

CORONER'S COURT
IN THE MATTER OF the *Coroners Act*, R.S.O. 1990, c. 37
AND IN THE MATTER OF
The Inquest into the deaths of Don Mamakwa and Roland McKay
BEFORE
David Cameron, Presiding Officer

RULING ON A MOTION TO EXCLUDE EVIDENCE

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I. Overview

- [1] Don Mamakwa and Roland McKay were both Indigenous men who died while in custody of Thunder Bay Police Service (TBPS). Both of their arrests involved suspicion of public intoxication, and both were being held in the lock-up at TBPS headquarters when they lost vital signs. Further commonalities in the two deaths include the facts that both men presented with an altered level of consciousness (assumed to be from intoxication), neither man received assessment or treatment from a nurse or doctor, and both men died from medical illness.
- [2] Inquests into their deaths are mandatory pursuant to sections 10(4) and 10(4.6.2) of the *Coroners Act*. The Chief Coroner has directed that the two cases will proceed as a single inquest pursuant to section 25(2) of the *Coroners Act*. The joint inquest is tentatively scheduled to proceed in the autumn of 2022.
- [3] During the investigation of Mr. Mamakwa's death, the coroner's office seized copies of security videos from the TBPS headquarters. The videos capture Mr. Mamakwa's booking and placement in police holding cells. They also capture the booking of another Indigenous man named Dino Kwandibens. This ruling concerns the admissibility of Mr. Kwandibens' booking videos at the inquest into the deaths of Mr. Mamakwa and Mr. McKay.¹

II. Facts

a) Arrest, detention and death of Don Mamakwa

- [4] On August 2, 2014, TBPS Constables ("Csts.") Ryan Krupa and Jeny Bailot were dispatched to respond to a call for service regarding an unconscious male on the steps of St. Andrew's Church in Thunder Bay. The male was later identified as Mr. Mamakwa.
- [5] Upon arrival, the officers observed that Mr. Mamakwa was slumped over on the stairs, drooling on himself. As they approached and began interacting with him, they detected a strong odour that they believed was alcohol, and possibly other odours. He was unable to stand on his own, so the officers assisted him in walking to the rear of their police cruiser. Emergency Medical Services ("EMS") arrived on scene soon after.

¹ The specific circumstances of Mr. McKay's death will not be further addressed in this ruling because, although important in the context of the inquest, Mr. McKay's circumstances are not relevant to this motion beyond the commonalities mentioned above. Mr. McKay died on July 20, 2017.

- [6] There may be conflicting evidence about what precisely occurred next, but I anticipate the jury will hear that Mr. Mamakwa told the officers and EMS that he had injuries to his knee and hip. He also said that he wanted to go to hospital because he was short of breath and/or could not breathe. EMS personnel spoke to him and determined that he did not appear to be short of breath and did not need to go to the hospital at that time. The jury may hear evidence about whether their examination of Mr. Mamakwa accorded with the applicable standards.
- [7] The officers arrested Mr. Mamakwa for public intoxication and for breaching a probation order that required him to abstain from alcohol. They transported him to the TBPS headquarters located at 1200 Balmoral Street (the “headquarters”). Once at the headquarters, they removed Mr. Mamakwa from the police cruiser and found a can of Lysol in his pants, which Cst. Krupa later threw in the garbage.
- [8] The officers booked Mr. Mamakwa and lodged him in his cell. The booking process is described in detail below. At around 3:00 a.m. on August 3, 2014, Mr. Mamakwa was discovered unresponsive in his cell. Resuscitation was attempted but was not successful and he was pronounced dead at the scene.
- [9] A forensic pathologist later determined that the cause of death was ketoacidosis complicating diabetes mellitus, chronic alcoholism, and septicemia. Ketoacidosis is a metabolic derangement where ketones in the blood lower the pH of the blood and many blood chemistry parameters are dangerously affected. Such blood chemistry imbalances can result in swelling of the brain, heart arrhythmias, and other metabolic problems. Untreated, ketoacidosis can result in death.
- [10] Ketoacidosis is most commonly precipitated by poorly controlled diabetes, but long-term alcohol use can also cause it and/or exacerbate the condition. Infection in the blood (septicemia) can also exacerbate ketoacidosis. Proper treatment of ketoacidosis involves reversing the condition with intravenous fluids and management of the levels of insulin, glucose, potassium, and sodium in a hospital setting.
- [11] Symptoms of ketoacidosis include confusion, weakness, abdominal pain, and vomiting. Signs of ketoacidosis include an altered level of consciousness, a chemical smell of acetone on the breath, and deep laboured breathing.
- [12] Mr. Mamakwa had a medical history of recurrent ketoacidosis requiring hospitalization.

