IN THE MATTER OF an Inquest into the Death of Ashley Smith

AFFIDAVIT OF KIM PATE
(AFFIRMED FEBRUARY 28, 2011)

I, Kim Pate, of Ottawa, Ontario, affirm as follows:

1. I am the Executive Director of the Canadian Association of Elizabeth Fry Societies (CAEFS) and have been since 1992. CAEFS has been granted standing at the Inquest into the Death of Ashley Smith. I have personal knowledge of the facts deposed herein unless otherwise stated, and if called to testify, could and would testify competently to such facts.

2. In my capacity as Executive Director of CAEFS, I met and spoke with Ashley Smith a number of times while she was incarcerated in the federal corrections system. During our discussions, Ashley described to me the conditions of her detention, and, in particular, she told me that she had been denied access to programs and services, including psychiatric care. She also complained about the length of time she was being held in segregation and the number of

times she was transferred between institutions. She also described how she was treated by medical and correctional staff, and told me that she had been assaulted by staff.

3. At Ashley's request, and on her behalf, I made a request for a copy of her personal records held by the Correctional Service of Canada (CSC). Ashley consented to the release of those records to me as well. I made two separate requests under the *Privacy Act,* on behalf of Ashley, for access to those records. Those requests were denied. The Privacy Commissioner upheld CAEFS right to access Ashley's records, but CSC continued to deny CAEFS access to the files. CAEFS then sought judicial review of CSC's denials of the *Privacy Act* claims, which were ultimately resolved in our favour. Specifically, on April 29, 2010, the Honourable Justice Kelen ordered the release of Ashley's personal records to CAEFS. Justice Kelen's decision was varied, on consent, by the Honourable Justice Beaudry, on August 23, 2010, to expand the scope of documents that would be produced to CAEFS. Attached hereto and marked as exhibit "A" is a true and correct copy of the judgement of the Honourable Justice Kelen, dated April 29, 2010. Attached hereto and marked as exhibit "B" is a true and correct copy of the Order of the Honourable Justice Beaudry, dated August 23, 2010.

4. As a result of CAEFS' successful assertion of Ashley's *Privacy Act* requests, on her behalf, I was given access to a number of video recordings of Ashley taken by CSC, while Ashley was incarcerated at the Joliette Institution. However, I was not provided with a copy of the video recordings. When I requested a copy of the video recordings, my request was denied. These video recordings are time-stamped, such that the viewer can determine the length of time of

each act or omission reflected in the video. I have reviewed the report of Dr. Paul Beaudry. That report was likewise not made available to CAEFS until Ashley's *Privacy Act* claims were litigated. It is my belief that the videos I reviewed are the same videos that Dr. Beaudry describes in his January 2010 report to the Correctional Investigator. Attached hereto and marked as exhibit "C" is a true and correct copy of the report of Dr. Paul Beaudry.

5. The content of the videos I reviewed was shocking and disturbing. For example, the videos clearly show that Ashley was physically restrained for hours at a time. The videos also clearly show that Ashley's requests to have her tampon changed were ignored for hours. The videos further show that Ashley was left in a wet security gown for an extended period of time while strapped to a metal gurney. The videos also show that Ashley received intravenous injections administered by certain staff at Joliette Institution on July 22, 23 and 26, 2007, without her consent. The foregoing is a description of only some of the acts and omissions I observed in reviewing these video recordings made by CSC. It is my belief that neither Dr. Beaudry's nor my own description of a portion of the contents of those recordings is sufficient to convey to the jury a complete and accurate account of the treatment of Ashley while within the care of the Correctional Service of Canada or how that treatment may have affected her state of mind on or about October 19, 2007. Rather, the contemporaneous video recordings provide the best evidence of what actually transpired and what might be done differently in the future to prevent similar treatment and/or additional deaths of those held in custody in Canadian prisons.

