1989 CarswellOnt 441

Stanford v. Ontario (Eastern Regional Coroner)

STANFORD v. HARRIS

Ontario Supreme Court, Divisional Court

Craig, O'Brien and Campbell JJ.

Heard: February 20, 1989
Judgment: June 28, 1989
Amended Reasons for Judgment: July 25, 1989
Docket: Doc. No. 521/88

Counsel: Diane L. Martin, for applicant.

Michael W. Bader, for respondent.

Subject: Civil Practice and Procedure; Public

Judges and Courts --- Coroners -- Coroner's inquest -- Procedural requirements -- View.

Judges and courts -- Coroners -- Coroner's inquest -- Standing -- Inquest into suicide of inmate in unique "super-protective custody unit" in penitentiary -- Remaining inmates of unit unsuccessfully seeking standing at inquest -- Application for judicial review of coroner's decision -- Inmates having a "direct and substantial" interest in potential recommendations of inquest -- Coroners Act, R.S.O. 1980, c. 93, s. 41.

The applicant, the elected representative of all 20 prisoners in a "super-protective custody unit" at Kingston Penitentiary, sought standing, at a coroner's inquest, into the suicide of a mentally ill inmate of the unit. Super-protective custody, a form of administrative segregation, was used to isolate prisoners who were at great risk of injury and death from the general penitentiary population. The unit in question was a unique facility in the Canadian penitentiary system. The applicant sought standing on the basis that the recommendations which might emerge from the inquest could have a significant impact on these inmates, who were not only similarly situated, but uniquely and identically situated. The coroner declined to grant the applicant standing, holding that the applicant, and those he represented, had no "substantial and direct interest", within the meaning of s. 41 of the Coroners Act (Ont.) and that there was no residual discretion to grant standing aside from that section. The applicant applied for judicial review of the coroner's decision.

Held:

The applicant was granted standing.

Per Campbell J.

The first question was to determine the standard of review in scrutinizing the coroner's decision. The standard of review has been stated in three ways: (1) error in principle; (2) jurisdictional error; and (3) error in principle or jurisdiction. Practically, there might be little difference between error in principle and jurisdictional error. A serious error in principle, which deprived an applicant of standing, would likely result in such unfairness to the affected party's opportunity to participate that an unfair inquest would result, it being common ground that an error in principle producing an unfair inquest was an error going to jurisdiction.

In interpreting s. 41, the coroner applied a traditional private law approach which would restrict standing to those with a personal or pecuniary interest in the outcome of the inquest or to those whose conduct might be subject to implicit censure or criticism. Such an approach failed to give effect to the dominant pubic interest function of the inquest, which involved public scrutiny and recommendations about those conditions which might have caused or contributed to the death. The instant case was one in which the interest of the applicant in the recommendations was so acute that it amounted to a substantial and direct interest. There was a unique identity of legal interest between the deceased and the represented inmates. They had an extraordinary interest in any recommendation with respect to the conditions which totally dominated every aspect of their existence and which were alleged to have caused or contributed to the death in question. Any recommendations would thus affect the represented inmates most directly and specifically. The traditional private law interest test applied by the coroner failed to recognize that their interest in the recommendations was so acute as to be direct and substantial, and therefore reflected a jurisdictional error.

The coroner enjoyed a residual discretion to grant standing, quite apart from s. 41. The Legislature, in compelling the coroner to give standing as of right to those directly and substantially interested, did not intend to abrogate the coroner's previously recognized and well established wide discretionary power to grant standing. In the absence of express statutory words removing such a residual power, it could not be inferred that the Legislature intended to abolish this clearly recognized power, which helped to secure the legislative goals of the statute as a whole.

Per Craig J. (concurring)

The application for judicial review should be allowed on the basis of jurisdictional error. It was unnecessary to decide whether the coroner retained a residual discretion to grant standing.

Per O'Brien J. (dissenting)

The coroner fully and fairly considered the submissions before him and concluded that the applicant failed to show that the interest of the inmates was substantial and direct. Coroners have almost universally denied standing to those beyond the relatives of the deceased or those in respect of whom questions of responsibility or cul-

pability might be addressed. The test for review of such a decision was the test of jurisdictional error: did the coroner direct his mind to the issue before him and did any error of jurisdiction arise from a failure to do so? The coroner properly considered and applied s. 41. Moreover, the Legislature, in revising the procedures to be followed at a coroner's inquest, intended only to permit standing in situations where there was a direct and substantial interest.

Cases considered:

Brown and Patterson (No. 2), Re (14 April 1975), Wells C.J.H.C., Zuber and Weatherston JJ. (Ont. Div. Ct.) [unreported] -- distinguished

Brown and Patterson, Re (1974), 6 O.R. (2d) 441, 21 C.C.C. (2d) 373, 53 D.L.R. (3d) 64 (Div. Ct.) -- considered

Inmates Committee of Millhaven Institution v. Bennett (26 January 1978), Garrett L.J.S.C. (Ont. Div. Ct.) [unreported] -- distinguished

Inmates Committee of the Prison for Women and Meyer, Re (1980), 55 C.C.C. (2d) 308 (Ont. H.C.) -- considered

Martineau v. Matsqui Institution Disciplinary Bd. (No. 2) (1979), [1980] 1 S.C.R. 602, 13 C.R. (3d) 1, 15 C.R. (3d) 315, 50 C.C.C. (2d) 353, 106 D.L.R. (3d) 385, 30 N.R. 119 -- followed

Nicholson v. Haldimand-Norfolk Police Commissioners Bd., [1979] 1 S.C.R. 311, 78 C.L.L.C. 249, 88 D.L.R. (3d) 671, 23 N.R. 410 -- followed

On Our Own and King, Re (7 November 1980), Galligan J. (Ont. H.C.) [unreported]considered

Parents of Baby Gosselin v. Grange (1984), 8 Admin. L.R. 250, 4 O.A.C. 242 (Div. Ct.) -- considered

R. v. Miller, [1985] 2 S.C.R. 613, 52 O.R. (2d) 585, 49 C.R. (3d) 1, 16 Admin. L.R. 184, 63 N.R. 321, 14 O.A.C. 33, 23 C.C.C. (3d) 97, aff'g (1982), 70 C.C.C. (2d) 129, 141 D.L.R. (3d) 330 (Ont. C.A.) -- applied

Royal Comm. on Conduct of Waste Management Inc., Re (1977), 17 O.R. (2d) 207, 4 C.P.C. 166, 80 D.L.R. (3d) 76 (Div. Ct.) -- referred to

Royal Comm. on Northern Environment and Grand Council of Treaty 9 Bands, Re (1983), 33 C.P.C. 82, 12 C.E.L.R. 74, 144 D.L.R. (3d) 416 (Ont. Div. Ct.) -- considered

Wolfe v. Robinson, [1961] O.R. 250, 27 D.L.R. (2d) 98, 129 C.C.C. 361 (H.C.), aff'd [1962] O.R. 132, 31 D.L.R. (2d) 233, 132 C.C.C. 78 (C.A.) -- followed

Statutes considered:

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B of the Canada Act 1982 (U.K.), 1982, c. 11 --

s. 7

Coroners Act, R.S.O. 1980, c. 93 --

s. 20(b)

s. 20(c)

s. 31

s. 32

s. 41

s. 41(1)

s. 50

Coroners Act, 1887 (50 & 51 Vict.) c. 71.