b) TBPS Security Videos

[13] As part of the investigation into Mr. Mamakwa's death, the coroner's office seized copies of security videos from the sally port, booking area and cells area at TBPS headquarters. The content of the videos is described in detail below.

i) *Videos of Mr. Mamakwa's booking and placement in holding cells*

[14] Before entering the booking area, Mr. Mamakwa can be heard on the video stating that he is not drunk and that his hip and knee are hurting. After his handcuffs are removed, the officers escort him to a bench and help him sit down. Mr. Mamakwa states, "I can't even fucking move". Cst. Krupa tells Mr. Mamakwa he is going to be charged with breach of probation because one of his conditions is "to not be under any kind of intoxicating substance". Cst. Krupa also tells Mr. Mamakwa he will be given an opportunity to speak to a lawyer when he "sober[s] up a bit".

[15] Mr. Mamakwa can be heard breathing very heavily. Cst. Krupa asks if he is on any medication. Mr. Mamakwa responds, "Yeah ... I got lots". Cst. Krupa states, "He's lying". Mr. Mamakwa has difficulty describing the medication but states, "That's why I'm breathing hard". Cst. Bailot appears to be simultaneously completing Mr. Mamakwa's Charge Report. This Charge Report was seized as part of the coroner's investigation. The portion of the report dedicated to medications is marked "No".

[16] Cst. Krupa later tells Mr. Mamakwa, "Do you know why you're probably breathing like that? Is because you were drinking and huffing the Lysol. That's going to be my guess. The ambulance checked you out and said you were fine, so." The Charge Report makes no reference to Mr. Mamakwa's breathing or the can of Lysol found in his possession.

[17] Cst. Krupa tells Mr. Mamakwa to stand up. Mr. Mamakwa states, "I can't stand up". Cst. Krupa replies, "You're not a three-year-old child. Like get up". Csts. Bailot and Krupa assist Mr. Mamakwa to his feet and escort him into the hallway to be placed in his cell. Mr. Mamakwa can be heard saying, "I can't walk".

[18] Mr. Mamakwa's booking process was overseen by Cst. Jeff Tackney, who was the "Jailer" on duty. Cst. Tackney's duties included ensuring the safety of persons in custody, apprising the Staff Sergeant of the circumstances of each prisoner's arrest and adhering to the policy of the Care and Handling of Prisoners. The booking video shows Cst. Tackney interacting with his fellow officers and supervising the process of Mr. Mamakwa being lodged in his cell.

[19] The moving parties have not challenged the admissibility of the above-noted portions of the security videos depicting Mr. Mamakwa's booking and placement in holding cells. However, the admissibility of what comes next is in issue.

ii) *Videos of Mr. Kwandibens' booking and placement in holding cells*

[20] A few minutes after Mr. Mamakwa is lodged in his cell, the booking area video shows two other TBPS officers bringing another individual into the booking area. This individual was Dino Kwandibens, an Indigenous man, who was arrested for public intoxication shortly after 4:30 p.m. on August 2, 2014. Mr. Kwandibens was 49-years-old at the time of these events. He had a disability, having experienced the complete amputation of his right arm. He has since died for reasons unrelated to the actions depicted in the video.

