

CORONERS COURT

IN THE MATTER OF the *Coroners Act*, R.S.O. 1990, c. 37
AND IN THE MATTER OF the Inquest into the death of Ashley Smith

NOTICE OF APPLICATION

TAKE NOTICE THAT the Moving Parties, Drs. Ligate, Rogers and Swaminath, will make an application to the presiding Coroner, Dr. Carlisle, on Friday, September 28, 2012, at 5:00 p.m., or as soon thereafter as it can be heard.

THE APPLICATION IS FOR THE FOLLOWING:

1. An order adjourning the application(s) seeking to have the presiding Coroner issue summonses for proposed out-of-province witnesses, currently returnable October 4, 2012, at 9:30 a.m.; and
2. Such further and other relief as counsel may request and the presiding Coroner may permit.

THE GROUNDS FOR THE APPLICATION ARE:

1. Counsel for the moving parties are unavailable at the proposed date and time of the return of the application noted above due to previous commitments to another Coroner's inquest commencing October 3, 2012 and to a Federal Commission that commenced approximately six months ago.
2. Further, the moving parties have advised the presiding Coroner that they will be bringing an application seeking to challenge the scope of the inquest as set by Dr. Carlisle and as provided to the moving parties on September 10, 2012;
3. The scope of the inquest serves to contextualize the evidence. Specifically, the party seeking to summons an out-of-province witness must demonstrate on a balance of probabilities that the witness' attendance is necessary for the due adjudication of the proceeding (as defined by the scope) and reasonable and essential to the due administration of justice in Ontario. This two part test must be applied in the context of the scope as set by the Coroner;

4. Until the challenges to the scope as currently constituted are resolved, any orders or summonses flowing from that scope are premature;
5. Such further and other grounds as counsel may advise and the Honourable Coroner may permit.

THE FOLLOWING DOCUMENTARY EVIDENCE WILL BE PROVIDED IN SUPPORT OF THE APPLICATION:

1. The Notice of Application, herein;
2. The Affidavit of Fred W. Tranquilli; and
3. Such further and other materials as counsel may advise and the Honourable Coroner may permit.

DATED this 27th day of September, 2012

LERNERS LLP
130 Adelaide Street West, Suite 2400
Toronto, ON M5H 3P5

Nancy M. McAuley
Tel: (519) 640-6376
Fax: (519) 932-3376

Mark Freiman
Tel: (416) 867-3076
Fax: (416) 867-9192

Lawyers for Dr. Carolyn Rogers,
Dr. Loys Ligate, and Dr. Sam Swaminath

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IN THE MATTER OF the *Coroners Act*, R.S.O. 1990, c. 37
AND IN THE MATTER OF the Inquest into the death of Ashley Smith

AFFIDAVIT OF FRED W. TRANQUILLI

I, Fred W. Tranquilli, of the City of London, in the Province of Ontario, **MAKE OATH AND SAY:**

1. I am an associate lawyer with the firm of Lerner LLP. Nancy McAuley, a partner with our office, represents the moving parties, Dr Loys Ligate, Dr Carolyn Rogers, and Dr Sam Swaminath, for the purpose of the inquest into the death of Ashley Smith. These physicians have been granted standing pursuant to Dr Carlisle's order of September 24, 2012. As such, I have knowledge of the matters to which I hereinafter depose. Where a deposed matter is based on my information and belief, the source of that information is set out and I verily believe it to be true.
2. As referenced above, Ms McAuley served as counsel to the subject physicians in the inquest into the death of Ashley Smith presided over by Dr Bonita Porter, which was formally announced in the spring of 2010, with hearings initially scheduled to commence on November 1, 2010. The start date was subsequently adjourned on three occasions, with hearings ultimately commencing on May 16, 2011. After a few days of evidence, the hearings were interrupted by a number of interim motions. The inquest was consequently adjourned to September 12, 2011.
3. On June 29, 2011, the parties were notified that Dr Porter was due to retire in November, 2011, and, as it was not expected that the inquest would be completed by that time, Dr Porter would be replaced by Dr John Carlisle. On September 30, 2011, Dr Carlisle issued an order discharging the jury, closing the first inquest, and directing that a new inquest into the death of Ashley Smith be convened.

