Citation: Hudson Bay Mining and Smelting Co. v. Cummings, P.C.J., 2006 MBCA 98

Date: 20060915
Docket: AI 05-30-06225

IN THE COURT OF APPEAL OF MANITOBA

Coram: Chief Justice Richard J. Scott
Mr. Justice Michel A. Monnin
Madam Justice Freda M. Steel

B E T W E E N:

HUDSON BAY MINING AND SMELTING CO., LIMITED	)	***W. J. Burnett, Q.C.,*** ***J. G. Edmond*** *and* ***M. L. Harrison***
(Applicant) Appellant	)	*for the Appellant*
	)	***M. S. Minuk***
- and -	)	*for the Attorney General of Manitoba*
THE HONOURABLE JUDGE ROBERT G. CUMMINGS	)	***M. A. Webb***
(Respondent) Respondent	)	*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*
	)	*Appeal heard:* ***March 15 and 16, 2006***
	)	*Judgment delivered:* ***September 15, 2006***

STEEL J.A.

INTRODUCTION

Appeal from (2005), 198 Man.R. (2d) 85, 2005 MBQB 186
See (2004), 190 Man.R. (2d) 231, 2004 MBCA 182, 2005 MBCA 9

1 This appeal raises the question as to whether transcripts of interviews conducted by Crown counsel at an inquest held under the provisions of *The Fatality Inquiries Act*, S.M. 1989-90, c. 30 – Cap. F52 (the *FIA*), are privileged. If not, then what is the applicable standard of disclosure?

2 Prior to the inquest, Crown counsel interviewed potential witnesses and transcripts of those interviews were produced. He declined to disclose those transcripts to other parties who have standing at the inquest, arguing that the transcripts are privileged. In the alternative, it is submitted that even if they are not privileged, the standard of disclosure applicable to an inquest does not require their production. Both the inquest judge and the reviewing judge agreed with Crown counsel and held the transcripts to be work product and therefore privileged.

3 For the reasons outlined below, I find that both the inquest judge and the review of his decision in the Court of Queen's Bench proceeded on errors in law.

4 The transcripts are not covered by any doctrine of privilege. Litigation privilege, or work product privilege, as it is also called, is a product of the adversarial process and exists to provide a lawyer with a zone into which adversarial parties cannot pry. An inquest under the *FIA* is not an adversarial process. It is not actual, anticipated or contemplated litigation. Nor are the parties who have received standing at the inquest adversarial in relation to Crown counsel.

5 Since the transcripts are not privileged, they should be disclosed. An inquest is a fact-finding, non-adversarial inquiry, where the focus should be upon discovering the cause of the accident and recommending changes to

prevent similar deaths. While Crown counsel is not counsel to the inquest judge, neither does he represent a specific government department or narrow government interests. Crown counsel represents the Attorney General, who, in turn, represents the public interest. As such, his goal is to aid in the search for truth. While *R. v. Stinchcombe*, [1991] 3 S.C.R. 326, is not applicable to these proceedings, considering the objectives and purpose of an inquest, procedural fairness requires that all relevant, non-privileged documents in the possession of Crown counsel should be disclosed to all parties with standing.

FACTS

6 On August 8, 2000, Steven Ryan Ewing died as a result of injuries sustained during a series of explosions that occurred at Hudson Bay Mining and Smelting Co., Limited (Hudson Bay), in Flin Flon, where he was employed.

7 In January 2002, the Chief Medical Examiner directed, pursuant to the *FIA*, that an inquest be held to determine the circumstances that led to his accidental death and what, if anything, could be done to prevent similar deaths from occurring in the future. The respondent, The Honourable Judge Robert G. Cummings, was appointed to preside at the inquest, and under s. 27 of the *FIA*, counsel was appointed "to act for the Crown."

8 A number of parties were granted standing at the inquest under s. 28 of the *FIA*. These are: the Government of Manitoba (represented by the Department of Labour and Immigration, Workplace Safety and Health Division), the United Steelworkers of America – Local 7106 (the

Steelworkers), three other unions (collectively, the unions) and the Manitoba Federation of Labour.

9 Before the commencement of the inquest, Crown counsel sent copies of certain materials to all the parties who had been granted standing. These materials included notes of interviews of 78 individuals conducted by the Joint Workplace Safety and Health Committee, consisting of union and management representatives (the joint committee), and statements from 33 individuals who had met with Manitoba's Workplace Safety and Health Division (Mines Branch) (WS&H). Most of the 33 individuals who met with WS&H had also met with the joint committee.

10 Crown counsel wished to interview some potential witnesses himself. Those interviews, conducted by Crown counsel and the inquest coordinator, were tape-recorded and transcribed. Each person interviewed was given a copy of the transcript of his or her interview.

11 Crown counsel refused Hudson Bay's requests for copies of the interview transcripts. Hudson Bay attempted to interview union members identified by Crown counsel as likely to be giving evidence at the inquest, but virtually all of these employees refused to meet with them. As a matter of fact, while the unions encouraged their members to give Crown counsel their full cooperation, they also encouraged their members not to speak to their employer, Hudson Bay. Crown counsel maintains that the only way he could obtain interviews with the witnesses was by agreeing that the interviews would not be held in the presence of representatives of Hudson Bay.

12 Crown counsel subsequently gave a list of persons "likely to be giving evidence at the fatality inquiry" to the parties with standing. The list included 91 names. Many had met previously with the joint committee and/or WS&H. There were 22 people on the list who had not been interviewed by either the joint committee or WS&H.

13 The inquest began on January 13, 2004. During the 12 days of hearings, 12 witnesses testified. Of those 12, six were interviewed previously by Crown counsel and five confirmed that they had reviewed the transcripts of their interview before testifying at the inquest. The evidence given by at least one of the inquest witnesses at the hearing, T. D. Wolokoff, contained information that was not present in either one of his previous statements to the joint committee and WS&H.

14 Hudson Bay brought a motion in front of the inquest judge requesting that Crown counsel provide all persons with standing with copies of the transcripts. The inquest judge dismissed the motion, whereupon Hudson Bay filed an application pursuant to Queen's Bench Rules 14.05 and 68 for an order quashing the decision and compelling production of the transcripts. Finding that the application raised important issues for this inquest and inquests generally, the inquest judge ordered that the taking of evidence be suspended pending a decision on the application and any appeal therefrom.

15 At the hearing of the application in the Court of Queen's Bench, Crown counsel raised a preliminary objection to the effect that the inquest judge did not have the jurisdiction to order disclosure. The applications judge agreed with him and dismissed the application on that ground without dealing with the merits of the case. On appeal, this court allowed Hudson Bay's appeal, finding that the inquest judge did have the jurisdiction to make

the order sought and ordered the matter returned to the Court of Queen's Bench for a determination on the merits ((2004), 190 Man.R. (2d) 231, 2004 MBCA 182, 2005 MBCA 9).

16 The application came on for hearing on the merits before a different Queen's Bench judge, who dismissed the application, finding that the inquest judge did not err when he found that the transcripts were privileged and that they need not be disclosed. This is an appeal from that judgment.

17 The grounds of appeal are as follows:

(1) it was an error of law to find that the transcripts were privileged; and

(2) if they are not privileged, based on the requirements of natural justice, procedural fairness, the purpose and function of an inquest and the role of Crown counsel at that inquest, copies of the transcripts should be disclosed to all persons with standing at the inquest.

18 Hudson Bay also argued that all or portions of the affidavit of James Glynn should be struck out and that costs should not have been awarded to the Crown and the Steelworkers. Given my decision, it is unnecessary to deal with those latter two points.