Judicial Review Procedure Act, R.S.O. 1980, c. 224 --

s. 6

Public Inquiries Act, R.S.O. 1980, c. 411.

Rules considered:

Coroners Rules 1953, S.I. 1953 No. 205 --

r. 16(1)

Authorities considered:

8 Hals., 3d ed., 1954, "representation at inquest".

Manson, Alan, Standing in the Public Interest at Coroners' Inquests in Ontario [unpublished].

McCormick's Evidence Handbook, 2d ed. (1972).

Ontario Law Reform Commission, Report on the Coroner System in Ontario (1971) (Chair: H. Allan Leal).

Report of the Commission of Inquiry into Certain Disturbances at Kingston Penitentiary during April 1971 (J.W. Swackhamer, Q.C.).

Royal Commission Inquiry into Civil Rights, Report Number One, vol. 1 (1968) (McRuer C.J.H.C.).

Words and phrases considered:

direct and substantial interest

APPLICATION for judicial review of coroner's dismissal of an application for standing at inquiry.

***Campbell J.*:**

The Issue

1 The issue on this application for judicial review is whether the Court should reverse a coroner's decision that the *Coroners Act*, R.S.O. 1980, c. 93, gave him no duty and no power, at an inquest into the suicide of a mentally ill prisoner in the super-protective custody unit at Kingston Penitentiary, to grant standing to the applicant who is the officially elected representative of the 20 remaining prisoners confined under identical and unique conditions in the same unit.

The Inquest

2 The coroner was conducting an inquest into the suicide on February 20, 1988, of Michael Zubresky, a mentally ill inmate confined in a super-protective custody unit, a prison within a prison inside the walls of Kingston Penitentiary. Super-protective custody is a form of administrative segregation.

3 Prisoners are put into super-protective custody not because they have broken the prison rules but because they are, by reason of their offences or their perceived status as informers, at great risk of injury and death from inmates in the general penitentiary population.

The Application for Standing

4 The applicant, Larry Stanford, is the officially elected range representative of the 20 prisoners confined in that unit.

5 He applied for standing at the inquest on behalf of himself and the other prisoners of that unit, on the basis that the unique conditions in that particularly restricted prison unit, including allegedly inadequate supervision and treatment, may have caused the death of Zubresky and that the remaining prisoners have a direct interest in the jury's recommendations about Zubresky's condition, which was uniquely identical to their own.

6 The unit in which Michael Zubresky died, and in which the applicants live, is said to be a unique facility unlike any other in the Canadian penitentiary system.

7 The applicant deposes that each prisoner is confined about 23 hours a day to a

9-foot by 5-foot cell, with no opportunity for employment, treatment, or the usual opportunities for rehabilitation open to ordinary prisoners.

8 He deposes that inmates with severe psychiatric and psychological problems are regularly kept there for long periods of time, together with inmates who are not mentally ill, and that inadequate treatment and supervision leads to constant anxiety and occasional suicide and self-mutilation.

9 Although there is a monthly review under the penitentiary regulations, we are told that prisoners may remain in the unit for years.

10 The applicant seeks standing on behalf of himself and the other inmates in the unit, on the basis that the recommendations that may come out of the inquest into Michael Zubresky's death may have a significant impact on the very select few inmates in this unit, which is a unique facility in Ontario and, indeed, in Canada.

11 The application for standing was made to the coroner on three grounds:

> 1. That the applicant and those he represents have a direct and substantial interest within the meaning of s. 41 of the *Coroners Act* and that the coroner was therefore obliged, as a matter of law, to grant standing;
>
> 2. Alternatively, that the coroner, in addition to the express duty in s. 41, had a residual discretionary power to grant standing, which power should be exercised in favour of the applicant;
>
> 3. That the applicant's right to life, liberty and security of the person under the *Canadian Charter of Rights and Freedoms*, s. 7, conferred a constitutional right to standing.

12 The coroner's reasons for refusing standing will be addressed below.

13 Although no order for standing has apparently yet been made on behalf of Mr. Zubresky's family or the penitentiary authorities, the usual course in these matters would seem to be to grant standing to them, if requested.

The Grounds of This Application

14 The same arguments made before the coroner are made here, with the exception that the *Charter* is not invoked in this Court, except to the extent that it might indirectly bolster the first two grounds.

The Statutory Provision

15 The *Coroners Act* provides, in part, as follows:

> 20. When making a determination whether an inquest is necessary or unnecessary, the coroner shall have regard to whether the holding of an inquest would serve the public interest and, without restricting the generality of the foregoing, shall consider,

. . . . .

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

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

. . . . .

31. -- (1) Where an inquest is held, it shall inquire into the circumstances of the death and determine,

(a) who the deceased was;

(b) how the deceased came to his death;

(c) when the deceased came to his death;

(d) where the deceased came to his death; and

(e) by what means the deceased came to his death.

(2) The jury shall not make any finding of legal responsibility or express any conclusion of law on any matter referred to in subsection (1).

(3) Subject to subsection (2), the jury may make recommendations directed to the avoidance of death in similar circumstances or respecting any other matter arising out of the inquest.

(4) A finding that contravenes subsection (2) is improper and shall not be received.

(5) Where a jury fails to deliver a proper finding it shall be discharged.

32. An inquest shall be open to the public except where the coroner is of the opinion that national security might be endangered or where a person is charged with an indictable offence under the *Criminal Code* (Canada) in which cases the coroner may hold the hearing concerning any such matters *in camera*.

. . . . .

41. -- (1) On the application of any person before or during an inquest, the coroner shall designate him as a person with standing at the inquest if he finds that the person is substantially and directly interested in the inquest.

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

(a) be represented by counsel or an agent;

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

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

. . . . .

50. -- (1) A coroner may make such orders or give such directions at an inquest as he considers proper to prevent abuse of its processes.

(2) A coroner may reasonably limit further cross-examination of a witness where he is satisfied that the cross-examination of the witness has been sufficient to disclose fully and fairly the facts in relation to which he has given evidence.

(3) A coroner may exclude from a hearing anyone, other than a barrister and solicitor qualified to practise in Ontario, appearing as an agent advising a witness if he finds that such person is not competent properly to advise the witness or does not understand and comply at the inquest with the duties and responsibilities of an adviser.

The Coroner's Decision on Direct and Substantial Interest

16 The coroner held that he had no residual discretion to grant standing and that his only power was that set out in s. 41 of the Act. The coroner denied standing, on the grounds that the applicant and those he represented did not have a substantial and direct interest, within the meaning of s. 41:

> Under Section 41 of the *Act* it is necessary for me to consider two conditions. One is that the person is substantially involved in this inquest and the other is that he is directly interested in the inquest. Now in the *Act* neither the words 'substantially' nor 'directly' are defined and we must rely on everyday meanings and we must rely on analogies, you just mentioned the word analogies. Let us take the situation where a small child, let us say falls down a stairwell of an apartment building and is killed. Now obviously the parents of that child have both a substantial and a direct interest in the case. You could argue that the parents of all other children in that apartment building are interested and indeed they would be. But certainly, they are not interested to the extent that the parents would be. Similarly, the driver of a motor vehicle is involved in an accident and his passenger is killed, obviously he has a substantial and a direct interest in any subsequent inquest proceedings. In both cases the deceased person is not, I believe the term is at 'arms length', he is immediately adjacent to the person with standing. Now your request involves people who are resident in the same institution and I would say and would argue that they fall into the same category as the parents of children living in an apartment building where another child is killed. They do not fall into the realm of interest that the parents would have. So in considering these two terms, 'substantially and directly' unless I grant that your clients may have an interest in these pro-

ceedings, I am not satisfied that their interest is 'substantial or direct.' In that case I have no alternative but to deny standing.