[21] Mr. Kwandibens' booking process is captured in four video files:

- *Thunder Bay Police Service Booking Area Video Audio Enhanced Part 1 – Camera Depicting Bench* between time stamps 10:09 and 11:15 (Exhibit #1, Tab 3A);
- *Thunder Bay Police Service Booking Area Video Audio Enhanced Part 2 – Camera Depicting Bench* between time stamps 00:00 to 6:45 (Exhibit #1, Tab 3B);
- *Thunder Bay Police Service Video Depicting Hallway Area Adjacent to Cells* between time stamps 00:00 to 00:25 (Exhibit #1, Tab 4)
- *Thunder Bay Police Service Video Depicting Cells Area* at 00:00 to 01:27 (Exhibit #1, Tab 5)²

[22] The admissibility of these sections of the TBPS security videos are in issue at this motion. I will refer to these as “the Videos”.³

[23] These Videos show TBPS Csts. Neal Soltys and Blain Joynson dragging Mr. Kwandibens by his left arm and right shoulder area through the sally port door into the booking area. Immediately prior to this, one of the officers is heard saying “sack of shit”.

[24] The officers place Mr. Kwandibens face down on the ground in the booking area and remove his jacket and shoes while Cst. Soltys states, “Why is everyone a child?”. Cst. Soltys describes Mr. Kwandibens to Cst. Tackney as “Dino the Dinosaur Kwandibens.” Cst. Tackney can be heard singing, “Dino the Dinosaur, bum, bum, bum.”

[25] Cst. Joynson rolls Mr. Kwandibens over and up into a sitting position, with his legs stretched out in front of him. Mr. Kwandibens appears to be unable to remain in this position independently and so Cst. Joynson maintains control of him by holding onto his back. Cst. Joynson tells him to wake up and asks if he is okay, to which there is no response. Cst. Soltys states that Mr. Kwandibens is “being difficult”.

² The time stamps on the videos do not reflect the actual time when the incidents occurred.

³ The moving parties did not provide particulars of the specific videos they want excluded from evidence. Instead, their written submissions refer generally to booking videos or cell block videos capturing police interactions with Mr. Kwandibens. I am satisfied that they are referring to the Videos I have summarized in paragraph 21.

- [26] Cst. Tackney enters the booking area. Mr. Kwandibens is asked if he is going to walk and Cst. Soltys tells him to get up. Cst. Tackney asks him to look up, then whistles and claps in front of his face.
- [27] During this entire exchange, Mr. Kwandibens is still sitting in the same position with his back supported by Cst. Joynson. His body and left arm appear limp. He is again told to stand up. One of the officers tells him to “walk like a man” and Cst. Soltys says, “You got drunk like a man. So get up.”
- [28] The officers then decide to drag Mr. Kwandibens to his cell. They place him back in a lying position, with his face up. Cst. Soltys drags him by one foot while Cst. Joynson holds his sweatshirt to prevent his head from striking the floor. In the process of dragging him, it appears that his torso strikes a garbage can and his leg accidentally strikes the door frame. The officers reposition his body and continue dragging him out of view. Cst. Tackney is present during these events.
- [29] As Mr. Kwandibens is dragged down the hallway, an unidentified officer can be heard off camera saying, “Pain in the ass. Fucking [inaudible] bitch. Little bitch.”
- [30] Csts. Tackney, Soltys and Joynson return to the booking area and Cst. Tackney walks to his office. Cst. Soltys states, “Holy fuck. Like, these guys are getting shit drunk and then they can’t even walk. I mean, Christ. Babysitting service.” Cst. Soltys then prepares Mr. Kwandibens’ Charge Report. This Charge Report was seized as part of the coroner’s investigation. The section dedicated to recording injuries is marked “a”, the box dedicated to medications is marked “no”, the box for contact with counsel, is marked “no ... too intoxicated, Aug 2 2014 1650”. Mr. Kwandibens’ race was listed as “N/C”.

c) Police Services Act proceedings against Cst. Soltys

- [31] The TBPS was notified about the Videos. A *Police Services Act (PSA)* investigation ensued, ultimately resulting in Cst. Soltys pleading guilty to discreditable conduct. On February 29, 2020, a hearings officer accepted a joint submission for a penalty of forfeiture of 12 paid hours and a letter of apology written by Cst. Soltys.

III. Scope of the inquest

- [32] The issues that will be explored at the inquest into the deaths of Mr. Mamakwa and Mr. McKay are set out in the Scope of the Inquest (the “scope”) which is attached as Appendix A to this ruling. None of the parties has requested any amendments or revisions to the scope.