THE INQUEST JUDGE

19 The inquest judge found that Crown counsel's primary purpose at the inquest was to ensure the interests of the government were protected. Consequently, the judge found that "the evidence gathered by Mr. Minuk [is] no different than a solicitor's interviews with a potential witness to a civil trial." In the alternative, he held that if he were wrong on the question

of work product or litigation privilege, the interview transcripts still should not be disclosed on the basis of fairness to Crown counsel. He reasoned that if the witnesses had known that the transcripts would have to be disclosed, then no interviews would have occurred. This would have put Crown counsel in an unfair position of being unable to prepare for the witnesses he was expected to put on the stand. The judge determined that because Crown counsel's work would be frustrated by disclosure, then disclosure should not be ordered in furtherance of the principles of procedural fairness.

COURT OF QUEEN'S BENCH

20 The applications judge reviewed the decision of the inquest judge on a standard of correctness and determined that procedural fairness did not dictate that the parties have access to the transcripts of the interviews. The court held that the interviews were not investigatory in nature, but were conducted as part of Crown counsel's preparation for the inquest. The interview transcripts constituted "work product," which was protected by litigation privilege. Therefore, the applications judge concluded that the inquest judge was correct to refuse disclosure of the transcripts.

STANDARD OF REVIEW

21 In this appeal, the court is conducting an appellate review of a lower court decision, not judicial review of an administrative decision. Thus, our task is to determine whether the reviewing judge chose and applied the correct standard of review. The question of the right standard to select and apply is one of law and therefore must be answered correctly by a reviewing judge. If the right standard of review was applied and the issue in dispute

was a question of law, the appeal court must then determine whether the question of law was answered correctly.

22 The Queen's Bench judge properly found that the standard of review in this case was the standard of correctness. He found (at paras. 40, 42):

> In the application before me I have what I consider to be a question of law, namely, whether, in the factual context before him, a judge of the Provincial Court of Manitoba, the respondent, Judge Cummings, erred in failing to compel counsel for the Crown to disclose transcripts of interviews he conducted with potential witnesses at an inquest.
>
> Having considered and balanced the four factors referred to by McLachlin, C.J.C., in **Pushpanathan**, [[1998] 1 S.C.R. 982], I have concluded that the appropriate standard of review here is that of correctness. ….

His decision on this point is consistent with the applicable authorities. See *Dr. Q v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226, 2003 SCC 19, *Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247, 2003 SCC 20, and *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982.

23 At issue on this appeal is whether the Queen's Bench judge correctly applied that standard; that is, whether the decision on law of the inquest judge was correct.

ARGUMENT OF THE PARTIES

24 Hudson Bay argues that the role of Crown counsel in an inquest is to protect the public interest, not the interests of the government. Consequently, it is similar to the role of a criminal Crown attorney, the disclosure requirements of *Stinchcombe* should apply and all relevant materials that are not privileged should be disclosed. Alternatively, they maintain that principles of natural justice and procedural fairness apply to inquests. In that context, the truth-seeking mission of an inquest requires that all relevant material that is not privileged should be disclosed to all interested parties with standing.

25 Hudson Bay submits that "work product privilege" or "litigation privilege" is not applicable as an inquest is not litigation. They also say that the four components of Wigmore's case-by-case privilege test are not met (*Wigmore on Evidence*, McNaughton rev. 1961 (Boston: Little, Brown and Company, 1961) vol. 8 at para. 2285).

26 The Government of Manitoba, represented by the Department of Labour and Immigration, Workplace Safety and Health Division, is in substantial agreement with Hudson Bay. They submit that it is they who represent the interests of the government at this inquest. The role of Crown counsel at the inquest is to represent the public interest, and therefore, at a minimum, disclosure should be ordered of "will say" or "can say" statements of witnesses who have previously provided statements, but who have now provided Crown counsel with new and inconsistent information, as well as evidence of facts that arise from Crown counsel's interviews of

witnesses who have not previously provided statements to either WS&H or to the joint committee.

27 WS&H agrees with Hudson Bay that there was no evidence before the judge to enable the interview transcripts to be characterized as either being "not investigatory" or in the nature of "work product."

28 On the other hand, Crown counsel argues that *Stinchcombe* does not apply as this is not a criminal proceeding and there is no requirement for full answer and defence. He further argues that the failure of the judge to order disclosure of the transcripts did not contravene the principles of natural justice and procedural fairness as the parties had other statements of the witnesses and had the right to cross-examine them. As well, this was the only way he could convince the unions to allow him to interview the union witnesses.

29 With respect to privilege, he argues that the transcripts are privileged as work product, produced solely for the purpose of his personal preparation for the inquest, an inquest being a broad type of litigation. The Steelworkers agree with the position taken by Crown counsel.

WAS THE DETERMINATION THAT WORK PRODUCT PRIVILEGE APPLIED TO THE TRANSCRIPTS AN ERROR OF LAW?

30 In Robert W. Hubbard, Susan Magotiaux & Suzanne M. Duncan, *The Law of Privilege in Canada*, looseleaf (Toronto: Canada Law Book, 2006), the authors summarize the litigation or work product privilege rule as follows (at paras. 12.10, 12.20):

> Litigation privilege, also called work product privilege, applies to communications between a lawyer and third parties or a client and third parties, or to communications generated by the lawyer or client for the dominant purpose of litigation when litigation is contemplated, anticipated or ongoing. Generally, it is information that counsel or persons under counsel's direction have prepared, gathered or annotated.
>
> Litigation privilege is a product of the adversarial process and exists to allow lawyers to prepare their cases with some protection of privacy.

31 In R.J. Sharpe, "Claiming Privilege in the Discovery Process" in *Law in Transition: Evidence*, L.S.U.C. Special Lectures (Toronto: De Boo, 1984) 163, the rationale behind litigation privilege was discussed (at pp. 164-65):

> Litigation privilege, on the other hand, is geared directly to the process of litigation. …. Its purpose is more particularly related to the needs of the adversarial trial process. Litigation privilege is based upon the need for a protected area to facilitate investigation and preparation of a case for trial by the adversarial advocate. In other words, litigation privilege aims to facilitate a process (namely, the adversary process), ….
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> RATIONALE FOR LITIGATION PRIVILEGE
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> Relating litigation privilege to the needs of the adversary process is necessary to arrive at an understanding of its content and effect. The effect of a rule of privilege is to shut out the truth, but the process which litigation privilege is aimed to protect – the adversary process – among other things, attempts to get at the truth. There are, then, competing interests to be considered when a claim of litigation privilege is asserted; there is a need for a zone of privacy to facilitate adversarial preparation; there is also the need for disclosure to foster fair trial.

32 The most widely cited case on litigation privilege is probably *General Accident Assurance Co. v. Chrusz* (1999), 180 D.L.R. (4th) 241 (Ont. C.A.).

In this case, the Ontario Court of Appeal undertook a comprehensive analysis of litigation privilege. Carthy J.A., with the approval of the rest of the court on this matter, quoted with approval the passages from the above paragraph. Doherty J.A., agreeing with Carthy J.A. on the applicability of these passages, noted in particular that he agreed with (at para. 134):

> [Carthy J.A.'s] conclusion that litigation privilege exists to provide "a protected area to facilitate investigation and preparation of a case for trial by adversarial advocates."

33 Carthy J.A. also noted that "[w]hile solicitor-client privilege stands against the world, litigation privilege is a protection only against the adversary" (at para. 43). See also, *Chmara v. Nguyen* (1993), 85 Man.R. (2d) 227 (C.A.), and *G. (N.) v. Upper Canada College* (2004), 70 O.R. (3d) 312 at para. 13 (C.A.).

34 *Black's Law Dictionary*, 7th ed., defines the terms "adversary proceeding" as "[a] hearing involving a dispute between opposing parties" and "adverse party" as "[a] party whose interests are opposed to the interests of another party to the action."