The Coroner's Decision on Residual Discretion

17 After counsel for the applicant suggested that the coroner, in addition to his legal duty under s. 41 of the *Act*, has a further common law discretion to grant standing, the coroner said:

> [Y]ou mentioned ... a Coroner having certain discretionary powers -- that is certainly not my interpretation of Section 41 of the *Act*.
>
> My understanding of that Section, and perhaps Mr. McKenna as Counsel to the Coroner will correct me if I am wrong -- that section tells me that if the Coroner is satisfied that the person has a direct and substantial interest then the Coroner must grant standing, he does not have a discretionary power. Adversely, if the Coroner finds that he does not have a substantial and direct interest then he is not in position to exercise any discretion because the Act simply states, that he must find this in order to grant standing. So I would question the use of the word 'discretionary' power of the Coroner.

18 Counsel to the coroner, the Crown Attorney, confirmed the coroner's view that he had no jurisdiction to grant standing, unless the applicant had a substantial and direct interest within the meaning of s. 41.

The Usual Practice

19 The coroner, in refusing standing to the applicant, was following the usual practice, as described by Professor Alan Manson in his unpublished article, *Standing in the Public Interest at Coroners' Inquests in Ontario* at p. 25:

> Before examining the line of cases since 1972 relating to deaths within penal or mental health institutions, it can be said at the outset that coroners have almost universally denied standing beyond the set of persons who are related to the deceased or in respect of whom questions of responsibility or culpability may be addressed. Individuals who share a common interest or even a common existence with the deceased and groups which represent those individuals have consistently been denied standing at inquests.

20 This statement is borne out by an examination of the cases presented by both counsel.

The Cases on Standing

21 In *Re Brown and Patterson* (1974), 6 O.R. (2d) 441, 21 C.C.C. (2d) 373, 53 D.L.R. (3d) 64 (Div. Ct.), a coroner conducting an inquest into the apparent suicide of an inmate in segregation at Millhaven Penitentiary refused standing to a number of inmates, some of whom were in the same segregation unit. The Divisional Court quashed the decision and remitted it to the coroner for a fresh determination, holding that the coroner had not initially acted judicially in denying standing, in the sense of

giving the applicant a full opportunity to be heard. In the course of its judgment, the Court, through Henry J., made some obiter comments about the test for standing [O.R., at 447- 48]:

> We do not consider it desirable to define extensively what constitutes a substantial and direct interest. This will depend on the facts of each case. We are informed that Edward Nalon died while in segregation and that some of the applicants were also in segregation then and still are. That group share a common experience. It may emerge that that environment was a factor in causing his death. If that should be, we consider that that would be proper justification in law for a finding that those applicants are persons having a substantial and direct interest in the inquest. It is alleged that some of the applicants knew of the incidents leading up to Mr. Nalon's death and his condition just before his death. If it were found that such evidence was pertinent and not otherwise available, such witnesses might well be persons having a substantial and direct interest. On the other hand, we do not view the section as extending to a person by reason only that he was a friend or associate of the deceased, as some of the applicants were. The Coroner must make his finding after proper inquiry, on the facts before him, on proper principles, and not arbitrarily or on the basis of extraneous considerations, or under the misapprehension that he has a discretion.

22 This Court took the view that the Act did not give the coroner a discretion and that standing must be granted if there is a finding that the applicant has a substantial and direct interest in the inquest.

23 The matter was remitted to the coroner who, after considering the matter, refused standing again. The coroner said (proceedings, December 11, 1974, at p. 30):

> I am quite familiar with possible circumstances where there would be no hesitation in granting an inmate the status of a person with standing, but I disagree with the Court Order that because they share a common environment, a common experience, that they are entitled to the status of a person with standing and therefore may call their own witnesses, cross-examine all witnesses, and I think their interests can be reflected in calling them as witnesses.

24 In *Re Brown and Patterson (No. 2)* (14 April 1975), Wells C.J.H.C., Zuber and Weatherston JJ. [unreported] the applicants again applied to the Divisional Court, which refused the application for judicial review of the coroner's decision to grant standing. Zuber J. said:

> With that decision we can find no fault. There is no error in principle demonstrated in his coming to that conclusion.
>
> We have been referred to the decision of Henry J. in this Court on the prior occasion. Henry J. in our view did not purport to lay down an exhaustive code or definition as to what might constitute the qualities attaching to a person with standing. He simply called attention to some issues that might be considered by the Coroner and it would appear that he has considered those issues.

Accordingly, in our view, this ground of attack on the proceedings fails.

25 That case is different from this case in two very important ways. The first difference is that there was no apparent suggestion in that case that the coroner has a residual discretion, quite apart from s. 41, to grant standing if he considers it advisable in order to secure the public interest purposes of the inquest. The second difference is that there is no apparent suggestion in that case that the applicants had anything more than knowledge of the accused's condition and a shared common environment (proceedings, supra, Mr. Copeland's submissions at pp. 21-22). There was no suggestion there, as there is here, that the unit is unique in Canada and that the applicants are not only similarly situated, but uniquely and identically situated in a unit where they must remain for years on end.

26 In 1978, in *Inmates Committee of Millhaven Institution v. Bennett* (26 January 1978), (Ont. H.C.) [unreported] Garrett J., sitting as a single judge of the Divisional Court, refused judicial review of a coroner's denial of standing to three prisoners in their personal capacity and as representatives of the Inmates Committee of Millhaven Penitentiary, at an inquest into the death of a prisoner shot by a guard during an escape attempt. He held that the coroner asked himself the proper question and that there was therefore no basis to interfere with his decision that the interest of the applicants, although it may have been substantial, was not direct.

27 Again, there was in that case no apparent suggestion that the coroner had a residual discretion, apart from s. 41, to grant standing in a proper case, or that the interest of the prisoners in that case was as unique and identical with the deceased's as it is in this case.

28 Eberle J., in *Re Inmates Committee of the Prison for Women and Meyer* (1980), 55 C.C.C. (2d) 308, sitting as a judge of the High Court on an urgent basis pursuant to s. 6 of the *Judicial Review Procedure Act*, R.S.O. 1980, c. 224, as am., refused an application for judicial review of a coroner's refusal to grant standing to individual inmates and a prisoner's committee at the Prison for Women. After remarking that the test of direct and substantial interest involves a question of mixed fact and law and some element of discretion, he held, at p. 310, that the test for review of such a decision was the test of jurisdictional error:

> [I]t is apparent that the coroner directed his mind to the issue before him and that no error of jurisdiction arises from any failure to do so. Did he, however, err in his interpretation of the section? Where the test to be applied involves a mixed question of fact and law, and the exercise of discretion, it is not easy to show an error in interpretation, and I can see none. In any event, in order to found successful application for judicial review, the error must be of such a nature or such a magnitude that it results in a loss of jurisdiction. The most that could be suggested in the present case is that the coroner improperly applied the words which constitute the test to the facts before him. I hasten to say that I do not find that he misapplied the words to the facts before him. There is no evidence of that. But if he did so, it would still not amount to a loss of jurisdiction.