4. Between September of 2011 and December 14, 2011, the parties with standing met several times in an effort to bring this matter forward.

5. In December of 2011, the parties were advised that Mr Siebenmorgen would not be continuing as Coroner's counsel for the Ashley Smith Inquest. Tragically, Mr Fred Duprey, counsel assisting Mr Siebenmorgen, died unexpectedly in December of 2011.

6. Despite follow up correspondence by counsel for Ashley Smith's family and other parties in the months that followed, no further substantive information on when and how the Ashley Smith inquest would resume was provided by the Coroner's office until June 20, 2012, when the parties with standing in the original inquest were advised that Ms Jocelyn Speyer would be the new counsel to the Coroner.

7. On July 6, 2012, we received correspondence directly from Ms Speyer advising that a pre-inquest meeting would take place on September 10, 2012. Thereafter, motions for standing at the inquest would be heard on September 20, 2012. With respect to motions, we were advised that "any additional motions will be heard on Thursday and Friday, October 4 and 5, and any additional dates that may be required". Finally, Ms. Speyer's memo concluded that the inquest would commence on Monday, January 14, 2013.

8. I am advised by Ms McAuley that at the pre-inquest meeting on September 10, 2012, Ms McAuley advised Coroner's counsel and the other parties that she was scheduled to commence a different inquest in Barrie on October 3, 2012 and therefore was not available on October 4, 2012. Further, Ms McAuley advised that her partner, Mr Mark Freiman, would be lead counsel on motions or applications relating to any potential jurisdictional issues (including a challenge to the scope and the issue of summoning out-of-province witnesses). Coroner's counsel was advised that Mr Freiman was currently involved in a Federal Commission that commenced approximately six months ago and that is not scheduled to conclude until mid-October. Therefore, Mr Freiman is also unavailable on October 4, 2012.

9. In addition, at the pre-inquest meeting on September 10, 2012, I am advised by Ms McAuley that she undertook to use her best efforts to advise as to our clients' position on

the scope as set by Dr Carlisle (and provided for the first time to counsel at that meeting), by Monday September 24, 2012.

10. I am advised by Ms McAuley that she spoke with Ms Speyer on September 13, 2012 and once again confirmed that neither she nor Mr Freiman were available on October 4, 2012 to argue motions. Ms McAuley also confirmed with Ms Speyer that she anticipated receiving instructions to bring an application to challenge the scope as set by Dr Carlisle.

11. On September 14, 2012, Ms Speyer advised of her intention to bring an application seeking to summons out-of-province witnesses. A partial witness list was provided representing the out-of-province witnesses. By Direction of Dr Carlisle, such applications were to be filed by September 24, 2012 and would be heard on Thursday October 4, 2012 at 9:30 am.

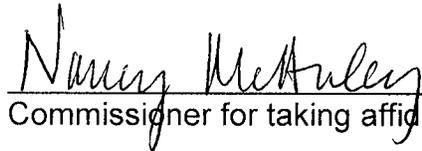
12. To date, the parties have not been provided with a full list of the witnesses Coroner's counsel anticipates calling, recognizing that this list could evolve during the course of the inquest. We have a list of eleven out-of-province witnesses.

13. On September 20, 2012, Ms McAuley wrote to confirm that she had been instructed to bring an application seeking to challenge the scope of the inquest as set by Dr Carlisle on behalf of the moving parties. By letter dated September 24, 2012, counsel for the Correctional Services of Canada advised that her client would be supporting our challenge to the scope and our request for an adjournment of the applications seeking to summons out-of-province witnesses.

14. The relevance and necessity of all anticipated evidence must be assessed within the context of the scope. Thus, it is premature to move forward with applications on evidence while our challenge to the scope itself remains pending. In the event our clients are successful in challenging the scope as currently defined, all evidentiary decisions flowing from the current scope will, of necessity, have to be reconsidered.

15. I swear this affidavit in support of our client's request that the applications for summonses of out-of-province witnesses, currently returnable October 4, 2012, be adjourned to a date to be directed by the presiding Coroner in consultation with the parties.

SWORN BEFORE ME at the City of
London, on September 27th, 2012.


Commissioner for taking affidavits

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Fred W. Tranquilli