35 All of this jurisprudence confirms that litigation privilege only applies to a document if that document was created for the dominant purpose of use in actual, anticipated or contemplated litigation. Litigation privilege is a product of the adversarial process and exists to provide a lawyer with a zone of privacy into which "opposing" adversarial parties cannot pry.

36 What then is the nature of an inquest under the *FIA*? Could it be characterized as litigation? Does an inquest have adversarial parties? Does

Crown counsel under the *FIA* require a zone of privacy within which to prepare his "case"?

37 At the appeal, Crown counsel warned us to be cautious in relying upon jurisprudence outside of Manitoba in our interpretation of the nature of an inquest under the Manitoba *FIA* since the legislation in each province differs. This is true, and the differences must always be kept in mind. However, with respect to the issues that concern us, an examination of the legislation in other provinces reveals that there are some fundamental similarities as to the essential purpose of these inquests and the role of counsel.

38 First, some comments should be made about terminology. Although this Act is entitled *The Fatality Inquiries Act*, it uses the phrase "inquest" when referring to the hearing conducted by the provincial judge. To avoid confusion, I will use the term "inquest" for the hearing in this case and I will use the term "inquiry" where the proceeding is under public inquiry legislation. Unlike inquests, inquiries are not limited to merely death-related matters.[1]

39 A review of the inquest legislation across Canada reveals that although the form of the legislation differs vastly, the fundamental aspects of

[1] Public inquiries are a different matter, although they may have some goals similar to inquests. All provinces, except Manitoba, have *Public Inquiries Acts*. Manitoba's public inquiry legislation is included in Part V of *The Manitoba Evidence Act*, R.S.M. 1987, c. E150. There is also a federal *Inquiries Act*, R.S.C., 1985, c. I-11. For the most part, the legislation permits inquiries into broad matters of public concern. In most public inquiries, the commissioner has counsel appointed to assist him (*The Manitoba Evidence Act*, s. 93(1)). For a more in depth discussion of the characteristics of inquiries, see the articles "Commissions of Inquiry and Public Policy in Canada" by Frank Iacobucci, Q.C., in A. Paul Pross, Innis Christie & John A. Yogis, *Commissions of Inquiry* (Toronto: Carswell, 1990) 21, and "Mandates, Legal Foundations, Powers and Conduct of Commissions of Inquiry" by A. Wayne MacKay in A. Paul Pross, Innis Christie & John A. Yogis, *Commissions of Inquiry* (Toronto: Carswell, 1990) 29. Fundamentally though, a public inquiry, like an inquest, is concerned with being a fair, fact-finding process, and in that way, some of the jurisprudence related to inquiries may also be helpful to our analysis.

the various regimes which impact on the issues in this case are extremely similar. All regimes clearly support the inquest as being an independent, fact-finding inquiry. The judges and coroners must all be impartial and independent, and they are charged with the primary duty of gathering the relevant facts surrounding the death of the deceased.[2] All of the regimes also support the idea of the inquest being in the public interest. This is reflected in provisions such as those which permit the coroner or judge to make recommendations to prevent similar deaths in the future[3], which mandate a public inquest, which give interested persons or groups standing and which permit the Attorney General or Crown to be represented.

40 All of the regimes also pay considerable attention to procedural matters, thereby indicating that inquests are to be conducted in a fair and impartial manner. In this regard, one may look at the provisions which permit the judge or coroner to stop vexatious or irrelevant questioning[4], which allow witnesses to have counsel present and which permit interested persons the ability to apply for standing and to examine, cross-examine and sometimes call their own witnesses and present arguments. Most regimes do not allow blame to be assigned or findings of legal responsibility to be made.

41 The importance of gathering all of the relevant facts is reflected very clearly in most of the regimes by the provisions surrounding the subpoenaing of witnesses and the requirement that witnesses testify fully.

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[2] See: R.S.A. 2000, c. F-9 (AB), s. 53(1); R.S.B.C. 1996, c. 72 (BC), s. 27(1); *FIA*, s. 33(1)(a); R.S.N.B. 1973, c. C-23 (NB), s. 26; S.N.L. 1995, c. P-31.1 (NL), s. 49(1); R.S.N.W.T. 1988, c. C-20 (NT/NU), s. 55(1); S.N.S. 2001, c. 31 (NS), s. 39(1); R.S.O. 1990, c. C.37 (ON), s. 31(1); R.S.P.E.I. 1988, c. C-25 (PE), s. 23; R.S.Q., c. R-0.2 (QC), s. 2; S.S. 1999, c. C-38.01 (SK), s. 54(1); R.S.Y. 2002, c. 44 (YT), s. 24(1).

[3] See: AB, s. 53(2); *FIA*, s. 33(1); NB, s. 25(1); NL, s. 49(2); NT/NU, s. 55(2); ON, s. 31(3); QC, s. 3 ("better protection of human life"); SK, s. 54(3).

[4] See: AB, s. 40(1); BC, s. 41(1)(c); *FIA*, s. 28(2); NT/NU, s. 48(1)(b); NS, s. 31(1); ON, s. 44(1); QC, s. 154; SK, s. 48(1)(b).

These provisions all support the viewpoint that although an inquest is not a forum in which blame is to be assigned, the coroner or judge should not shy away from examining all of the facts surrounding a death, even if that examination reveals facts which might have a damaging effect on someone legally or professionally. In most regimes, the goal of receiving all of the relevant information supersedes almost all other concerns. The only evidence that will generally not be receivable by the coroner or judge is evidence to which privilege attaches and evidence which is statutorily prohibited from being received.[5]

42 There are two general "death inquiry" systems – the coroner system and the medical examiner system. In the coroner system, the initial investigation of the death, the decision to hold an inquest and the conduct of the inquest is assigned to coroners. In most coroner systems, a jury is usually convened to hear the evidence and give the verdict. British Columbia, Saskatchewan, Ontario, Quebec, New Brunswick, Prince Edward Island, Northwest Territories and Nunavut and Yukon use coroner systems. In the medical examiner system, the initial investigation of the death and the decision to hold an inquest[6] is assigned to medical examiners and the conduct of the inquest is assigned to a judge, who writes the report. Manitoba, Alberta, Newfoundland[7] and Nova Scotia have medical examiner systems.

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[5] Where a person has been charged with causing the deceased's death, some provinces make that person non-compellable at the inquest. In most provinces, however, the inquest is simply stayed until the criminal trial is over. If the circumstances surrounding the death have been sufficiently inquired into in the criminal trial, then the judge or coroner may stay the inquest permanently. See: AB, s. 40(3); BC, s. 41(2); NT/NU, s. 48(2); NS, s. 31(3); ON, s. 44(2); QC, s. 179; SK, s. 48(2).

[6] In Alberta, a Board decides whether to hold an inquest – s. 33.

[7] S.N.L. 1995, c. F-6.1

43 The nature of the inquest under Manitoba's *FIA* appears to be in accord with that of most of the inquest regimes across Canada. The provisions of Manitoba's *FIA* clearly reveal that an inquest is intended to be fair and independent, as it is presided over by a judge. Other provisions of Manitoba's *FIA* reveal that fairness is critical. See, for example, s. 28(1) (standing to persons with interest, ability to have counsel and ability to cross-examine witnesses) and s. 28(2) (no vexatious cross-examination). The provisions of Manitoba's *FIA* also indicate that the goal of the inquest is to get to the full truth surrounding the death of the deceased in the public interest by receiving relevant evidence which is not inadmissible, but without assigning blame (s. 33(2)(b)).