IV. Issue to be determined in this ruling

[33] Should I exclude the Videos from evidence at this inquest?

V. Positions of the Parties

[34] I received written submissions and heard oral arguments on January 14, 2021.

[35] The TBPS Chief of Police, Csts. Krupa, Bailot, Heyder, Tackney, Sgt. Reynolds, and Cst. Soltys are the moving parties to this motion. They argue that the Videos should be excluded from evidence because:

- The Videos are not relevant to the inquest, as they depict a separate incident involving two uninvolved officers and an unrelated individual. These individuals had no contact with Mr. Mamakwa and their actions are irrelevant to the circumstances surrounding his death.
- The interaction between Cst. Soltys and Mr. Kwandibens has already been the subject of a *Police Services Act* disciplinary action and there was no finding that his behaviour was motivated by racism, bias or stereotyping.
- The Videos are outside of the scope of the inquest.
- Any minimal probative value is outweighed by the prejudicial effects the Videos will have on the parties and the inquest process, including:
 - Reputational harm to the moving parties.
 - Prejudice to the inquest process by introducing an adversarial tone, inviting the jury to consider fault or blame, and distracting from the main issues.
 - Harm to the TBPS's efforts to build better relationships with Indigenous communities.

[36] Coroner's Counsel, the family of Don Mamakwa, the family of Roland McKay and Aboriginal Legal Services are the responding parties to this motion. They argue that the Videos should be admitted into evidence because:

- The Videos are relevant to paragraphs 1, 3, and 5 of the scope of the inquest. They show a pattern of stereotyping and non-compliance with TBPS policy. They may also assist the jury to understand the officers' general attitude and approach towards persons who present as intoxicated.
- The jury should have access to evidence suggesting systemic problems that may need to be addressed in preventative recommendations.
- Examining racism requires considering a broad range of circumstantial and contextual evidence. Inquiring into racism does not render the inquest an adversarial proceeding.
- Any minimal prejudice is outweighed by the Videos' probative value.

[37] In oral argument, counsel for the family asserted that my credibility with Indigenous communities will be severely undermined if I exclude the Videos from evidence. I have given this argument no weight in determining this motion.

VI. Governing Principles

[38] The admissibility of evidence at an inquest is governed by section 44 of the *Coroners Act*. The test for admission is broad and is not restricted to evidence that would be admissible in a court proceeding:

Admissibility of evidence

What is admissible in evidence at inquest

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

(a) any oral testimony; and

(b) any document or other thing,

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

[39] To begin with, the proposed evidence must be relevant and material. The threshold for relevance is not high in any proceeding. Evidence is relevant if it makes the existence of a material fact more or less probable. Evidence is material if what it is offered to prove is in issue in the proceeding.⁴

[40] Notably, section 44 defines “relevance” in relation to the “purposes of an inquest”. These purposes are described in section 31 of the *Coroners Act* and include the jury’s authority to make recommendations directed at the avoidance of further deaths or respecting any other matter arising out of the inquest. The Court of Appeal for Ontario has also emphasized an inquest’s broader public-interest function, which includes exposing systemic failings and conditions that threaten life.⁵

[41] Inquests are unique legal proceedings. Unlike a civil or criminal trial, an inquest does not determine rights or liabilities. Rather, it is an inquiry that leads to findings of fact regarding discrete verdict questions and possible recommendations. Inquests are non-adversarial, and juries are not permitted to assign blame or make findings of legal responsibility. Inquest verdicts and recommendations are directed at public safety and do not affect parties the same way as verdicts in criminal and civil trials.

⁴ *R. v. Candir*, 2009 ONCA 915 (CanLII) at paras. 47 to 48; *Gentles v. Gentles Inquest (Coroner of)*, 1998 CanLII 19472 (ON SCDC) at para. 7.

⁵ *Pierre et al. v. McRae*, 2011 ONCA 187 at paras. 21 to 22.