6. With regard to the injections, the videos clearly depict Ashley repeatedly and calmly stating that she did not want an injection. On one occasion, Ashley indicates she would be prepared to take the medication orally. Despite this agreement, Ashley is given another injection. The videos show how the medical staff treated Ashley -- often threatening her with further injections if she didn't "calm down", despite the fact that she appears to be responding in a very calm and measured manner overall. The videos clearly show that Ashley was not aggressive or combative with the medical staff before they threatened her and/or administered the forcible injections. On one occasion, Ashley is seen to be standing up in her cell. She is handcuffed and surrounded by numerous guards in riot gear when she is injected without her consent. She does not display any form of physical resistance to this forced injection. At times, the nurse is also seen wearing a gas mask while dealing with Ashley. While Ashley verbally resisted the injections and expressed her opposition to the injections, she was not particularly agitated or otherwise physically aggressive with the staff. Again, it is my view that my description of these events would not convey a complete and accurate account of how Ashley was treated to the jury.

7. I also was given access to a videotaped recording of Ashley during one of her inter-regional transfers. The video depicts Ashley being restrained in her seat and wearing a "spit hood" which covers her entire face. At one point, it appears as though Ashley is tied to her seat. This video was also shocking and provides a clear image of how Ashley was handled by correctional authorities. Again, it is my view that my description of these events would not convey a complete and accurate account of how Ashley was treated to the jury.

8. I make this affidavit in support of a motion to produce videotape recordings of Ashley Smith and for no other or improper purpose.

Affirmed before me at New York, NY)
this 28th day of February 2011)
)
)
)

Kim Pate

Commissioner for taking oaths

ANTOINETTE RUDZINSKI
Notary Public, State of New York
No. 02RU5001560
Qualified in Dutchess County
Certificate Filed in New York County
Commission Expires Sept. 8, 2014

THIS IS EXHIBIT " A " REFERRED TO IN THE
AFFIDAVIT OF KIM PATE
SWORN BEFORE ME THIS 25th DAY
OF FEBRUARY 2011

A Commissioner, etc

ANTOINETTE RUDZINSKI
Notary Public, State of New York
No. 02RU5001560
Qualified In Dutchess County
Certificate Filed in New York County
Commission Expires Sept. 8, 2014

Case Name:

Canadian Assn. of Elizabeth Fry Societies v. Canada (Minister of Public Safety Canada)

Between
Canadian Association of Elizabeth Fry Societies, Applicant,
and
Minister of Public Safety Canada, and Correctional Services of Canada, Respondent

[2010] F.C.J. No. 551

[2010] A.C.F. no 551

2010 FC 470

368 F.T.R. 211

7 Admin. L.R. (5th) 160

2010 CarswellNat 1071

Docket T-1040-09

Federal Court
Ottawa, Ontario

Kelen J.

Heard: March 29, 2010.
Judgment: April 29, 2010.

(81 paras.)

Government law -- Access to information and privacy -- Protection of privacy -- Personal information -- Legislation -- Federal -- Privacy Act -- Disclosure or release of information -- Consent to disclosure or release -- Statutory exceptions or exemptions -- Appeals and judicial review -- Standard of review -- Correctness -- Application by prisoner's advocate group for judicial review of refusal of correctional services to disclose personal information of deceased prisoner allowed -- While prisoner was still alive, applicant sought disclosure of prisoner's personal information with her consent -- Correctional services failed to provide information within statutory time lines and then denied request six months after prisoner committed suicide on basis that documents exempted as disclosure would interfere with criminal investigation -- Prisoner's death did not vitiate consent to release of information -- As no ongoing criminal investigation at time of refusal, refusal could not be justified under criminal investigation exemption -- Privacy Act, ss. 22(1)(b) and 41.

Application by a prisoner's advocate group for judicial review of the refusal of the correctional services to disclose the personal information of a deceased prisoner. During her incarceration, the prisoner alleged to the applicant, a non-profit organization devoted to assisting female prisoners, that she was being subjected to improper treatment including assaults from staff, inadequate living conditions, lack of psychiatric care or assessment and frequent segregation and transfers. She sought the assistance of the applicant in addressing her concerns of improper treatment and, to that end, requested access