44 This viewpoint also tends to be reflected in the meager case law in Manitoba. For example, in *Head and Head v. Trudel, P.C.J.* (1988), 54 Man.R. (2d) 145 (Q.B.), aff'd (1989), 57 Man.R. (2d) 153 (C.A.), Kroft J. (as he then was) stated (at paras. 10-11):

> …. The object of the **Fatal[ity] Inquiries Act** [S.M. 1975, c. 9 – Cap. F52] and an inquest conducted thereunder is not so much the protection of private rights as it is the furtherance of the public interest. That is, the community has a right to be informed about the circumstances surrounding sudden, suspicious or unexplained deaths.
>
> In that context it is important to understand that an inquest under the **Act** is not an adversarial trial; neither is it an examination for discovery. It is an inquisition into the circumstances of a death. There are no "parties", there is no cause of action or charge to be answered. The presiding judge does not try, does not commit and renders no judgment of either a criminal or civil nature. His findings and recommendations are not and never can be determinative of anyone's rights.

See also, *Swan v. Harris* (1992), 79 Man.R. (2d) 188 (Q.B.).

45 The fact-finding and public policy nature of an inquest under Manitoba's *FIA* is also made apparent in the following statement of Freedman J.A. in *Hudson Bay Mining and Smelting Co. v. Cummings, P.C.J.* (2004), 190 Man.R. (2d) 231, 2004 MBCA 182, 2005 MBCA 9 (at para. 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.

46 The legal literature about the purpose or role of inquests makes similar observations concerning the nature of the hearing, whether under the coroner or the medical examiner system. In R.C. Bennett, M.D., "The Role of the Coroner's Office" in *The Role of the Inquest in Today's Litigation* (Toronto: The Law Society of Upper Canada, 1975) 1, Dr. Bennett, a Deputy Chief Coroner in Ontario, stated (at p. 6):

> There is no other court that truly resembles an inquest. It is a provincial form of public inquiry into death and not a trial. …. The inquest form is inquisitorial rather than accusatorial and the investigating coroner is the presiding officer ….

And further (at p. 8):

> … [T]here is no real issue at an inquest, there is no defendant, no one is accused, no one is on trial and the adversary approach should be avoided.

See also, Christopher Granger, *Canadian Coroner Law* (Toronto: Carswell, 1984).

47 Thus, an inquest is designed to be an impartial, non-adversarial and procedurally fair, fact-finding inquiry committed to receiving as much relevant evidence about the facts and issues surrounding the death of a community member as is in the public interest, but without making findings of criminal or civil responsibility.

ROLE OF COUNSEL IN AN INQUEST

48 The Crown argues that even if the inquest itself is a non-adversarial process, the role of Crown counsel at that inquest is adversarial in that he or she represents the government, not the public interest. Consequently, Crown counsel has a client and is entitled to privilege over his work product. The inquest judge viewed "the evidence gathered by Mr. Minuk as no different than a solicitor's interviews with a potential witness to a civil trial" which "need never be disclosed … to the opposing side in the litigation." Concluding that an inquest is litigation, the Queen's Bench judge similarly characterized the transcripts as "[w]ork product … protected by litigation privilege" (at para. 54).

49 The role of counsel appointed to an inquest differs greatly from jurisdiction to jurisdiction. In general, it may be said that in coroner systems, a lawyer is usually appointed as counsel to the coroner and some sort of counsel is usually appointed to represent the interests of the Crown/Attorney General. But this is not always true. Conversely, in medical examiner systems, there is usually no counsel to the judge appointed, but counsel of some sort is usually appointed to represent the Crown/Attorney General.

50 So, for example, in Newfoundland, a person appointed by the Attorney General "to act for the Crown" may attend the inquest, examine and cross-examine witnesses and present arguments and submissions.[8] In Nova Scotia, "[a] Crown attorney or counsel for the Minister" shall appear at the inquest and may examine and cross-examine witnesses and present arguments and submissions.[9]

51 In Manitoba, "[a] Crown attorney or other officer or counsel" may be appointed by the Minister "to act for the Crown" and may examine witnesses called at the inquest.[10]

52 In enacting s. 27 of the *FIA*, the legislature has specifically used the term "Crown." In contrast, under s. 33(1), the *FIA* reads that recommendations may flow to the government:

> **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

[8] NL, s. 47(1)
[9] NS, s. 36(1)
[10] *FIA*, s. 27

> of deaths in circumstances similar to those that resulted in the death that is the subject of the inquest.

53 *The Interpretation Act*, S.M. 2000, c. 26 – Cap. I80, defines the term "government" and the term "Crown" separately and differently in the Schedule of Definitions as follows:

> **"government"** means Her Majesty the Queen acting for the Province of Manitoba;
>
> **"Her Majesty", "His Majesty", "the Queen", "the King"** or **"the Crown"** means the Sovereign of the United Kingdom, Canada and Her other realms and territories, and Head of the Commonwealth.

54 Reading these provisions in their ordinary sense, contextually and in accord with the purpose of the *FIA*, "Crown" must be given a different interpretation than "government." See *R. v. Gladue*, [1999] 1 S.C.R. 688 at para. 25. It cannot be intended that Crown counsel is to represent only the narrow interests of the government. To the extent that the Government of Manitoba may feel that it has any particular interests or rights to protect, it is entitled to seek standing at an inquest as an interested party under s. 28 of the *FIA*, as in fact it did in this inquest. The Government of Manitoba, represented by the Department of Labour and Immigration, Workplace Safety and Health Division, sought and received standing. The government is represented and its interests are protected by counsel for the Department of Labour and Immigration. Therefore, I conclude that Crown counsel appointed under s. 27 of the *FIA* represents the Crown at an inquest, and the Crown at an inquest represents the public interest. This would be in accord not only with the objectives of the *FIA*, but also other similar legislation across Canada.

55 One of the responsibilities of the Attorney General is the supervision of all matters connected with the administration of justice in the province. See s. 2(b) of *The Department of Justice Act*, R.S.M. 1987, c. J35. *The Crown Attorneys Act*, R.S.M. 1987, c. C330, in s. 5(1), sets out some of the general duties of a Crown attorney. Looking at them overall, it appears that the role of a Crown attorney is generally to assist in the administration of justice in the province. Thus, the function of Crown counsel at an inquest would be to assist in the administration of justice.

56 This view of Crown counsel under the *FIA* supporting the administration of justice is echoed in the legislative history of the *FIA*. When introducing changes to the *FIA* in 1975, the Attorney General stated:

> When the committee of three determines that an inquest is desirable, the Crown Attorney for the district is given notice of a decision and the Crown Attorney organizes for the inquest to be held.
>
> [Manitoba, Legislative Assembly, *Hansard* (9 April 1975) at 1102 (Mr. Pawley)]

57 In the advancement of the administration of justice and the public interest, Crown counsel at an inquest should be impartial and neutral. He performs a public duty which requires him to ensure that all available relevant evidence is presented in a fair, impartial and objective manner. The court, in the case of *Cronkwright Transport Ltd. v. Porter*, [1983] O.J. No. 558 (H.C.J.) (QL), commented that "[i]t is not the duty of the Crown at an inquest to have an adversary position" (at para. 8). This concept is reinforced in The Honourable Mr. Justice T. David Marshall, *Canadian Law of Inquests*, 2d ed. (Toronto: Carswell, 1991), when the author states (at p. 99):

> … [T]he mandate of the Attorney-General, when the Crown is not a party and there is no *lis inter partes* at an inquest, is only to preserve the general integrity of the law and the administration of justice.

58 Viewed in this light, Crown counsel does not have a "client"; there are no adversarial parties against whom he must maintain a zone of privacy. As stated earlier, the whole assumption which grounds the doctrine of litigation privilege is that it is related to litigation and the zone of privacy is required to facilitate adversarial preparation. There is no adversary here against whom Crown counsel's work product needs to be protected.