Scope of Judicial Review

29 There is no appeal from the coroner's decision on standing and the first question is what standard of review this Court should apply in scrutinizing the decision.

30 The standard of review obviously does not involve a power in this Court to substitute its own view for that of the coroner, on the basis only that the Court, in the position of the coroner, would have reached a different decision.

31 The coroner is faced with a very difficult task and must be afforded a sufficient degree of insulation from review. He must have the power to keep the inquest from turning into a circus and the power to prevent every busybody from using the inquest as a platform for their particular views. Applications for judicial review should be discouraged, as they detract from the coroner's ability to control the proceedings, and they produce delay.

32 Some cases in this Court, such as *Re Brown and Patterson No. 2*, supra, describe the standard of review as that of error in principle.

33 Others, such as *Re Inmates Committee of the Prison for Women and Meyer*, supra, were put on the basis of error in jurisdiction.

34 In *Re On Our Own and King* (7 November 1980), Galligan J. (Ont. H.C.) [unreported] an inquest standing case involving the use of psychotropic drugs by the deceased, Galligan J. dismissed the application for review, on the grounds that he found "no error in principle or in jurisdiction."

35 The standard of review of coroners' decisions on standing at inquests has thus been stated three ways:

36 (1) error in principle

37 (2) jurisdictional error

38 (3) error in principle or jurisdiction

39 As a practical matter, there may be little difference between error in principle and jurisdictional error. A serious error in principle which deprives an applicant of standing would likely result in such unfairness to the affected party's opportunity to participate in the inquest that an unfair inquest would result. It is common ground between counsel that an error in principle that produces an unfair inquest is an error that goes to jurisdiction.

40 In my view, the coroner erred in law in the interpretation of his jurisdiction to grant standing to a degree that resulted in jurisdictional error. The Legislative Assembly has not insulated coroners with a privative clause, as it has labour tribunals.

41 While the coroner enjoys special expertise in medical matters relating to the cause of death and in the conduct of inquiries into institutional deaths, he has no more expertise than this Court in relation to the peculiar legal position of inmates of a

prison within a prison or in the interpretation of his or her governing statute.

42 So far as the legal interpretation of the expression "direct and substantial interest" is concerned, the coroner is in no better position than the Court to determine the intention of the Legislature.

43 The power to review a coroner should, however, be exercised with a real degree of judicial restraint, just like the review of decisions made by prison authorities and tribunals.

44 Although s. 41 provides mandatory standing without any discretion once substantial and direct interest is found to exist, the application of the test involves a measure of discretion in each case, as Eberle J. pointed out, because the test is expressed in open-ended language.

45 For the reasons noted above, coroners must be given considerable leeway if they are to discharge their difficult responsibilities effectively. To avoid mere second-guessing of coroners on questions of standing, it is important that the courts exercise real restraint in reviewing the decisions of coroners on standing.

The Interpretation of S. 41.

46 The coroner's reasons for concluding that the applicant and those he represented did not have a substantial and direct interest in the inquest, although thoughtful and consistent with the prevailing practice, reflect, in my respectful opinion, these serious errors in principle, which require correction:

> (1) The test is too narrow a test, based on a private law approach, which does not reflect the public interest functions of an inquest.
>
> (2) The test does not recognize the potentially crucial impact of coroners' jury's recommendations or measure the interest of the applicants in such recommendations.
>
> (3) The test does not reflect the legally unique position of the applicants, whose situation is not merely similar to, but actually identical with, that of the deceased.

47 By applying the analogy of the apartment residents and the motorcycle driver, the coroner applied the traditional private law approach that restricts standing at inquests to those who have a personal or pecuniary interest in the outcome of the inquest, or those whose conduct might be subject to implicit censure or criticism.

48 This private law approach fails to give effect to the dominant public interest function of the inquest, which involves public scrutiny and recommendations about those conditions which may have caused or contributed to the death of a member of the community. As the Ontario Law Reform Commission said in its *Report on the Coroner System in Ontario* (1971) (Chair: H. Allan Leal) at p. 25:

> The death of a member of society is a public fact, and the circumstances that

> surround the death, and whether it could have been avoided or prevented through the action of agencies under human control, are matters that are within the legitimate scope of all members of the community. A major role within the framework of institutions that have been created by our society to reflect these facts of human existence is implicit within the office of the coroner. ... The role of the office of coroner must keep pace with societal changes, and where necessary, must move away from the confines of doctrines that are inconsistent with community needs and expectations in 20th century Ontario.

49 In this public interest context, the recommendations of the coroner's jury assume a crucial role.

50 Different applicants will have a different degree of interest in the potential recommendations of a jury. In some cases, the interest of an applicant or applicants will be so remote that there is no question of substantial interest. In other cases, the interest will be substantial, but not direct. In other cases, and I think this is one of them, the interest of the applicant in the recommendations will be so acute that it will amount to a substantial and direct interest.

51 It will be a question of degree in each case and the coroner must have a wide ambit of discretion in the application of the test, in the sense that he is applying a degree of judgment to a question of mixed fact and law that presents no simple mechanical solution.

52 Mere concern about the issues to be canvassed at the inquest, however deep and genuine, is not enough to constitute direct and substantial interest. Neither is expertise in the subject matter of the inquest or the particular issues of fact that will arise. It is not enough that an individual has a useful perspective that might assist the coroner. The interest of an applicant for standing in the recommendations of the jury must be so acute that the interest may be said to be not only substantial, but also direct.

53 Once the determination is made by the coroner that the interest of an applicant is substantial and direct, discretion vanishes and there is no choice under the statute but to make the order for standing.

54 In this case, the coroner, following the traditional approach, did not analyze the question of standing in terms of the degree to which the applicants had an interest in the recommendations of the jury, and did not analyze the particular nature and degree of their interest in the potential recommendations to see whether or not it was so acute as to amount to a substantial and direct interest.

55 There is, in this case, a unique identity of legal interest between the deceased and the applicants, who have an extraordinary interest in any recommendations that may be made with respect to the conditions that totally dominate every aspect of their existence.

56 Unlike the apartment dweller or the vehicle passenger, the applicants are required, by law, to live under conditions identical to those which it is alleged caused or

contributed to the death of the inquest's subject. In that sense, the interest of the applicants is not only similar to that of the deceased, but identical in a very unique way. To use the words of the coroner's analogy, they are, unlike the apartment dwellers, not at arm's length from the deceased.

57 Their interest is thus more than merely similar or parallel or adjacent; their interest is identical and uniquely so, having regard to the singularly restrictive nature of the confinement and precise identity of legal interest which may not be shared by anyone else in Canada.