under the Privacy Act, to her personal records held by the correctional service and consented to the release of those records to the applicant. Approximately two weeks after the prisoner made the request, the executive director of the prisoner's advocate group made a request for specific information on the prisoner's behalf. The correctional services advised that a 30-day extension was required to process the request. At the conclusion of the 30-day extension, the correctional services had not responded to the request, and the prisoner made a second consent and request for the release of her personal information. Approximately one month after the second request was made, the prisoner committed suicide. Approximately six months after the prisoner's death, the applicant followed up on the request and was advised by the correctional services that due to the death of the prisoner, all of the files related to the prisoner were exempt from disclosure under sections 21 and 26 of the Privacy Act. On or about the same day that the respondent denied the request, a criminal investigation into the death of the prisoner was initiated which led to criminal charges against four correctional services employees. The applicant filed a complaint with the Privacy Commissioner, who found that the complaint was well-founded, that the death of the prisoner did not vitiate her consent and that the correctional services did not properly invoke the exemptions in the Privacy Act. However, the Commission elected not to apply to the Federal Court to order the release of the prisoner's records and consequently, the applicant brought an application to the Federal Court to compel the release of the prisoner's records under the Privacy Act.

HELD: Application allowed. The appropriate standard of review was correctness. The applicant had standing to bring the application as when it initially made its request for disclosure of the prisoner's records, the prisoner had not yet died and had given her consent to the release of her records, which survived her death. Furthermore, subsection 10(c) of the Privacy Act was broad enough to encompass authorization of the release of personal information by a person who was no longer alive as long as the consent was in writing. The relevant date upon which the Court should review the decision of the respondent to refuse access to the applicant was the date on which the respondent was deemed to have refused the request for disclosure following the expiry of the time limits under the Act, at which time the prisoner was still alive and consequently there could be no argument that her death vitiated the consent. The respondent's failure to provide the personal information to the applicant within the 30-day extension was a breach of sections 14 and 15 of the Privacy Act. As there was no criminal investigation at the time of the refusal for access, the refusal could not be justified under the exemption under subsection 22 (1)(b) of the Act and furthermore, the written decision which was later provided to the applicant did not provide sufficient explanation or evidence to support the exemption, nor was there tangible evidence of harm from the disclosure of the personal information.

Statutes, Regulations and Rules Cited:

Access to Information Act, R.S.C. 1985, c. A-1,

Canadian Charter of Rights and Freedoms, 1982, R.S.C. 1985, App. II, No. 44, Schedule B,

Federal Courts Rules, 1998,

Privacy Act, R.S.C. 1095, c. P-21, s. 2, s. 3, s. 3(m), s. 8, s. 8(1), s. 8(2)(j), s. 8(2)(m), s. 12, s. 14, s. 15, s. 16(3), s. 22, s. 22 (1)(b), s. 22(3), s. 26, s. 29, s. 29(1)(d), s. 29(2), s. 41, s. 47, s. 48, s. 49, s. 52

Municipal Freedom of Information and Protection of Privacy Act, R.S.O. c. M-56, s. 54(a)

Privacy Act Regulations SOR/83-508, s. 10, s. 10(a), s. 10(b), s. 10(c)

Counsel:

Kris Klein, Shaun Brown for the Applicant.

Gregory Tzemenakis, Korinda McLaine, for the Respondent.

REASONS FOR JUDGMENT AND JUDGMENT

1 **KELEN J.:**— This is an application pursuant to section 41 of the *Privacy Act*, R.S.C. 1985, c. P-21 as amended (the "Act") for a review of the decision of the Correctional Services of Canada (CSC) wherein it refused to disclose to the applicant access to certain personal information regarding Ms. Ashley Smith, a 19 year old prisoner who committed suicide in her cell.

FACTS

Background facts

2 Ms. Ashley Smith was imprisoned in New Brunswick's youth justice system at the age of 15. In custody, she committed a number of additional criminal offences and her sentence was extended. When she reached the age of majority (i.e. 18), she was transferred in October 2006 to New Brunswick's adult correctional system, and then to the custody of the federal prison system operated by the respondent.

3 The respondent allegedly moved Ms. Smith several times among a number of penitentiaries, treatment facilities and hospitals across Canada until her death by suicide in her cell on October 19, 2007 at the Grand Valley Institution for Women in Kitchener, Ontario.

4 During her incarceration, Ms. Smith alleged to the applicant, the Elizabeth Fry Society, that she was being subjected to improper treatment including alleged assaults from the staff, alleged inadequate living conditions, alleged lack of psychiatric care or assessment, and alleged frequent segregation and transfers.

