessing whether it is vested with an implied power to grant the remedy sought. Such implied powers are found only where they are required as a matter of practical necessity for the court or tribunal to accomplish its purpose: National Energy Board Act (Can.) (Re), [1986] 3 F.C. 275 (C.A.). While these powers need not be absolutely necessary for the court or tribunal to realize the objects of its statute, they must be necessary to effectively and efficiently carry out its purpose: Interprovincial Pipe Line Ltd. v. National Energy Board, [1978] 1 F.C. 601 (C.A.); Bell Canada, supra; Macaulay and Sprague, [Practice and Procedure Before Administrative Tribunals, vols. 3 and 4. Toronto: Carswell, 1988 (loose-leaf updated 2001, release 1)] vol. 4, at p. 29-2. This emphasis on the function of a court or tribunal, in discerning the powers with which the legislature impliedly endowed it, accords with the functional and structural approach to the Mills [[1986] 1 S.C.R. 863] test set out above.
>
> [Emphasis added]

29 Turning to the present matter, I refer to the purpose of the inquest being conducted by the judge. It is, in the words of s. 33(1) of the FIA, to:

> ....
>
> (a) make and send a written report of the inquest to the minister setting forth when, where and by what means the deceased person died, the cause of the death, the name of the deceased person, if known, and the material circumstances of the death;
>
> . . . . .
>
> and [the judge] may recommend changes in the programs, policies or practices of the government and the relevant public agencies or institutions or in the laws of the province where the presiding provincial judge is of the opinion that such changes would serve to reduce the likelihood of deaths in circumstances similar to those that resulted in the death that is the subject of the inquest.

30 To facilitate the achievement of those objectives, which in some ways are more far-reaching than the usual judicial decisions made by a provincial judge, the inquest judge is expressly given certain powers under the FIA. By way of example, he or she may grant standing to interested persons, may limit examination or cross-examination, and may issue subpoenas requiring the attendance of a witness (which in my opinion would include subpoenas duces tecum that require the attendance of a witness with relevant documents). (See ss. 28(1), 28(2) and 30(1)).

31 Those express grants of power facilitate an inquest judge's carrying out of his or her duties under the FIA, and the exercise of the jurisdiction which he or she has by virtue of being a judge. They aid in the accomplishment of the purposes required of him or her. But not all facilitative powers are expressed; they may be implied, if they are necessarily incidental to the jurisdiction of the judge. The task in any particular case, once having identified the particular power sought to be exercised, is to ascertain whether that power is truly necessarily incidental to the judge's jurisdiction. Or, to revert to the words of McLachlin C.J.C. in 974649, is the power "required as a matter of practical necessity for the court or tribunal to accomplish its purpose" (at para. 71)?

32 The inquest judge is mandated to investigate the cause of death and to make a report which may recommend changes in programs, policies and practices. He or she may recommend changes in the law. The judge's mandate is broad indeed.

33 The FIA confers a subpoena power, and HBM & S could have asked that the inquest judge issue a subpoena. Instead, it asked simply that the judge order Crown counsel to produce all the interview notes. In the case of a subpoena, the FIA confines the judge to subpoenas "requiring the attendance of witnesses." At least by the express terms of the FIA, a subpoena, including a subpoena duces tecum, could not be issued except if the party requesting it intended to call the person as a witness. On the other hand, an order for production or disclosure has no necessary connection to a particular individual who will be called as a witness. It is, therefore, no answer to the jurisdictional argument to say, as was argued here, that another power exists in the statute and should be exercised; the subpoena power is fundamentally different from a power to order production.