59 Even if I accepted the argument that there is some zone of privacy which every counsel requires, even in a proceeding such as an inquest, that zone of privacy should only apply to material that consisted of preparatory work or notes on strategy and tactics.

60 Crown counsel and the Steelworkers argued that the interviews were for the purpose of preparation only and were therefore privileged. They cited the cases of *R. v. O'Connor*, [1995] 4 S.C.R. 411, *R. v. Regan (G.A.)* (1997), 174 N.S.R. (2d) 72 (S.C.), and *R. v. Johal*, [1995] B.C.J. No. 1271 (S.C.) (QL), in support of this proposition. These cases do not support the proposition for which they are cited.

61 Let me be clear. I have found that it was an error of law to apply the doctrine of litigation privilege to a proceeding which is not litigation and in which there are no adversaries from whom these documents need to be shielded. I need go no further for the resolution of this point. However, in deference to the arguments of the parties and the findings of the lower courts, let me say a few words about "investigatory" work as opposed to

preparatory work in the criminal context, an analogy which was urged upon us by Crown counsel and the Steelworkers.

62 As mentioned previously, in the civil context, information or communications may be privileged or immune from disclosure where the dominant purpose of the communication is its use in actual, contemplated or anticipated litigation. In the criminal process, Crown counsel's role is different from the role of counsel for a party to civil litigation. Documents in a Crown brief are generally not subject to litigation or work product privilege. What is privileged are notes that involve thought processes or considerations of counsel in the preparation of his/her case. As pointed out in *R. v. Chan*, [2002] 7 W.W.R. 223, 2002 ABQB 287 (at paras. 95-96, 98):

> As indicated by McWilliam J. in *R. v. Stewart*, [1997] O.J. No. 924 (Ont. Gen. Div.) [QL] at para. 33, work product, at least in the criminal context, is "rooted in analysis, not investigation" and comprises "fruits of the mind, not of the feet." I adopt the definition that was in turn adopted by Mr. Justice Binder in *R. v. Trang #2* [(2002), 50 C.R. (5th) 242, 2002 ABQB 19] at para. 67:
>
> > Work product is usually in the form of written notes or material that involves thought processes or considerations of Crown counsel in the preparation of its case. In other words the product is the result of an analysis of the mind.
>
> In the criminal context "work product" generally includes, but is not limited to:
>
> 1. Crown counsel's notes on a file;
> 2. Crown counsel's memoranda on a file;
> 3. Correspondence;
> 4. Crown counsel's opinion; and
> 5. Trial strategy
>
> *Stewart*; *Derose* [(2000), 264 A.R. 359, 2000 ABPC 67]; *Mah* [(2001), 288 A.R. 249, 2001 ABQB 322].

> The parties all acknowledge that "work product" does not include factual information. As a result, where the material in question contains new facts not previously disclosed or facts inconsistent with previously disclosed information, those facts must be disclosed: *R. v. Brennan Paving & Construction Ltd.*, [1998] O.J. No. 4855 (Ont. C.A.) [QL]; *Derose*; ***Martin Report*** [*Report of the Attorney-General's Advisory Committee on Charge Screening, Disclosure and Resolution Discussions* (Toronto: Queen's Printer for Ontario, 1993)].

63 In the case of *O'Connor*, L'Heureux-Dubé J. pointed out that the Crown is not obliged to produce work product "provided that it contains no material inconsistencies or additional facts not already disclosed" (at para. 87). In the case of *Regan*, there was a request for disclosure which included notes of all Crown attorneys made in the course of interviewing potential witnesses. The court analyzed the notes, found that some of the interviews contained "highly relevant information of a purely fact finding nature" (at para. 29) and ordered such material disclosed. Again, in the case of *Johal*, the court ordered "will say" statements in regard to personal notes of a Crown attorney taken while interviewing a witness in preparation for direct examination where that interview disclosed information that was new or different from that already disclosed.

64 In the case at hand, only one transcript of an interview (with John Laidlaw) conducted by Crown counsel was filed as an exhibit. There were certainly arguments and submissions made by counsel, but that was the only evidence filed on the disclosure motion as to the nature of this material. A review of that evidence does not reveal a conversation based solely on counsel acquiring an understanding of the working of a smelter. Rather, it contains information of a factual nature and included a description of the

accident and Mr. Laidlaw's observations concerning the accident, both before and after the explosion.

65 As a matter of fact, a review of the entire transcript reveals no opinions, strategies or conclusions of Crown counsel. With respect to learning technical terminology, Crown counsel specifically states at the beginning that that is not the main purpose of the Laidlaw interview:

> Now we started out in a pretty general way with everybody. You're about the 16th or 17th that we have interviewed already so by now I know what a tapper is and where the slag holes are, where the matte holes are, where the furnace is, what the roaster is, what the converter is. We've sort of got a little bit of an idea. I would not say I am an expert but, we know, so you can use all of these terms and if we don't get it I will just ask you, okay?

66 The balance of the interview with Mr. Laidlaw focusses on Mr. Laidlaw's position at Hudson Bay and what he did on the night of the explosion. Most importantly in the course of that interview, new facts are revealed which were not previously known. As all counsel agreed, the precise circumstances and cause of the accident are not known. The processes involved are technical, and a layperson might not recognize the importance of certain facts. As counsel for WS&H pointed out, since experts were retained to help determine the cause of the accident, it is important to provide them with all the facts before they testify at the inquest. Of crucial importance then were Mr. Laidlaw's comments during his interview with Crown counsel that, after the explosion, he saw the "slag launder with water," that he "could see big red cracks" and that "the [matte] holes were plugged up." These were new facts not contained in the notes of his previous interviews conducted with the joint committee. Yet, without

disclosure of the transcript of his evidence, only Crown counsel had access to this information.

67 Besides new facts, it appears there was also inconsistent information presented at the inquest. Mr. T. D. Wolokoff testified at the inquest that he saw eight to ten inches of water in the furnace, but in his statements to the joint committee and WS&H, no water was mentioned. If his statement to Crown counsel was different or inconsistent on those facts, even based on the authorities cited by Crown counsel, those facts would have to be disclosed.

68 The issue of new or inconsistent facts was not considered by the reviewing judge or the inquest judge.

69 It would appear that, as a matter of law, at a minimum, according to these authorities, Crown counsel should disclose new and inconsistent information from witnesses who have previously provided statements, as well as interview transcripts from witnesses who have not previously provided statements to either WS&H or to the joint committee.

PRIVILEGE ON A CASE-BY-CASE ANALYSIS

70 It is argued further that if work product privilege is not applicable, then the transcripts are still privileged on a case-by-case analysis based on Wigmore's four criteria.

71 In *Slavutych v. Baker et al.*, [1976] 1 S.C.R. 254, the Supreme Court of Canada determined that the establishment of a privilege against the disclosure of communications can apply on a case-by-case basis by reference to the four Wigmore criteria. The four fundamental conditions

necessary to establish such communications are (*Wigmore on Evidence*, vol. 8 at para. 2285):

> (1) The communications must originate in a *confidence* that they will not be disclosed.
>
> (2) This element of *confidentiality must be essential* to the full and satisfactory maintenance of the relation between the parties.
>
> (3) The *relation* must be one which in the opinion of the community ought to be sedulously *fostered*.
>
> (4) The *injury* that would inure to the relation by the disclosure of the communications must be *greater than the benefit* thereby gained for the correct disposal of litigation.