58 These applicants have an extraordinarily strong interest in any recommendations directed to the avoidance of death in identical circumstances -- their own precise circumstances.

59 In most cases, the jury's recommendations reflect upon some aspect of the lives of those who seek standing. In this case, any recommendations would affect the applicants most directly and specifically, much more so than recommendations about the death of a prisoner would affect members of the general prison population. It is customary, in these cases, to grant standing to the penitentiary authorities, on the basis that they have a direct and substantial interest in the inquest. Yet, the recommendations would affect only one relatively small part of the overall concerns of the penitentiary authorities, as opposed to the single and overwhelming concern of the applicants, who are required by law to spend 23 hours a day in conditions identical to those of the deceased. It would be somewhat ironic to grant standing to the prison authorities and refuse it to those so overwhelmingly affected by potential recommendations.

60 I do not see how this unique group of prisoners has any less direct and substantial interest under this statute than did the parents in phase I of the Grange Inquiry, or the Grand Council of Treaty 9 Bands in the Northern Environment Inquiry, or the P.O.W.R. (Protect Our Water Resources) group in the Waste Management Royal Commission, under the *Public Inquiries Act*, R.S.O. 1980, c. 411. (See *Parents of Baby Gosselin v. Grange* (1984), 8 Admin. L.R. 250, 4 O.A.C. 242 (Div. Ct.); *Re Royal Comm. on Northern Environment and Grand Council of Treaty 9 Bands* (1983), 33 C.P.C. 82, 12 C.E.L.R. 74, 144 D.L.R. (3d) 416 (Ont. Div. Ct.); *Re Royal Comm. on Conduct of Waste Management Inc.* (1977), 17 O.R. (2d) 207, 4 C.P.C. 166, 80 D.L.R. (3d) 76 (Div. Ct.).)

61 Inmates in this "particularly restricted form of segregated detention," to borrow a phrase from Le Dain J., in *R. v. Miller*, [1985] 2 S.C.R. 613, 52 O.R. (2d) 585, 49 C.R. (3d) 1, 16 Admin. L.R. 184, 63 N.R. 321, 14 O.A.C. 33, 23 C.C.C. (3d) 97 at 99, have a singular legal status in our law. This special legal status was recognized in *Martineau v. Matsqui Institution Disciplinary Bd. (No. 2)* (1979), [1980] 1 S.C.R. 602, 13 C.R. (3d) 1, 15 C.R. (3d) 315, 50 C.C.C. (2d) 353, 106 D.L.R. (3d) 385, 30 N.R. 119, and in the trilogy of the Supreme Court of Canada case, which included *Re Miller and R.* (1982), 70 C.C.C. (2d) 129 at 131-32, 141 D.L.R. (3d) 330, a judgment upholding a decision of our Court of Appeal, in which Cory J.A. referred to the potentially devastating effect of solitary confinement and other particularly restricted forms of segregated detention.

62 This recent recognition of the unique legal position of prisoners such as the applicants, inmates of a prison within a prison, emphasizes the uniqueness of their situation and the special nature of their interest in any recommendations of the coroner's jury, regarding the identical conditions which are said to have caused or contributed to the death of Michael Zubresky.

63 I note that it was only in comparatively recent years, after many of the decisions of this Court on standing, that the special status of inmates of a prison within a prison, such as the applicants, has been recognized by our law.

64 In a sense, the *Charter* adds very little because the courts, long before the *Charter*, exercised their inherent jurisdiction to scrutinize the conditions and protect the rights of those undergoing extraordinary deprivations of liberty.

65 To conclude on the issue of direct and substantial interest, the coroner applied to the traditional narrow private interest test, which failed to measure the interest of the applicants in the potential recommendations of the jury directed to the avoidance of death in the unique and identical circumstances shared by the deceased and the applicants, a test which failed to recognize that the interest of the applicants in such recommendations was so acute as to be direct and substantial. The decision therefore reflects a jurisdictional error, which, in my view, can only be corrected by setting aside the coroner's order and granting standing to the applicants.

The Question of Residual Discretion

66 In my respectful view, the coroner enjoys a residual discretion to grant standing quite apart from the provisions of s. 41, if he is of the view that it is appropriate to do so in order to achieve the public interest purposes of the inquest.

67 This argument has been developed at some length by Professor Manson in his article on standing, referred to above.

68 The modern root of judicial authority on the coroner's power to grant standing is *Wolfe v. Robinson*, [1961] O.R. 250, 27 D.L.R. (2d) 98, 129 C.C.C. 361 (H.C.), aff'd [1962] O.R. 132, 31 D.L.R. (2d) 233, 132 C.C.C. 78 (C.A.). A coroner refused standing to the parents of a child who died after their refusal, on his behalf, to consent to a blood transfusion. Wells J. held that the coroner had a discretion to grant standing but that although he might have been more favourably inclined to grant standing had he been sitting as coroner [[1961] O.R., at 257-58] there was no right to standing:

> [A]part from express statutory authority there is no right in counsel to appear, examine or cross-examine in the Coroner's Court unless the coroner grants such leave. There is undoubtedly a discretion in the coroner to allow such a procedure.

69 He expressed this conclusion after discussing the statement in *8 Hals.*, 3d ed., p. 494, that "[a]ny person, who, in the opinion of the coroner, is a properly interested person may examine witnesses either in person or by counsel or solicitor." The authority noted for that statement was the Coroners Rules 1953, S.I. 1953 No. 205, r. 16(1). After some further historical references to the development of the coroners'

system in England, Wells J. referred to the *Coroners Act, 1887* (50 & 51 Vict.) c. 71:

> The passing of the Coroners Rules and the absence of any other provisions in the Statute of 1887, which was in effect a tidying up of the law relating to coroners, strengthens the view that apart from express statutory authority there is no right in counsel to appear, examine or cross-examine in the Coroner's Court unless the coroner grants such leave. There is undoubtedly a discretion in the coroner to allow such a procedure. But that is something he must decide in view of all the facts of the matter before him. Unless that discretion is exercised in such a way that the facts are suppressed deliberately the Court should not deem it necessary to interfere.

70 It is important to note that his finding of "undoubted discretion" does not rest on the rules under the English statute, but merely "strengthened" his view that the power inhered in the coroner apart from any express statutory authority.

71 Wells J., at p. 262, hinted that he, in the coroner's position, might have made a different order:

> It may very well be that had I been sitting in the coroner's shoes I might have exercised my discretion differently because here was a matter in which religious belief caused an objection to certain medical practices. It would have seemed to me the part of wisdom to have had as full a hearing as possible. I think in a certain measure the coroner tried to obtain this result by offering as he repeatedly did to call any witnesses the parents of the child desired to have heard by the jury. Subject to what I have said there is no question in my mind that he had a full discretion to reach the decision which he did. Under these circumstances I do not think I would be justified, considering all the facts of this case, in interfering with that discretion.