- [42] Evidence at an inquest is rarely restricted to the simple facts surrounding a person's death. Juries often learn about systems, processes and environments that are likely new to them. Their recommendations may be aimed at changing those systems, processes and environments. Therefore, evidence must provide to the jury an understanding of the overall environment and the systems and processes in place and how they work.
- [43] Restricting the evidence to the simple facts around one individual's death would inhibit the jury's ability to understand the circumstances of the death and make meaningful recommendations. For example, it may be essential for the jury to hear evidence about whether the circumstances that led to a death were isolated or part of a more general phenomena that could produce future deaths.⁶
- [44] Most importantly, an inquest is not purely a retrospective exercise. Inquests look back at the circumstances of a death primarily to determine what lessons can be learned to prevent similar tragedies from happening again. The death this inquest is aiming to prevent is not Mr. Mamakwa's or Mr. McKay's, but rather someone else's who is alive today.
- [45] Notwithstanding this broad approach, it is essential for inquests to remain focused. There are often many social issues that impact people's lives. To determine relevance in an inquest however, those issues must be tied to the specific deaths being examined. If they are not, then an inquest is not the place to address them no matter how important they may be. Otherwise, an inquest becomes indistinguishable from a public inquiry.⁷

VII. Analysis and Ruling

a) Relevance and Materiality

- [46] I find that the Videos are relevant and material to paragraphs 1, 3, and 5 of the scope. I will address each area of the scope separately.

i) Paragraph 1 of the scope

- [47] Paragraph 1 states that the inquest will examine:

How racism, bias and stereotyping may have been a factor in the Thunder Bay paramedics' and police officers' interactions with Don Mamakwa and Roland McKay. Practical solutions to address racism, bias and stereotyping in such interactions will be examined.

⁶ *Cronkwright Transport Ltd. v. Porter*, [1983] O.J. No. 558 (Div. Ct.) at para. 5.

⁷ *Ontario (Provincial Advocate for Children and Youth) v. Anderson Inquest (Coroner of)*, [2011] O.J. No. 2521 (SCJ) at paras. 18 and 30.

- [48] Supported with proper instruction to the jury, this inquest will explore evidence of racism, bias and stereotyping openly, honestly and without fear.⁸ All inquests should follow this approach, particularly because a goal of inquests is to prevent further deaths through change.
- [49] Mr. Mamakwa and Mr. Kwandibens were both Indigenous men who were booked at the same location within minutes of each other under the oversight of the same supervising officers. In both cases, the booking officers appeared to dismiss the possibility that the men were in medical distress, despite their presentation on the Videos. It appears the officers assumed that their conditions were benign and were due solely to self-induced intoxication.
- [50] The officers did not use overtly racist terms on the Videos, but some of their language could be considered by some to be implicitly racist. At the very least, the conduct in the booking videos is circumstantial evidence that could support an inference that the treatment of the two individuals was influenced by racism or stereotyping.
- [51] I agree with the moving parties that this inquest is not a forum to tackle racism, bias and stereotyping in policing at large. Inquests must remain focused on the circumstances of the deaths being examined.
- [52] However, the question of whether racism, bias or stereotyping was a factor in Mr. Mamakwa's death should not be examined in a vacuum. On its own, Mr. Mamakwa's treatment may appear to be an isolated incident. The fact that another Indigenous man was almost simultaneously experiencing very similar treatment may suggest systemic issues that need to be addressed to prevent further deaths. This is particularly relevant when exploring practical solutions in such interactions.
- [53] My determination that the Videos are relevant and material to paragraph 1 of the scope does not amount to a finding that any officer's conduct was in fact influenced by racism, bias or discrimination. Nor am I suggesting that the actions of one officer can explain the conduct of another officer.
- [54] It is not the function of this inquest to make findings of racism or discrimination directed at the TBPS or any specific officer. This is not a fault-finding exercise. The purpose of this inquest is to identify public safety issues and help the jury develop preventative recommendations, should they choose to do so. All the videos are relevant contextual evidence about the workplace culture at TBPS headquarters on the night of Mr. Mamakwa's death. The Videos will help the jury determine whether any issues they identify are part of a broader phenomenon that needs to be addressed.
- [55] I will instruct the jury on the proper use of this evidence, and its limitations, in relation to this area of the scope.