72 These criteria were adopted by the Supreme Court in *R. v. Gruenke*, [1991] 3 S.C.R. 263, where Lamer C.J.C., for the majority, explained the "case-by-case" privilege in more detail (at p. 286):

> The term "case-by-case" privilege is used to refer to communications for which there is a *prima facie* assumption that they are <u>not</u> privileged (i.e., are admissible). The case-by-case analysis has generally involved an application of the "Wigmore test" (see above), which is a set of criteria for determining whether communications should be privileged (and therefore not admitted) in particular cases. In other words, the case-by-case analysis requires that the policy reasons for excluding otherwise relevant evidence be weighed in each particular case.

73 In this case, neither the inquest judge nor the reviewing judge entered into a consideration of the Wigmore criteria because they found that the materials were covered by litigation privilege. Therefore, an independent review is necessary.

74 The affidavit of James Glynn, President of IAMAW, Local 1848, was part of the evidence. At para. 5 of the affidavit, Mr. Glynn indicates that he

was made aware of the fact that Crown counsel wanted to interview union members and states, *inter alia*:

> I was informed by Mr. Bage that he would contact Mr. King for advice on what we should advise these members. Subsequently, I was informed by Mr. Bage that he was informed that Mr. King spoke with Mr. Minuk and was told that these meetings were only to assist him prepare for the inquiry, that the meetings would be confidential, and would not take place on work time or company property. As a result of these assurances, Mr. Bage and I agreed to encourage our members who were approached by Mr. Minuk to co-operate fully with him.

He states further, at para. 10 of the affidavit:

> If I, and I believe on information that I received that this view is shared by other union representatives, had known that transcripts or any record of the meetings held between Mr. Minuk and potential witnesses would be required to be copied for other parties, we would have advised our members to exercise their right not to give evidence until required to at the inquest under the authority of a subpoena.

75 The evidence also includes a copy of the newsletter as an exhibit to Mr. Glynn's affidavit which advised the union members that Mr. Minuk would be interviewing potential witnesses and that the union encouraged the members to provide Mr. Minuk with their full cooperation.

76 With respect to the first Wigmore criterion, in *Gruenke*, Lamer C.J.C. stated (at p. 292):

> … [I]t is absolutely crucial that the communications originate with an expectation of confidentiality (in order for those communications to be qualified as "privileged" and to thereby be excluded from evidence). Without this expectation of confidentiality, the *raison d'être* of the privilege is missing.

77 Clearly, these comments indicate that there must be evidence that suggests that the people making the communications expected that the communications would be confidential, in the sense that they would not be disclosed to anyone else. The evidence does not establish the presence of the first Wigmore criterion – the expectation of confidentiality. Hudson Bay argued that this court should not rely on the statements of Mr. Glynn in his affidavit because they are, at best, second- or third-hand hearsay and therefore inadmissible. But even relying on them does not advance the argument. Although the affidavit of Mr. Glynn indicated that he was told, somewhat third-hand, that the interviews would be "confidential," there was no evidence from any of the people interviewed as to their expectations.

78 In fact, the newsletter put out by the union makes no mention of the interviews being "confidential." Rather, the newsletter speaks to the fact that Hudson Bay also wishes to interview these union members and the union feels that it is both unnecessary and possibly distressful to the members. It may be that the union representatives had an expectation of confidentiality, but that does not mean that each of the witnesses had that expectation. Further, although Mr. Glynn stated in his affidavit that he and other union representatives would have advised their members not to speak to Mr. Minuk if they had known that the transcripts could be disclosed, this does not constitute evidence that the witnesses themselves had an expectation of confidentiality. It is also significant that, in the only transcript that was put into evidence, nothing was said about confidentiality. Therefore, it appears that there is no evidence that the witnesses themselves had any expectation of confidentiality.

79 In addition, it is my view that if the analysis taken in *Merrill Lynch, Royal Securities Limited Limitee v. Granove* (1985), 35 Man.R. (2d) 194 (C.A.), is taken here, the case-by-case privilege still would not apply. In *Merrill Lynch*, this court, at para. 15, accepted the approach of Taggart J.A. in *Bergwitz v. Fast* (1980), 108 D.L.R. (3d) 732 (B.C.C.A.), wherein he stated, with the concurrence of Carrothers J.A. (at p. 733):

> I think that the rules referred to by Spence, J., at … p. 260 …, of the *Slavutych* judgment, while forming useful guides when considering whether a claim of privilege such as the one advanced here should be acceded to, ought not to dominate the Judges' consideration of that request. Rather, to use the language of Thurlow, J., in *Re Blais and Andras* (1972), 30 D.L.R. (3d) 287 at p. 292, [1972] F.C. 958, one should consider whether "the public interest in the proper administration of justice outweighs in importance any public interests that might be protected by upholding the claim for privilege."

80 In *Merrill Lynch*, Matas J.A., for the court, stated (at para. 19):

> I am not satisfied that the respondents have shown that the communications made to the investigator were made on a clear understanding of confidentiality. But assuming that the employees of ML thought so, should the appellant be denied production? In my view, refusing production would not be in accordance with the public interest in the proper administration of justice. The trend in Canada is to keep open the truth-finding function of the judicial process unless maintenance of confidentiality is deemed desirable for reasons of public policy. (See **Bergwitz**, supra; **Smerchanski v. Lewis et al.** (1981), 21 C.P.C. 105 (Ont. C.A.); **Attorney General for Nova Scotia v. Murphy et al.** (1978), 10 C.P.C. 279 (N.S.S.C.A.D.); **Campbell v. Paton et al.** (1979), 26 O.R. (2d) 14 (Ont. H.C.).

81 In support of this view, see the case of *Re Attorney-General of British Columbia and Messier et al.* (1984), 8 D.L.R. (4th) 306 (B.C.S.C.), in which

a special nursing audit report was determined, at an inquest, not to be privileged pursuant to the four Wigmore criteria. MacKinnon J. stated (at p. 311):

> The inquest was conducted by the coroners to investigate an unexpected and sudden death in a public institution caring for mental patients. The family of the deceased and the public at large are entitled to the fullest inquiry into the surrounding circumstances, and such disclosures, in my view, are of far greater importance than any need there may be to uphold a claim for privilege.

82 In my opinion, these comments are entirely applicable to the case at bar. The maintenance of the "open … truth-finding function" of an inquest is more important than keeping this information confidential.

83 I understand that Crown counsel felt that he had no choice but to conduct the interviews as he did because, otherwise, the union employees would not speak to him and it may be that the inquest judge would have had to subpoena individuals with no knowledge of their evidence ahead of time. I would not wish to comment on the dynamics between the unions and Hudson Bay that led to this result in a situation where all parties should have been focussed on the priority of determining the cause of Mr. Ewing's death. I also understand that while no blame or culpability will be determined at the inquest, its factual report may have some influence on later possible litigation. However, the introduction of partisan preoccupations into a proceeding that is designed to be non-partisan is not a development that should be encouraged by this court.

STANDARD OF DISCLOSURE AT AN INQUEST

84 Even if the interview transcripts are not privileged, a determination must still be made as to whether disclosure should be ordered.

85 Hudson Bay argued that considering the nature of an inquest, the appropriate standard of disclosure is similar to that in a criminal trial; that is, the standard set out by the Supreme Court of Canada in *Stinchcombe*.

86 In *Stinchcombe*, the Supreme Court of Canada determined that the Crown in a criminal proceeding has a legal duty to disclose all relevant information to the defence, subject to the Crown's discretion to withhold privileged information. The Crown has the discretion to determine relevance, but this discretion is reviewable by the trial judge, who is to be guided by the principle that information should not be withheld if there is a reasonable possibility that this will impair the right of the accused to make full answer and defence.