72 As noted above, his decision was upheld by the Court of Appeal (Roach, Gibson and Schroeder JJ.A.). Schroeder J.A. [1962] O.R., at 143] expressed himself differently on the question of the coroner's residual discretion to grant standing:

> I turn finally to the appellant's contention that as a result of the advice given to him by the Crown Attorney to the effect that under the provisions of the *Coroners Act* of Ontario counsel was not entitled to participate in the proceedings before him or to cross-examine the witnesses, the coroner had misdirected himself and had wrongly decided that he possessed no legal discretion to permit counsel to do so. There is no rule of law or practice in Canada applicable to coroners' inquisitions having the force of a statutory enactment similar to the Lord Chancellor's Rules of 1953 in England, to which reference has been made. In the absence of any such Rule or enactment, a coroner in this country has no legal discretion, *i.e. a discretion governed and controlled by a specific rule of law or practice* to grant or withhold that privilege. Appellant's counsel had no right, therefore, to participate in the proceedings or, more particularly, to cross-examine the witnesses. The coroner's ruling in this respect was therefore sound in law despite the erroneous ground upon which it was based, and his refusal to grant counsel the privilege which he sought affords the appellant no right of redress.

(Emphasis added.)

73 To what extent does this passage represent a rejection of the limited residual discretion, identified by Wells J., to grant standing? In my view, a rigorous examination suggests that the limited discretion identified by Wells J. survives this passage.

74 Schroeder J.A. limited his rejection of a discretion to grant standing to the rejection of "a discretion governed and controlled by a specific rule of law or practice to grant or withhold that privilege." The discretion that he expressly rejected would be a much more powerful tool in the hands of an applicant than the discretion contended for here. Although he by no means enthusiastically embraced the idea of discretion to grant standing, he did not reject a discretionary power, uncontrolled by any specific rule of law or practice, to grant standing in a case where the coroner thought it would be helpful to achieve the ends of the inquest.

75 He did not, therefore, reject the discretion identified by Wells J., which is precisely the kind of discretion contended for here.

76 *Wolfe v. Robinson*, supra, was referred to by McRuer C.J.H.C., in his *Royal Commission Inquiry into Civil Rights, Report Number One*, vol. 1 (1968) at 491, as authority for the proposition that:

> There are no rules or regulations that give those affected by the [inquest] proceedings any right to be heard and there is no legal right to be heard.

77 It is noteworthy that the reference here was restricted to the right to be heard, not the discretion to hear. The commissioner continued:

> This we think is wrong and our view is shared by many coroners.

78 After referring (at pp. 491 and 492) to the potentially devastating social and financial effects on an individual of the publicity given to the inquest and the jury's verdict, and after referring to the then current English rules, the commissioner recommended (at p. 492):

> that there be a specific statutory right in persons substantially and directly interested in the inquest to appear by counsel, to call witnesses and cross-examine witnesses, but that there should be a discretion in the presiding officer to limit this right where it appears to be exercised vexatiously or beyond what is reasonably necessary in the circumstances. An inquest should be kept within the bounds of its manifest purpose -- an inquiry in the public interest. It should not be a process devised as a preliminary round to the determination of civil liability.

And at p. 497:

> that persons who, in the opinion of the presiding officer, are substantially and directly interested, should have full right to appear by counsel and to call, examine and cross-examine witnesses, with discretion in the presiding officer to

limit these rights where it appears they are vexatiously exercised or beyond what is reasonably necessary.

79 The Ontario Law Reform Commission adopted this recommendation in its *Report on the Coroner System in Ontario* (1971) at p. 89:

> In England, with respect to the right to examine witnesses at an inquest, standing which is in some respects equivalent to that of a party before a court is conferred upon 'any person who in the opinion of the coroner is a properly interested person'. The *Royal Commission Inquiry Into Civil Rights* recommended giving this right, among others, to 'persons who, in the opinion of the presiding officer, are substantially and directly interested' in the inquest. The Commission is of the opinion that the formula recommended by this Royal Commission is the appropriate way in which to determine who should have standing at an inquest. The consequences that should follow from such a determination are set out below.

80 In its analysis of the issue of standing (at pp. 91-93) the Commission discussed only the right to have standing, without any reference at all to the right to apply to the coroner to exercise his discretion to grant standing. The focus was entirely on the right to be heard, not the discretion to hear. After quoting from the Court of Appeal judgment in *Wolfe v. Robinson* a passage emphasizing that an inquest is not an adjudication of rights affecting either person or property and therefore does not attract the maxim audi alterem partem, the Commission said, at p. 92:

> None of this is any answer to the question as to whether there should be some right to be heard at a coroner's inquest. Whether a statutory duty to hear the submissions of persons with a substantial and direct interest in an inquest should exist in the new *Coroners Act* is a different matter from the result decreed by the present state of the law in the absence of such a duty.
>
> After carefully considering this question, the Commission concludes that it would be desirable to place a statutory duty upon the presiding officer at an inquest to afford the right to be heard to such persons and under such circumstances as are appropriate, considering the nature of the forum and the type of matters that are dealt with at an inquest.

81 It will be noted that the Commission speaks uniquely in terms of right and duty to grant standing, not in terms of a residual discretionary power to grant standing.

82 I conclude that *Wolfe v. Robinson*, while rejecting a discretionary right to be heard in the sense of "a discretion governed and controlled by a specific rule of law or practice," recognized and left open a residual discretion in the coroner to hear. I conclude that neither Commission, in seeking to correct the mischief identified in *Wolfe v. Robinson*, recommended the abolition of this zone of residual discretion.

83 The crucial question is this: did the Legislature, in compelling the coroner to give standing as of right to those directly and substantially interested, thereby correcting the problem of *Wolfe v. Robinson*, intend to wipe out his wide discretionary power to grant standing to those outside the narrow mandatory test whom he con-

sidered to be proper parties?

84 Section 41 does not explicitly take away the discretionary power so clearly recognized in *Wolfe v. Robinson*. Neither, in my view, does it do so by implication. It would make sense for the Legislature to add, as it did in s. 41, a new mandatory power to grant standing in a case like *Wolfe v. Robinson*. But I see no evidence in the statute that the grant of the new mandatory power was intended to have any effect on the clearly recognized and well established discretionary power.

85 It is, of course, arguable that in specifically granting standing as of right to a limited class, the Legislature, by implication, rejected any residual discretion to grant standing in other cases, expressio unius exclusio alterius.

86 The first reason I reject this argument is that the old doctrine should not be applied if it will lead to injustice, particularly when dealing with the holder of a public office engaged in duties connected with important public duties (*Nicholson v. Haldimand-Norfolk Police Commissioners Bd.*, [1979] 1 S.C.R. 311 at 321-22, 78 C.L.L.C. 249, 88 D.L.R. (3d) 671, 23 N.R. 410, per Laskin C.J.C.).

87 The second reason I reject this argument is that the maxim does not apply if there is no evidence demonstrated in the statute or its legislative history that the Legislature turned its mind to the impugned power and rejected it. In the absence of such evidence, the interpretation should be chosen which most closely accords with the objectives of the statute.

88 It would take express words to convince me that the Legislature, in a statute designed to advance to the public interest and preventative goals of the inquest, would abolish an established residual power in the coroner to promote those very goals, by granting standing in appropriate cases to those whose interest, perspective, or expertise could help the inquest achieve these goals.

89 While it would certainly be within the power of the Legislative Assembly to give with one hand and take away with the other, it would not be logically consistent for it to do so in the light of the goals it was attempting to achieve. I can see no such logical inconsistency implicit in the statute.