⁸ *R. v. Barton*, 2019 SCC 33 at para. 197.

ii) Paragraphs 3 and 5 of the scope

[56] Paragraph 3 states that the inquest will examine:

The goals and appropriateness of taking intoxicated people or suspected to be intoxicated people into police custody. This would include the limitations of medical assessments performed by paramedics and cell checks performed by the police officers as well as barriers that may exist to police taking intoxicated people or people suspected to be intoxicated to the hospital.

[57] Paragraph 5 states that the inquest will examine:

The policies and procedures regarding interactions between a police officer and an intoxicated person or a person suspected to be intoxicated. These interactions would include responding to a person's need for a health care assessment, the decision to make an arrest, interactions during the admission process and throughout the person's time in police custody. Police officer compliance with such policies and procedures will be in scope.

[58] The relevance and materiality to both these areas of scope are related. With respect to paragraph 3, the Videos provide useful insight into the challenges and risks of bringing individuals into custody who have altered levels of consciousness. The Videos contain evidence about the work environment on August 2, 2014, including the busyness (or quietness) of the headquarters, the general workplace culture and attitude, and the supports, facilities, and resources available to officers when booking individuals with an altered level of consciousness. Understanding the environment in which the deaths occurred will help the jury make useful, practical recommendations.

[59] The degree of police officer compliance with policies and procedures will also be examined and the Videos will help the jury assess whether any non-compliance was isolated or part of a broader pattern. The Videos provide additional insight into the supervision of the booking process and cell monitoring that night. For example, Cst. Tackney was responsible to fulfill the duties of the Jailer and was personally present during the booking process for Mr. Mamakwa and Mr. Kwandibens. Furthermore, Sgt. Tamara Reynolds was the Watch Commander at the relevant times and was ultimately responsible for ensuring that appropriate assistance was provided to any prisoner requiring medical attention.

[60] For the same reasons explained above in relation to scope paragraph 1, I find that the Videos will assist the jury with respect to paragraphs 3 and 5 of the scope. The Videos may help the jury understand whether there are systemic issues at the TBPS that need to be addressed through preventative recommendations.

iii) Summary re: relevance and materiality

[61] The Videos are relevant and material to the inquest and should be introduced into evidence unless there is an applicable exclusionary rule.

[62] Arguments were put forward by the moving parties that the Videos should be excluded because they are prejudicial to the parties and the inquest process, and because the issues in the Videos were already dealt with in Cst. Soltys' PSA hearing. I will address those arguments below.

b) Prejudicial Effect vs. Probative Value

[63] The moving parties contend that the Videos should be excluded from evidence because their prejudicial effect outweighs their probative value.

[64] The concept of weighing the probative value of evidence against its potential prejudicial effect is commonplace in criminal and civil trials. In those proceedings, the specific balancing varies depending on the circumstances of the case. For example, evidence that could lead a criminal jury to convict an accused based on perceived propensity, disposition or bad character is generally excluded unless the prosecutor can establish a high degree of probative value.⁹

[65] The parties to this motion have not provided any caselaw on how this analysis applies at an inquest. It appears the principles have not yet been explored in the inquest context.

[66] In my view, an assessment of the potential prejudicial effect of evidence must be guided by the purposes and functions of an inquest as set out in paragraphs 40 to 45, above.

i) *Prejudice to the inquest*

[67] I accept that it is appropriate for me to consider whether any proposed evidence may prejudice the inquest process. Some of the potential considerations include whether the evidence may:

- Transform the inquest into an adversarial process.
- Overemphasize peripheral issues.
- Distract from the focus of the inquest.
- Unduly lengthen the inquest or cause delays.
- Confuse the jury.
- Inflame the jury's emotions to the extent that they may make findings or recommendations that are based on inappropriate considerations.

[68] The moving parties argue that if the Videos are admitted into evidence, the inquest will lose its focus and become a "roving investigation". I disagree. The disputed portions of the Videos are discrete, and any contextual evidence required to explain their contents will have a minimal impact on the focus and duration of this inquest.

⁹ *R. v. B.(C.R.)*, 1990 CanLII 142 (SCC).