5 The applicant, the Canadian Association of Elizabeth Fry Societies, is an umbrella organization of 25 Elizabeth Fry Societies across Canada. The applicant is a non-profit organization committed to raising public awareness with respect to decreasing the number of criminalized and imprisoned women in Canada, promoting the decarceration of women presently in prison, and increasing the availability of a publicly funded and community-based social system to care for women before they imprisoned.

6 The respondent, the Correctional Services of Canada, is responsible for the care of imprisoned persons. Ms. Smith was in the custody and care of the respondent at the time she made the *Privacy Act* request which is the subject of this application.

Privacy Act request and subsequent denial

7 Ms. Smith sought the assistance of the Elizabeth Fry Society. The Affidavit of Ms. Kim Pate sets out the interaction between the Elizabeth Fry Society and Ms. Smith from the initial contact. Ms. Pate is the Executive Director of the Canadian Association of Elizabeth Fry Societies (CAEFS) and a part-time professor at the University of Ottawa in the Faculty of Law.

8 On May 31, 2007 Ms. Smith requested under the *Privacy Act* access to her personal records held by the respondent and consented to the release of her private CSC records to the Elizabeth Fry Society and Ms. Pate. The Consent for Disclosure of Personal Information Form states:

> *I hereby consent to the disclosure* by the Correctional Services of Canada of the personal information pertaining to myself which may be described as segregation, transfer, charges, and other information related of my prison term to the following individual(s) or organization(s) Kim Pate (CAEFS) and lawyer for the purpose of assisting me.

[Emphasis added]

9 Ms. Pate made the following specific request for information on Ashley's behalf on June 14, 2007, which was received on June 18, 2007:

> With respect to Ms. Ashley Smith, FPS #820435E (D.O.B. 29/01/88), please forward all information pertaining to:
>
> a. the terms of reference and investigation report regarding the allegations of staff assault of and by Ms. Smith;
> b. the various transfers of Ms. Smith to and from Nova, Pinel GVI,. St. Thomas;
> c. security classification and re-assessments, including information utilized from the youth system, police reports and court decisions;
> d. placement and retention of Ms. Smith in segregation, including segregation reviews;

e. all incident reports, charge sheets, and decisions regarding institutional behavioural issues, including institutional preventive security reports, et cetara;
f. psychological and psychiatric reports, assessments for decision;
g. internal CSC memoranda, electronic and other correspondence regarding the management and/or treatment of Ms. Smith, including, but not limited to activity and log sheets pertaining to staff assessments of her ongoing behaviour, et cetera.

10 On July 18, 2007 Ms. Ginette Pilon, a Senior Analyst of the CSC's Access to Information and Privacy Division, advised Ms. Pate that a 30-day extension beyond the statutory 30-day limit contained in section 14 of the *Privacy Act* would be required to process the request because meeting the original 30-day timeline would unreasonably interfere with the operations of the government institution. CSC did not disclose Ms. Smith's records at the conclusion of the 30 day extension, which was August 17, 2007.

11 Ms. Smith sent a second consent and request for release of her information on September 24, 2007. The form was written and signed by an Executive Director of the Elizabeth Fry Society and witnessed by a CSC staff person because Ms. Smith not allowed writing utensils. The Release of Information Form states:

> I, Ashley Smith, hereby authorize CSC, to release to Kim Pate, CAEFS, the following information: All CSC, Police, Court, health records, reports et cetera, for the purpose(s) of assisting me. This release will be in effect from Sept 24/07 until Jan 30/09.

12 Ms. Pate stated in her cross examination that the dates January 31, 2009 and January 30, 2009 were inserted into the consent and authorization forms respectively because those were the last days of Ms. Smith's sentence.

13 Ms. Smith committed suicide on October 19, 2007, 123 days after the first request for records was received, 62 days after the last day of the 30-day extension.

14 On May 23, 2008 counsel for the applicant contacted the CSC by email to inquire about the status of the outstanding request for records. On May 26, 2008 CSC sent out the following reply by email:

> Unfortunately, due to the incident that resulted in the death of this inmate on October 19, 2007, all files related to this individual are exempted in their entirety pursuant to section 22 and 26 of the *Privacy Act*.