90 In the absence of express words removing the residual power, I am not prepared to infer, from the silence of the Legislature, an intention to abolish this clearly recognized power which helps secure the legislative goals reflected in the statute as a whole.

91 There has been some tendency by coroners, in recent years, to grant standing in cases to applicants whose special knowledge and expertise will assist the coroner in achieving the goals of the inquest, even though they have no direct or substantial interest.

92 To take one example from Professor Manson's article, Dr. Robert McMillan, in a 1983 inquest into the death of Richard Thomas, a mentally retarded man, granted standing to the Ontario and Canadian Associations for the Mentally Retarded. There was a suggestion that the primary parties in the inquest would be mainly concerned

to protect their own self-interest. The coroner, although stressing that the inquest was not a Royal Commission and would not be permitted to become a public forum for the whole issue of the care of the mentally handicapped, granted standing.

93 That case may provide an example of the difficulties that arise when the primary parties at an inquest are involved in actual or contemplated litigation. Actual or contemplated litigation might encourage a party to focus on its own litigation interest, to the detriment of the public interest. A coroner might well feel that the public interest would best be served by granting standing to a party which enjoyed significant expertise, coupled with a less biased perspective.

94 It is true that the Crown Attorney, as coroner's counsel, will bring to bear his or her traditional expertise as an advocate for the public interest. That perspective, however, relates to the overall public interest, as opposed to the interest of a particularly affected group and the Crown Attorney, of course, lacks the benefit of a confidential relationship with those who seek standing.

95 The residual power to grant standing is not completely open-ended. It must be exercised judicially in a way that will assist the coroner achieve the goals of the inquest. It is not a power to turn the inquest into a Royal Commission or, as noted above, to provide a platform for every busybody in search of a platform.

96 There are very few cases on the issue and it must be left initially to the coroners to develop their own practice, in accordance with their considerable experience and their understanding of the public interest and preventive goals of the inquest.

97 The principles in these cases, however, cannot be transplanted unthinkingly to the inquest which is not a trial or a Royal Commission, and must be adapted to its unique goals and needs. So long as the coroner acts judicially and without any serious error in principle in his or her understanding and application of the residual power to grant standing, a court would defer to the coroner's expertise and would not interfere.

98 It may be that in cases involving prison deaths, a coroner might be inclined to exercise the residual discretion in a way to provide some measure of inmate participation, if the coroner was of the view that the applicants and their counsel would be of assistance to the coroner and to the objectives of the inquest.

99 In cases involving prison death, there is, in addition to the ordinary considerations, another powerful force at work: the inmate code of silence. It is an open and notorious public fact that prisoners are most reluctant to co-operate with investigations conducted by the authorities. While that may be less so in the investigation of a suicide than the investigation of a homicide, it is, nonetheless, a strong force in the culture of a prison and a significant barrier to the effective investigation of any prison incident.

100 A coroner might well conclude that inmates who have the benefit of representation, including a confidential relationship with a responsible and experienced counsel, may be able to contribute something to the inquest that would not be available if they did not have the benefit of standing and counsel.

101 One of the functions of an inquest into a death in a prison or other institution not ordinarily open to public view is to provide the degree of public scrutiny necessary to ensure that it cannot be said, once the inquest is over, that there has been a whitewash or a cover-up. There is no better antidote to ill-founded or mischievous allegations and suspicions than full and open scrutiny. The granting of standing to the applicants in this case will provide added reassurance that the inquest has the benefit of all the evidence and perspectives necessary to ensure the fullest scrutiny.

102 The problem of suspicions and misgivings was addressed in the *Report of the Commission of Inquiry into Certain Disturbances at Kingston Penitentiary during April 1971*, by J.W. Swackhamer, Q.C., at p. 62:

> Thirty-eight years ago the Archambault Report commented that under the present system existing in the Canadian penitentiaries, what is going on in the institutions is shrouded with absolute secrecy, giving rise to suspicion and misgivings, which are further enhanced by extravagant and abused tales of ex-prisoners and the imagination of sentimentalists. As a consequence, although for the sake of security no undue information should be given, a practical check of what is going on should be made. The prisoner feels that he has no access to a fair administration of justice and is absolutely removed from the protection of his fellow man. These observations are equally pertinent in 1971.

103 I would adopt these words and add only that nothing in the record of this case, or the common experience of those engaged in the administration of criminal justice, suggests they are any less true today than they were in 1971 or 1933.

104 While great benefits may come from granting standing at an inquest to interested groups who may not technically have a direct and substantial interest, there are corresponding dangers if the residual discretion to grant standing is not exercised with some caution.

105 The danger is not simply that of the busybody or the crank, but also the danger of sincerely motivated groups seeking a public platform for views that are not sufficiently relevant to the subject of the inquest, and which will only result in undue delay and inefficiency.

106 To paraphrase what was said with respect to criminal trials in *McCormick's Evidence Handbook*, 2d ed. (1972) at 81, the coroner has the power and the duty to see that the sideshow does not take over the circus. As said with respect to criminal trials, it is for the coroner in each case to balance this danger, and the need to avoid repetition and unduly prolonged procedures, against the degree of knowledge or expertise demonstrated by the applicants for standing and the degree to which they and their counsel can assist, by providing a point of view that might not otherwise emerge.

107 In my view, the coroner erred in law in declining jurisdiction to exercise his residual discretion to grant standing on the principles noted above.

Conclusion

108 In my view, the coroner's interpretation and application of s. 41 reflects a jurisdictional error which requires intervention by the Court. The only way to give effect to the correct interpretation of s. 41 in this case is to grant standing.

109 In light of that conclusion, it is unnecessary to consider what follows from the coroner's declining of his residual jurisdiction, although I cannot imagine a clearer case for its exercise.

110 In the result, I would allow the application and grant standing to the applicants.

111 I would make no order for costs.

***Craig J.*:**

112 I have had the advantage of reading the reasons for judgment of my brothers O'Brien and Campbell JJ. Contrary to the views expressed by Campbell J., O'Brien J. holds the view that a coroner does not retain any residual jurisdiction to grant standing.

113 In the interest of ensuring a fair inquest and for the reasons stated by Campbell J., I agree that the applicant should be granted standing and that the application be allowed on the basis of jurisdictional error. However, having come to that conclusion, it is my view that it is unnecessary to decide, in this case, whether or not the coroner retains a residual jurisdiction to grant standing.

***O'Brien J*:**

114 I have had the advantage of reading the careful analysis and decision of Campbell J. Unfortunately, I do not agree with it.

115 The issue on this application for judicial review is whether the Court should reverse a coroner's decision that the *Coroners Act* gave him no jurisdiction to grant standing to the applicant.

116 The coroner was conducting an inquest into the suicide of Michael Zubresky, a mentally ill inmate confined to a super-protective custody unit in Kingston Penitentiary. Super-protective custody is a form of administrative segregation. Prisoners are put into that custody because they are, by reason of their offences, or their perceived status as informers, at great risk of injury or death from other inmates.

117 Although no order for standing has apparently yet been made on behalf of Mr. Zubresky's family or the Penitentiary authorities, the usual course in these matters would be to grant standing to them, if requested.