- [69] The moving parties also contend that the Videos will introduce an adversarial tone and lead the jury to consider and weigh fault or blame in arriving at their findings. I believe that the potential for this is minimal for the following reasons.
- [70] Evidence at an inquest is often upsetting and can elicit an emotional response in juries. This is not necessarily inappropriate so long as the evidence is not so inflammatory that it risks causing the jury to make findings or recommendations based on emotion rather than proper inferences from the evidence. Evidence can be prejudicial to an inquest if it will adversely affect the verdict or recommendations by inappropriately arousing the jury's hostility or sympathy to a party or a recommendation recipient or using emotion to exaggerate the magnitude of a potential problem.
- [71] Having presided at and witnessed many inquests, I am confident that a jury can calmly and rationally review the Videos and remain focused on the appropriate issues and considerations. Any potential risk can be cured by an instruction to the jury about the relevance and the proper use of the evidence.
- [72] I expect the parties and their counsel to refrain from arousing improper emotional reactions related to the viewing of any videos for collateral purposes and will remind counsel about this during the inquest if necessary.

ii) *Reputational harm*

- [73] The moving parties also assert that the Videos will damage the reputations of the TBPS and Cst. Soltys in the following ways:
- It will damage the reputation of the TBPS within the broader community and prejudice efforts to rebuild its relationship with the Indigenous community;
 - It will harm Cst. Soltys' career and professional reputation. The conduct on the Videos was an isolated incident that does not provide a thorough depiction of his career or an accurate reflection of the quality of his service. The jury will be left with an inaccurate impression of him as a police officer. He has already been disciplined and now his conduct will be publicly scrutinized again.
- [74] The moving parties have not provided any caselaw citing a requirement to balance this type of alleged prejudice in any kind of proceeding, let alone an inquest. Inquest juries regularly hear evidence that may damage the reputation of inquest parties. That is why parties with a reputational interest are granted standing and have the right to call and examine witnesses, conduct cross-examinations, and present arguments and submissions.
- [75] I find that I am not required to balance this type of potential reputational harm against the probative value of the Videos.

[76] In any event, I note that the Videos are already part of the public record because of the *PSA* proceedings. Accordingly, it is difficult to understand how playing the Videos for the inquest jury could do any further damage to the reputation of the TBPS or Cst. Soltys. Accordingly, even if I were required to weigh the potential for reputational harm, I find that the Videos' probative value outweighs any potential prejudice.

[77] Notwithstanding these comments, I acknowledge that presiding officers at inquests should be sensitive to the reputational impact of evidence and avoid gratuitously admitting evidence that could harm the reputation of witnesses or parties. This is a question of relevance, not prejudice, but it is still an important consideration that should not be treated lightly.

c) Cst. Soltys's *PSA* hearing

[78] Cst. Soltys submits that I should exclude the Videos from evidence because a *PSA* hearing officer has already made findings about their contents. For example, he refers to the hearing officer's findings that Mr. Kwandibens only became uncooperative upon arrival at the headquarters. He also points out that there was no finding that Cst. Soltys's behaviour was motivated by racism, bias or stereotyping or reason to believe that systemic or organizational failure impacted his conduct.

[79] Cst. Soltys has not provided any caselaw in support of his argument. I find that the *PSA* proceedings do not preclude the introduction of the Videos into evidence at this inquest. Inquests routinely hear evidence about incidents that have already been the subject of other legal proceedings. For example, inquests are mandatory when a worker dies while working at a construction project. Many of those deaths result in administrative appeals at the Ontario Labour Relations Board and prosecutions for alleged violations of the *Occupational Health and Safety Act*. Regardless of the outcomes of those prosecutions, inquests still proceed and hear evidence about the same facts that were canvassed in those other forums. Similarly, many deaths involving police officers are the subject of mandatory inquests. Inquest juries hear evidence about the circumstances of those deaths even if they were the subject of disciplinary hearings or criminal charges. There are many more examples.

[80] As noted above, the purpose of an inquest is not to determine liability, recommend punishment or place any blame. The purpose of introducing the Videos into evidence is not to relitigate an issue that has already been decided. It is to assist the jury in making preventative recommendations.