Ms. Anne Rooke, Access to Information and Privacy Coordinator to the CSC reportedly instructed the author of this email.

15 On the same day, May 26, 2008, CSC issued a short letter setting out the reasons for refusing to disclose the requested records:

> This is in response to your request for access to the personal information contained in documentation held by Correctional Services of Canada pertaining to Ashley Smith (deceased).
>
> Please note that the information has been exempted in its entirety pursuant to section 22 and 26 of the *Privacy Act*.
>
> You are entitled to file a complaint with the Office of the Privacy Commissioner of Canada concerning this request. Should you wish to exercise this right, you complaint should be forward to the Office of the Privacy Commissioner Place de Ville, Tower "B", 112 Kent Street, Ottawa, Ontario, K1A 1H3.

Report of the Privacy Commissioner of Canada

16 The applicant filed a complaint against Ms. Rooke and CSC with the Privacy Commissioner on June 26, 2008.

17 On May 15, 2009 the Privacy Commissioner determined that the complaint was well founded. The Commissioner held that the death of the individual did not vitiate their consent under the Act and that the CSC did not properly invoke the exemptions found in the Act. Part of the Commissioner's reasons are reproduced below for convenience:

...

5. In order to determine the appropriateness of the application of section 26, our office needed to asses the validity of the consent upon the death of the individual providing the consent. *After careful consideration, our office concluded that the individual's death does not vitiate the consent provided to the Executive Director of the Canadian Association of Elizabeth Fry Societies.* Consequently, for CSC's purposes, the death of the individual was only relevant to the extent that it may have affected the exemptions CSC was entitled to rely on. As a result, we are of the view that CSC could not rely on the application of section 26 to deny access to the entire personal information requested.

...

7. In this particular case, CSC advised the requester that the information requested was exempted in its entirety pursuant to section 22 of the Act without specifying the paragraph or paragraphs invoked to exempt the information requested. In the course of this investigation, we have reviewed the actions taken by the institution and its representations and concluded that CSC did not establish to our satisfaction that it properly invoked the provisions contained in section 22 to exempt the requested information in its entirety.

[Emphasis added]

18 The Commissioner elected not to apply to the Federal Court to order the release of Ms. Smith's records. However, the applicant applied to this Court to compel the release of Ms. Smith's records under the Act.

Evidence before the Court

19 The evidence before this Court consists of an affidavit sworn on behalf of the applicant by Ms. Pate and the public and confidential affidavits by Mr. Nick Fabiano on behalf of the respondent. Both affiants were cross examined on their affidavits and exhibits. Mr. Fabiano was not cross examined on his confidential affidavit which attaches as an exhibit Ms. Smith's undisclosed records.

Ms. Pate's Affidavit and cross examination

20 The affidavit dated July 16, 2009 by Ms. Kim Pate, the Executive Director of the Canadian Association of Elizabeth Fry Societies and a part-time professor at the University of Ottawa in the Faculty of Law deposes, *inter alia*:

a. the role of the applicant in assisting incarcerated women in Canada through direct action and advocacy;
b. allegations of mistreatment of Ms. Smith at the hands of CSC staff and Ms. Pate's personal observations of Ms. Smith during her visits;
c. on May 31, 2007 and September 24, 2007, Ms. Smith requested and consented to the release of her CSC records to the applicant and Ms. Pate;
d. on June 14, 2007 a request was sent to CSC for specific release of records;
e. the applicant has since commenced an application in the Federal Court to compel the release of Ms. Smith's records in order the understand "exactly what happened to Ashley, and to allow us to better assist other imprisoned women who are experiencing treatment similar to that to which Ashley was subjected, and to try to prevent similar treatment in the future".