118 The applicant, Larry Stanford, is the officially elected range representative of the 20 prisoners confined to the super-protective unit.

119 He applied for standing at the inquest on behalf of himself and the other inmates, on the basis that the unique conditions in that unit, including allegedly inadequate supervision and treatment, may have caused or contributed to Zubresky's death, and the applicants had a direct interest in the jury's recommendations.

120 In my view, the coroner correctly considered and interpreted his statutory duty under s. 41 of the *Coroners Act*. He fully and fairly considered the submissions of counsel and concluded the applicants had not satisfied him their interest was substantial and direct.

121 The relevant sections of the *Coroners Act* are as follows:

> 20. When making a determination whether an inquest is necessary or unnecessary, the coroner shall have regard to whether the holding of an inquest would serve the public interest and, without restricting the generality of the foregoing, shall consider,
>
> . . . . .
>
> (b) the desirability of the public being fully informed of the circumstances of the death through an inquest; and
>
> (c) the likelihood that the jury on an inquest might make useful recommendations directed to the avoidance of death in similar circumstances.
>
> . . . . .
>
> 31. -- (1) Where an inquest is held, it shall inquire into the circumstances of the death and determine,
>
> (a) who the deceased was;
>
> (b) how the deceased came to his death;
>
> (c) when the deceased came to his death;
>
> (d) where the deceased came to his death; and
>
> (e) by what means the deceased came to his death.
>
> (2) The jury shall not make any finding of legal responsibility or express any conclusion of law on any matter referred to in subsection (1).
>
> (3) Subject to subsection (2), the jury may make recommendations directed to the avoidance of death in similar circumstances or respecting any other matter arising out of the inquest.
>
> (4) A finding that contravenes subsection (2) is improper and shall not be received.

(5) Where a jury fails to deliver a proper finding it shall be discharged.

32. An inquest shall be open to the pulic [sic] except where the coroner is of the opinion that national security might be endangered or where a person is charged with an indictable offence under the *Criminal Code* (Canada) in which cases the coroner may hold the hearing concerning any such matters *in camera*.

. . . . .

41. -- (1) On the application of any person before or during an inquest, the coroner shall designate him as a person with standing at the inquest if he finds that the person is substantially and directly interested in the inquest.

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

(a) be represented by counsel or an agent;

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

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

. . . . .

50. -- (1) A coroner may make such orders or give such directions at an inquest as he considers proper to prevent abuse of its processes.

(2) A coroner may reasonably limit further cross-examination of a witness where he is satisfied that the cross-examination of the witness has been sufficient to disclose fully and fairly the facts in relation to which he has given evidence.

(3) A coroner may exclude from a hearing anyone, other than a barrister and solicitor qualified to practise in Ontario, appearing as an agent advising a witness if he finds that such person is not competent properly to advise the witness or does not understand and comply at the inquest with the duties and responsibilities of an adviser.

122 It is to be noted that the current statutory regime relating to coroners' inquests was enacted in Ontario in 1972 and that significant changes were made in the Act and, in particular, with reference to standing under s. 41.

123 The question of standing in these matters is fully considered, by Professor Alan Manson, in his unpublished article, *Standing in the Public Interest at Coroners' Inquests in Ontario*.

124 While I do not agree with many of his conclusions, he correctly concluded coroners have almost universally denied standing beyond the set of persons who are related to the deceased, or in respect of whom questions of responsibility or culpabil-

ity may be addressed. Individuals sharing a common interest, or even a group existence with the deceased, and groups which represent those individuals, have consistently been denied standing at inquests.

125 See *Re Brown and Patterson*, supra, per Henry J. The matter was remitted to the coroner and, again, came to the Divisional Court (per Wells C.J.H.C., Zuber and Weatherston, JJ.). The Court refused an application for judicial review of the coroner's decision to grant standing. Zuber J., in the unreported judgment, said:

> We have been referred to the decision of Henry J. in this Court on the prior occasion. Henry J. in our view did not purport to lay down an exhaustive code or definition as to what might constitute the qualities attaching to a person with standing. He simply called attention to some issues that might be considered by the Coroner and it would appear that he has considered those issues.
>
> Accordingly, in our view, this ground of attack on the proceedings fails.

126 In *Inmates Committee of Millhaven Institution v. Bennett*, supra, (per Garrett J., sitting as a single judge) the Court refused judicial review of a coroner's denial of standing to three prisoners in their personal capacity and representing the Inmates' Committee of Millhaven Penitentiary. That application involved an inquest into the death of a prisoner shot by a guard during an escape attempt. Garrett J. held that the coroner asked the proper question and there was, therefore, no basis to interfere with his decision that the interest of the applicants, although perhaps substantial, was not direct.

127 In *Re Inmates Committee of the Prison for Women and Meyer*, Eberle J., sitting as a judge of the High Court on an urgent basis, pursuant to s. 6 of the *Judicial Review Procedure Act*, refused an application for judicial review of a coroner's refusal to grant standing to individual inmates and the prisoners' committee at the Prison for Women. After noting the test of direct and substantial interest involved a question of mixed fact and law, and some element of discretion, Eberle J. held the test for review of such a decision was the test of jurisdictional error [55 C.C.C. (2d), at 310]:

> [I]t is apparent that the coroner directed his mind to the issue before him and that no error of jurisdiction arises from any failure to do so. Did he, however, err in his interpretation of the section? Where the test to be applied involves a mixed question of fact and law, and the exercise of discretion, it is not easy to show an error in interpretation, and I can see none. In any event, in order to found successful application for judicial review, the error must be of such a nature or such a magnitude that it results in a loss of jurisdiction. The most that could be suggested in the present case is that the coroner improperly applied the words which constitute the test to the facts before him. I hasten to say that I do not find that he misapplied the words to the facts before him. There is no evidence of that. But if he did so, it would still not amount to a loss of jurisdiction.

128 The applicant's argument that there is residual discretion in a coroner, apart from that contained in s. 41 of the *Coroners Act*, is largely based on the decisions in

the Trial Division of this Court and in the Court of Appeal in *Wolfe v. Robinson*. It is to be noted that in the *Wolfe* decision, both Wells J. at trial, and the Ontario Court of Appeal, per Schroeder J.A., upheld the decision of a coroner refusing to permit counsel for parents of a deceased child to take part in the inquest, other than suggesting witnesses who were then called by Crown counsel. Counsel for the parents was denied any opportunity of examining or cross-examining these witnesses.

129 On the basis of the present s. 41, it is unlikely that such a situation would occur at a coroner's inquest at this time.

130 I do not accept the submissions that the decisions in *Wolfe* support the proposition that there is any inherent discretion in a coroner to grant standing, apart from that contained in s. 41(1) of the Act.

131 In my view, when the Legislature revised and amended the procedures to be followed at coroners' inquests, particularly on the question of standing, the intention was to permit standing only in the situations as they are dealt with in s. 41, and as considered by Eberle J. in *Re Inmates Committee and Meyer*. I conclude the coroner properly considered and applied s. 41.

132 I therefore see no reason to interfere with the decision and I would dismiss this application.

Application allowed.

END OF DOCUMENT