87 There is case law which applies the *Stinchcombe* level of disclosure outside of the criminal context. For a review of cases in which *Stinchcombe* has been applied outside the criminal context, see *Hammami v. College of Physicians & Surgeons (British Columbia)* (1997), 47 Admin. L.R. (2d) 30 at paras. 61-75 (B.C.S.C.). In *Hammami*, the issue was whether the *Stinchcombe* disclosure principles applied to disclosure of information in the hands of the College of Physicians and Surgeons when making a decision to terminate or restrict a member's practice. Williams C.J.S.C. conducted a full review of the relevant decisions and concluded (at paras. 75, 78):

> It seems to me the following principles can be gleaned from the above cases:
>
> 1. The *Stinchcombe* case itself arose in the criminal context and held that full disclosure must be made in indictable offenses, and that it may be applicable in other offenses as well.

> 2. That in cases arising from the administrative law context where the decision of an administrative tribunal might terminate or restrict the "accused's" right to practice or pursue that career or seriously impact on a professional reputation then the principles in *Stinchcombe*, in respect of disclosure may well apply.
>
> 3. In appropriate cases the court's approach should be as outlined by the Court of Appeal in *G. (J.P.) v. British Columbia (Superintendent of Family & Child Services)* [(1993), 77 B.C.L.R. (2d) 204] and that is where the disclosure "might have been useful" then disclosure should be made by the Crown (or tribunal) unless there is "any special reason why such material should not be disclosed" and in those circumstances the special reason should be brought to the attention of the judge or tribunal.
>
> . . . . .
>
> I have concluded that this is the type of case where the principles of the *Stinchcombe* [case] should be applied, particularly bearing in mind its unsettling history. The important principle to be followed here is that set forth by our Court of Appeal in *G. (J.P.) v. British Columbia (Superintendent of Family & Child Services)*; full disclosure of the file should be made unless there is good reason why not.

88 Although the findings on an inquest may certainly impact an individual's reputation, it does not directly affect a person in a way similar to a disciplinary hearing (*Sheriff v. Canada (Attorney General)*, [2006] F.C.J. No. 580 (QL), 2006 FCA 139, at para. 29, *per* Malone J.A.) or a human rights hearing (*Human Rights Commission (Ont.) v. House et al.* (1993), 67 O.A.C. 72 (Div. Ct.)) or a child protection hearing (*G. (J.P.) v. British Columbia (Superintendent of Family & Child Services)* (1993), 77 B.C.L.R. (2d) 204 (C.A.)).

89 This was made clear by the Supreme Court of Canada in *May v. Ferndale Institution*, [2005] 3 S.C.R. 809, 2005 SCC 82. In that case, the

Supreme Court of Canada considered whether the *Stinchcombe* level of disclosure applied in relation to decisions made by the Ferndale Institution to transfer inmates from minimum to medium security. The majority of the Supreme Court considered the issue as follows (at paras. 89-91):

> The appellants contend that the disclosure requirements set out in *Stinchcombe* apply to the present case because the transfer decisions involved the loss of liberty. On the other hand, the respondents argue that the proper context in which to deal with involuntary transfers is administrative law and not criminal law. The *Stinchcombe* disclosure standard is fair and justified when innocence is at stake but not in situations like this one.
>
> We share the respondents' view. The requirements of procedural fairness must be assessed contextually in every circumstance: *Ruby v. Canada (Solicitor General)*, [2002] 4 S.C.R. 3, 2002 SCC 75, at para. 39; *Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653, at p. 682; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, at para. 21; *Chiarelli v. Canada (Minister of Employment and Immigration*), [1992] 1 S.C.R. 711, at p. 743; *Therrien (Re)*, [2001] 2 S.C.R. 3, 2001 SCC 35, at para. 82.
>
> It is important to bear in mind that the *Stinchcombe* principles were enunciated in the particular context of criminal proceedings where the innocence of the accused was at stake. Given the severity of the potential consequences the appropriate level of disclosure was quite high. In these cases, the impugned decisions are purely administrative. These cases do not involve a criminal trial and innocence is not at stake. The *Stinchcombe* principles do not apply in the administrative context.

90 In summary, *Stinchcombe* standards of disclosure will generally not apply outside of the criminal context unless an interest equal to a person's innocence and right to full answer and defence are at stake. That is not the case here. Therefore, I find that the standard of disclosure developed by the Supreme Court in *Stinchcombe* is not applicable to an inquest.

PROCEDURAL FAIRNESS

91 There cannot be any serious dispute that the principles of natural justice and procedural fairness apply to the conduct of both inquests and inquiries: *People First of Ontario v. Porter, Regional Coroner Niagara* (1992), 6 O.R. (3d) 289 (C.A.); *Canada (Attorney General) v. Canada (Commission of Inquiry on the Blood System)*, [1997] 3 S.C.R. 440; and *Mondesir v. Manitoba Association of Optometrists* (1998), 129 Man.R. (2d) 96 (C.A.). Although there is no finding of liability or blameworthiness, the findings of fact and the conclusions of the inquest judge may well have an adverse impact upon the reputation of a witness or a party to the inquest. Moreover, the truth-seeking function of the inquest is enhanced when parties given standing have an opportunity to effectively prepare.

92 This is consistent with the approach taken by Kroft J. in *Head and Head*, when he determined that there was nothing in the inquest judge's conduct that amounted to a "violation of the principles of natural justice" (at para. 27).

93 The Supreme Court of Canada, in *May*, while rejecting the *Stinchcombe* level of disclosure, also confirmed that disclosure obligations could still apply consistent with statutory obligations and procedural fairness. The majority indicated (at para. 93):

> Therefore, the fact that *Stinchcombe* does not apply does not mean that the respondents have met their disclosure obligations. As we have seen, in the administrative law context, statutory obligations and procedural fairness may impose an informational burden on the respondents.

94 The content of procedural fairness is contextual and dependent upon the nature of the particular hearing. In *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, the Supreme Court of Canada considered the allegation that a decision not to allow a woman to stay in Canada on humanitarian grounds violated procedural fairness. L'Heureux-Dubé J., for the majority, agreed that a duty of procedural fairness applied, that the concept of procedural fairness is infinitely variable and that its content has to be decided in the specific context of each case. L'Heureux-Dubé J. stated (at para. 22):

> Although the duty of fairness is flexible and variable, and depends on an appreciation of the context of the particular statute and the rights affected, it is helpful to review the criteria that should be used in determining what procedural rights the duty of fairness requires in a given set of circumstances. I emphasize that underlying all these factors is the notion that the purpose of the participatory rights contained within the duty of procedural fairness is to ensure that administrative decisions are made using a fair and open procedure, appropriate to the decision being made and its statutory, institutional, and social context, with an opportunity for those affected by the decision to put forward their views and evidence fully and have them considered by the decision-maker.

95 L'Heureux-Dubé J. went on, in paras. 23-27, to consider five factors which could be used to determine the content of the duty of procedural fairness in a particular context. The first factor identified was the nature of the decision being made and the process followed in making it. The more the process resembled judicial decision-making, the more likely that procedural protections closer to the trial model will be required by the duty of fairness. The second factor was the nature of the statutory scheme and the role of the decision within the statutory scheme. Greater procedural protections, for example, will be required when no appeal procedure is

provided within the statute or when the decision is determinative of the issue. The third factor to consider is the importance of the decision to the individual affected. The more important the decision is to the lives of those affected and the greater its impact on those persons, the more stringent the procedural protections should be. The fourth factor considers the legitimate expectations of the person challenging the decision. Thus, if the promises or regular practices of a decision-maker lead someone to believe the same practice will be followed, it will generally be considered unfair for the decision-maker to act in contravention of those representations. Finally, the analysis of which procedures the duty of fairness requires should also take into account and respect the choices of procedure made by the agency itself.