Mr. Fabiono's Affidavit and cross examination

21 The public affidavit dated August 28, 2009 by Mr. Nick Fabiano, the Director General, Rights, Redress and Resolution of CSC deposes:

a. on June 18, 2007 CSC received a request enclosing a copy of the Consent for Disclosure of Personal Information form for release of specific records belonging to Ms. Smith, ;
b. on July 18, 2007 the CSC's Access to Information Division (also known as the "ATIP Division") sent a notice of extension;

c. Ms. Smith died on October 19, 2007 before the ATIP Division completed a review of the documents in question;
d. Mr. Fabiano was advised by Ms. Anne Rooke, Director, Access to Information and Privacy at CSC that Ms. Smith's consent for disclosure of her records ceased to be valid upon her death and that all her files were exempted pursuant to section 22 and 26 of the Act:

The confidential personal records of Ms. Smith filed with the Court

22 The respondent CSC filed the confidential personal records of Ms. Smith with the Court attached to the confidential affidavit dated August 28, 2009 by Mr. Nick Fabiano. The confidential affidavit does not provide any elaboration on the events that led to denial of the applicant's request for records. This affidavit attaches the personal records of the Ms. Smith, which I can describe in general, non-confidential terms as follows:

a. numerous assessments of Ashley Smith by CSC;
b. transfer records;
c. violent incident records in both CSC and provincial custody;
d. criminal code charge sheets;
e. at least one sentencing court transcript; and
f. security classification for Ms. Smith in the "Maximum" security risk category.

The records of Ms. Smith's personal information contain 291 pages, and end in June 2007. There are no records for the last few months before her suicide, or records following her suicide.

Evidence from cross-examination

23 The following points emerged from Mr. Fabiano's cross-examination:

a. Ms. Anne Rooke, to whom Mr. Fabiano reports, made the decision to deny the requested disclosure of record;
b. Mr. Fabiano never reviewed Ms. Smith's requested records and has no knowledge of their contents;
c. Mr. Fabiano could not answer who made the decision not to meet the original or extended deadline for releasing Ms. Smith's records;
d. CSC has in the past disclosed the records of deceased inmates on a case by case basis;
e. the ongoing criminal investigation which was cited as a reason for exempting the records under section 22 of the Act had ended at the time of his affidavit; and
f. Ms. Rooke was not available to swear an affidavit at the time it was requested.

24 At the conclusion of the cross examination counsel for the respondent undertook to provide the Court and the applicant with the respondent's current grounds for refusing to release Ms. Smith's information. The respondent's current position is as follows:

a. Section 26 of the Act is no longer relied on;
b. Section 22(1)(b) of the Act is relied upon as a ground for refusal; and
c. Section 3 of the Act and section 10 of the *Privacy Regulations* form the basis of the respondent's objection to the applicant's standing to bring this application.

Judicial notice of Criminal Code charges

25 The Court was asked by the parties to take judicial notice of the fact that a Royal Canadian Mounted Police investigation was initiated with respect to Ms. Smith's death which led to Criminal Code charges of "criminal negligence causing death" against four CSC employees. This investigation was conducted in and around May 26, 2008. The Court was informed that those charges were later dismissed at the preliminary hearing stage.

Key dates and timelines

26 The key dates and timelines with respect to this application are as follows:

a. request and consent for disclosure by Ms. Smith of her personal information was dated June 18, 2007;
b. the extension to the 30 day timeline for producing this personal information was made by the respondent on July 18, 2007;
c. the personal information was due from the respondent at the end of this extension, which was August 17, 2007. At that time, under the law, the respondent is deemed to have denied that the request and consent to produce the personal documents;
d. Ms. Smith and the applicant sent a second request for the release of her personal information on September 24, 2007 since the first request was not being complied with;
e. Ms. Smith committed suicide on October 19, 2007;
f. the decision of the respondent to deny the request for the disclosure was dated May 26, 2008; and
g. the date of the hearing before this Court was March 29, 2010.

LEGISLATION

27 The purpose of the *Privacy Act* is set out at section 2:

> 2. The purpose of this Act is to extend the present laws of Canada that protect the privacy of individuals with respect to personal information about themselves held by a government institution and that provide individuals with a right of access to that information.
>
> * * *
>
> 2. La présente loi a pour objet de compléter la législation canadienne en matière de protection des renseignements personnels relevant des institutions fédérales et de droit d'accès des individus aux renseignements personnels qui les concernent.