- [81] Furthermore, in *Penner v. Niagara (Regional Police Services Board)*, the Supreme Court of Canada explained the factors to be considered in determining whether findings from a police discipline proceeding should be given effect in other proceedings (referred to as the “doctrine of issue estoppel”). The fairness of the prior proceeding is one factor. In this case, it is significant that the findings at Cst. Soltys’ hearing were the result of an agreement between two of the moving parties. None of the other parties to this inquest participated or provided input.
- [82] The purpose of the legislative regime is another factor. The purpose of a police disciplinary hearing is to determine whether to impose employment-related discipline. There is nothing in the *PSA* to suggest that findings are meant to apply at a proceeding with a broad public interest mandate such as an inquest.
- [83] Finally, I note that the *PSA* empowers the Chief of Police, who is a party to this inquest, to appoint the investigator, prosecutor, and hearings officer in the discipline proceedings. Excluding the Videos from evidence at the inquest would arguably benefit the Chief by preventing further inquiry into the TBPS and its officers’ conduct.
- [84] Accordingly, based on the factors set out in *Penner*, I find that the doctrine of issue estoppel does not apply.¹⁰

VIII. Summary and Conclusion

- [85] The motion to exclude the Videos is denied. The Videos are relevant and material to paragraphs 1, 3 and 5 of the scope and will be admitted into evidence at this inquest. There are no applicable exclusionary rules that make the Videos inadmissible. Any potential prejudicial effect can be addressed through proper instruction to the jury.

I thank all counsel for their submissions.



David A. Cameron, M.D., LL.B., C.C.F.P.
Presiding Officer

March 16, 2022

¹⁰ *Penner v. Niagara (Regional Police Services Board)*, 2013 SCC 19 at paras. 29, 54 and 66. (“*Penner*”)

Appendix “A”

Inquest into the Deaths of Don Mamakwa and Marlon (Roland) McKay

Scope of the Inquest

This inquest will explore the circumstances surrounding the deaths of Don Mamakwa, who died on August 3rd, 2014, and Roland McKay, who died on July 20th, 2017. The evidence will be directed at assisting the jury to answer the five questions outlined in section 31(1) of the *Coroners Act* and to make recommendations to prevent further deaths. The jury will not be making any finding of legal responsibility or expressing any conclusions of law.

Specifically, we will be addressing the following issues with respect to the deaths of Don Mamakwa and Roland McKay:

1. How racism, bias and stereotyping may have been a factor in the Thunder Bay paramedics' and police officers' interactions with Don Mamakwa and Roland McKay. Practical solutions to address racism, bias and stereotyping in such interactions will be examined.
2. The assessment of an intoxicated person or a person suspected to be intoxicated by, and communication between, first responder services prior to an individual being transported elsewhere, including to hospital by paramedics or into police custody.
3. The goals and appropriateness of taking intoxicated people or people suspected to be intoxicated into police custody. This would include the limitations of medical assessments performed by paramedics and cell checks performed by police officers as well as barriers that may exist to police taking intoxicated people or people suspected to be intoxicated to the hospital.
4. Alternatives to bringing intoxicated people or people suspected to be intoxicated into custody, such as to sobering centres or hospitals.

5. The policies and procedures regarding interactions between a police officer and an intoxicated person or a person suspected to be intoxicated. These interactions would include responding to a person's need for a health care assessment, the decision to make an arrest, interactions during the admission process and throughout the person's time in police custody. Police officer compliance with such policies and procedures will be in scope.
6. Whether police policies, procedures and practices have been informed by other cell deaths at the Thunder Bay Police detachment since 2014, and the reports arising from the investigations of such deaths.
7. Medical illnesses that can mimic or exaggerate signs of intoxication and the supports (training, resources, etc.) that could help first responders identify such conditions.

The following issues will not be in scope at this inquest except as required to understand the factual circumstances of the death:

1. The emergency response and medical care provided to Don Mamakwa and Roland McKay after they were discovered unresponsive in their cells.
 2. The general availability of access to health care by citizens in Thunder Bay.
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