96 Applying those criteria to an inquest, it appears that the context in which an inquest occurs and the process followed in an inquest is quite similar to the judicial process. A judge *qua* judge conducts the inquest, in public. Relevant evidence is heard, parties apply to have standing and can be represented by counsel. Witnesses can be subpoenaed, examined and cross-examined, and although the Manitoba legislation is silent on this matter, practice is clear that counsel can make submissions to the judge on legal and procedural issues. Although the decision of the inquest judge does not determine specific rights or liabilities of participants in a manner similar to a court, the inquest judge is able to receive evidence on a wide scope of matters which could affect professional or personal reputations and could affect issues relating to civil or criminal liability. See, for example, the *Swan* case and the Sophia Lynn Schmidt inquest (report dated February 5, 2003).

97 The inquest's purpose is also to provide recommendations to prevent future deaths. Therefore, not only is the inquest itself usually of great importance to the family of the deceased, but the recommendations have the potential to greatly affect the lives of members of the public generally. The inquest is also the last stage in the inquiry into an unexpected death for most people (barring criminal or civil proceedings) and is not subject to appeal. Although there are not "legitimate expectations" about disclosure *per se* at inquests, there are strong expectations that Crown counsel, as the primary advocate of the public interest, will elicit the truth by presenting relevant materials in a disinterested, dispassionate, neutral and non-adversarial way. All of these considerations therefore suggest that a high duty of fairness applies to inquests.

98 The failure to direct or order that all relevant evidence be produced to a party with standing prevents that party from participating as it is entitled to in an inquest and prevents the evidence from being fully and properly explored. In *People First of Ontario*, an inquest was held into the deaths of 15 developmentally handicapped children. The coroner refused to provide the deceased children's medical records to People First (a self-help group which had been granted standing) and provided only their own children's records to two mothers who also had standing.

99 An application for judicial review was dismissed by the Divisional Court ((1991), 5 O.R. (3d) 609), but an appeal from that decision was allowed by the Ontario Court of Appeal, which concluded (at pp. 291-92):

> In our view, the coroner erred in refusing to turn over the medical records of all the children and that refusal was a matter that, in the circumstances of the case, went to jurisdiction. Neither of the applicants could properly prepare for cross-examination on the cause

> of death without examining those documents. Through that examination they could be sure that all relevant information would be disclosed in evidence. …. The failure of the coroner to give the medical records to the applicants prevented them from participating as they were entitled to in the inquest and the coroner lost jurisdiction in so doing.

See also, *Gentles v. Ontario (Regional Coroner)* (1998), 22 C.R. (5th) 343 at paras. 65-66 (Ont. Div. Ct.).

100 Therefore, considering the inquest in its statutory and social context, the requirements of procedural fairness at an inquest should include the disclosure of all relevant, non-privileged materials in the possession of Crown counsel.

101 This conclusion accords with the trend in both criminal and civil litigation toward greater disclosure. Mention has already been made of the principle arising from *Stinchcombe* and its application to other contexts. Fuller disclosure requirements have been present in civil proceedings for many years. Justice Sopinka noted this in *Stinchcombe* (at p. 332):

> This change resulted from acceptance of the principle that justice was better served when the element of surprise was eliminated from the trial and the parties were prepared to address issues on the basis of complete information of the case to be met.

102 See also, *Chrusz*, where the Ontario Court of Appeal stated that "[t]he modern trend is in the direction of complete discovery" in relation to a civil suit (at para. 25). This view was accepted in *Blank v. Canada (Minister of Justice)*, [2005] 1 F.C.R. 403, 2004 FCA 287, at para. 28, and the court commented that "in the context of civil litigation … disclosure is done in a better search for the truth" (at para. 35).

103 Indeed, this court has held on several occasions that the public interest is better served by as much disclosure as possible. See *Hamulka v. Golfman* (1985), 35 Man.R. (2d) 189 at para. 20, and *Merrill Lynch*, at para. 19.

104 Not every instance of non-disclosure results in a breach of procedural fairness. The documents must be relevant, non-privileged and material to the fulfillment of the purposes of the inquest. However, when faced with an application for disclosure, an inquest judge should consider the factual circumstances of the case measured against that high standard.

105 A word or two should be said about the comment of the inquest judge that the fairness of the inquest was not affected by the non-disclosure because "all of the parties already have plenty of material." The issue is the relevance of the materials, not the amount of materials. As was indicated in *Stinchcombe*, even if defence counsel was able to interview a witness, "what the witness said on two prior occasions could be very material to the defence" (at p. 347).

COSTS

106 As stated by the inquest judge, this application has raised important issues for this inquest and inquests generally. Given the nature and importance of the questions raised, and in the circumstances of the inquest and the application, each party will bear their own costs.

CONCLUSION

107 An inquest under the *FIA* is a fact-finding exercise which attempts to determine the circumstances surrounding the death of the person who is the subject of the inquest and make recommendations so as to prevent a reoccurrence. As such, the evidence should be as complete and accurate as possible. Crown counsel represents the public interest, and his role is to facilitate the administration of justice and to be neutral, fair and impartial.

108 In accordance with the purpose of an inquest and the role of Crown counsel, procedural fairness requires the disclosure of all relevant, material and non-privileged information. Such disclosure has been routinely made in the past in Manitoba and is consistent with the authorities and contemporary legal requirements. A high standard of disclosure would assist the inquest judge in accomplishing the very wide purposes of an inquest and increase the likelihood of truly meaningful recommendations. This is particularly true in the facts in this case, where some of the transcripts contain new and sometimes different factual information not otherwise available to some of the parties with standing.

109 The contents of these interviews are not privileged or confidential. An inquest is not litigation in the sense that there are adversarial parties

engaged in a dispute. There is no evidence that the witnesses themselves, as opposed to the unions, had an expectation of confidentiality. The inquest judge and the reviewing judge erred in law when they held that Crown counsel was no different than a solicitor preparing an ordinary case and that these notes fell within the doctrine of work product privilege.

110 Although counsel for WS&H indicated she would be satisfied with "will says," someone would have to review all the transcripts and prepare the "will says." I do not believe that is an expeditious way to proceed in this particular case. "Will says" can be produced if the evidence is not available in a convenient format (that is, there are privileged parts to it) (see *Johal*, at paras. 7-10). Here, I have already held that the entire interview is not privileged and the interviews have already been transcribed. Therefore, I believe that the appropriate remedy would be for the inquest judge to order disclosure of the actual transcripts. It may be otherwise in different circumstances. The order of disclosure may be subject to such terms and conditions as may be agreed upon by the parties and, if necessary, ordered by the inquest judge.

111 One last comment. It has now been over six years since Steven Ewing died. It has been over two years since the hearings were adjourned pending appeals over the disclosure issue. Hindsight is easy. There is no question that this was a difficult issue. However, I wonder whether the decision to suspend hearings pending the appeals over this issue was the wise one. The law tends to frown on appeals with respect to interlocutory matters because they often lead to significant delays. Had an appeal been held after the conclusion of the hearings, as in the normal course of events, the refusal to order disclosure may have been a ground for judicial review.

112 So, for example, in the *People First of Ontario* case, the Ontario Court of Appeal commented (at p. 292):

> We entirely agree with the Divisional Court that it is undesirable to interrupt inquests with applications for judicial review. Whenever possible, it is best to let the inquest proceed to its resolution and then perhaps, if circumstances dictate, to take judicial proceedings.

See also, *Canada (Attorney General) v. Ontario (Regional Coroner)* (1998), 22 C.R. (5th) 359 at paras. 22-26 (Ont. Div. Ct.), *per* A. Campbell J.

113 The appeal is allowed.

_____ J.A.

I agree: _____ C.J.M.

I agree: _____ J.A.