34 Applying the test set out in 974649, my conclusion is that the inquest judge has the jurisdiction to order the disclosure sought, because the making of such an order is truly necessarily incidental to his jurisdiction as an inquest judge. It is required as a matter of practical necessity for the inquest judge so that he may accomplish the very wide purposes set out in s. 33(1) of the FIA. The power to order disclosure would, in my opinion, increase, and possibly by a substantial measure, the likelihood that an inquest judge could make truly meaningful recommendations under the FIA. The power would help the inquest judge fulfill the role he plays under that section. Since the ultimate goal of the inquest judge includes the making of recommendations in a number of areas, providing the judge with all the tools that might be reasonably necessary to do the job accords well with a functional and structural approach to assessing jurisdiction. See also Sharpe J.A., in chambers, in G. (N.) v. Upper Canada College (2004), 70 O.R. (3d) 312 (C.A.): "statutory courts have by necessary implication the power to control their own process and the procedural tools to ensure the effective and efficient disposition of matters falling within their competence" (at para. 10).

35 The power sought to be exercised here is one which I find to be necessarily incidental to the powers granted to the inquest judge under the FIA, and accordingly the power falls within his jurisdiction.

36 Finally, I observe that the inquest judge, who proceeded on the correct assumption that he had the necessary jurisdiction, decided not to grant the order requested. He gave reasons for that decision. The motions judge did not express her view on the merits of the application before her; instead, she ruled only on the question of jurisdiction. We do not have her views on the merits, nor were the merits argued before us. Had it been otherwise, we could have disposed of both the jurisdictional argument and an appeal on the merits. In the circumstances, I would allow the appeal and return the matter to the court below for a determination on the merits of the application.

COSTS

37 In dismissing the application before her, the judge ordered that HBM & S pay costs to the Union. HBM & S included in its notice of appeal an assertion that the award of costs was an error. Given our conclusion above, I would set aside that award of costs.

FREEDMAN J.A.
MONNIN J.A.:-- I agree.
STEEL J.A.:-- I agree.

* * * * *

APPENDIX A

The Fatality Inquiries Act

Inquest attendance by Crown counsel 27 A Crown attorney or other officer or counsel appointed by the minister to act for the Crown may attend an inquest and may examine witnesses called at the inquest.

Inquest attendance by interested persons 28(1) Subject to subsection (2), a person who,

in the opinion of the provincial judge presiding at an inquest, is substantially and directly interested in the inquest, may attend the inquest in person or by counsel and may examine or cross-examine witnesses called at the inquest.

Judge may limit examination
28(2) A provincial judge presiding at an inquest may limit examination or cross-examination under subsection (1) where the examination or cross-examination is vexatious or is beyond what is necessary for the purpose of the inquest.

Subpoena to witness
30(1) A provincial judge may issue subpoenas requiring the attendance of witnesses at an inquest.

Separation of witness
30(2) A provincial judge may direct that a witness be kept separate from another witness or from other witnesses generally.

Application of Criminal Code
30(3) Sections 20 and 527 and Part XXII of the Criminal Code, to the extent that they relate to a witness, apply, with such modifications as the circumstances require, to proceedings under this Act.

Duties of provincial judge at inquest 33(1) After completion of an inquest, the presiding provincial judge shall

(a) make and send a written report of the inquest to the minister setting forth when, where and by what means the deceased person died, the cause of the death, the name of the deceased person, if known, and the material circumstances of the death;
(b) upon the request of the minister, send to the minister the notes or transcript of the evidence taken at the inquest; and
(c) send a copy of the report to the medical examiner who examined the body of the deceased person;

and may recommend changes in the programs, policies or practices of the government and the relevant public agencies or institutions or in the laws of the province where the presiding provincial judge is of the opinion that such changes would serve to reduce the likelihood of deaths in circumstances similar to those that resulted in the death that is the subject of the inquest.

In camera evidence and culpability 33(2) In a report made under subsection (1), a provincial judge

(a) may disclose in camera evidence that is received during the inquest where the judge is satisfied that disclosure of the evidence

(i) is essential to setting forth when, where and by what means the deceased person died, the cause of death and the material circumstances of the death, and
(ii) is in the public interest;

(b) shall not express an opinion on, or make a determination with respect to, culpability in such manner that a person is or could be reasonably identified as a culpable party in respect of the death that is the subject of the inquest.

cp/e/qw/qlscw