28 Section 3 of the Act defines "personal information" as follows:

> 3. "personal information" means information about an identifiable individual that is recorded in any form including, without restricting the generality of the foregoing,
>
> [...]
>
> but, for the purposes of sections 7, 8 and 26 and section 19 of the *Access to Information Act*, does not include
>
> [...]
>
> (*m*) information about an individual who has been dead for more than twenty years;
>
> * * *
>
> 3. "renseignements personnels" Les renseignements, quels que soient leur forme et leur support, concernant un individu identifiable, notamment :
>
> [...]
>
> toutefois, il demeure entendu que, pour l'application des articles 7, 8 et 26, et de l'article 19 de la *Loi sur l'accès à l'information*, les renseignements personnels ne comprennent pas les renseignements concernant :
>
> [...]
>
> *m*) un individu décédé depuis plus de vingt ans.

29 Section 8 of the Act sets out the circumstances where personal information shall be disclosed:

> 8. (1) Personal information under the control of a government institution shall not, without the consent of the individual to whom it relates,
>
> be disclosed by the institution except in accordance with this section.
>
> (2) Subject to any other Act of Parliament, personal information under the control of a government institution may be disclosed
>
> [...]
>
> (*j*) to any person or body for research or statistical purposes if the head of the government institution
>
> (i) is satisfied that the purpose for which the information is disclosed cannot reasonably be accomplished unless the information is provided in a form that would identify the individual to whom it relates, and
> (ii) obtains from the person or body a written undertaking that no subsequent disclosure of the information will be made in a form that could reasonably be expected to identify the individual to whom it relates;
>
> [...]
>
> (*m*) for any purpose where, in the opinion of the head of the institution,
>
> (i) the public interest in disclosure clearly outweighs any invasion of privacy that could result from the disclosure, or
> (ii) disclosure would clearly benefit the individual to whom the information relates.
>
> * * *
>
> 8. (1) Les renseignements personnels qui relèvent d'une institution fédérale ne peuvent être communiqués, à défaut du consentement de l'individu qu'ils concernent, que conformément au présent article.
> (2) Sous réserve d'autres lois fédérales, la communication des renseignements personnels qui relèvent d'une institution fédérale est autorisée dans les cas suivants :
>
> [...]
>
> *j*) communication à toute personne ou à tout organisme, pour des travaux de recherche ou de statistique, pourvu que soient réalisées les deux conditions suivantes :
>
> (i) le responsable de l'institution est convaincu que les fins auxquelles les renseignements sont communiqués ne peuvent être normalement atteintes que si les renseignements sont donnés sous une forme qui permette d'identifier l'individu qu'ils concernent,
> (ii) la personne ou l'organisme s'engagent par écrit auprès du responsable de l'institution à s'abstenir de toute communication ultérieure des renseignements tant que leur forme risque vraisemblablement de permettre l'identification de l'individu qu'ils concernent;
>
> [...]
>
> *m*) communication à toute autre fin dans les cas où, de l'avis du responsable de l'institution :

(i) des raisons d'intérêt public justifieraient nettement une éventuelle violation de la vie privée,

(ii) l'individu concerné en tirerait un avantage certain.

30 Section 12 of the Act grants individuals the right of access to their personal information:

12. (1) Subject to this Act, every individual who is a Canadian citizen or a permanent resident within the meaning of subsection 2(1) of the *Immigration and Refugee Protection Act* has a right to and shall, on request, be given access to

(*a*) any personal information about the individual contained in a personal information bank; and

(*b*) any other personal information about the individual under the control of a government institution with respect to which the individual is able to provide sufficiently specific information on the location of the information as to render it reasonably retrievable by the government institution.

[...]

* * *

12. (1) Sous réserve des autres dispositions de la présente loi, tout citoyen canadien et tout résident permanent au sens du paragraphe 2(1) de la *Loi sur l'immigration et la protection des réfugiés* ont le droit de se faire communiquer sur demande :

a) les renseignements personnels le concernant et versés dans un fichier de renseignements personnels;

b) les autres renseignements personnels le concernant et relevant d'une institution fédérale, dans la mesure où il peut fournir sur leur localisation des indications suffisamment précises pour que l'institution fédérale puisse les retrouver sans problèmes sérieux.

[...]

31 Section 14 of the Act requires the head of the government institution to acknowledge in writing receipt of a request for access to personal information within 30 days of the request being made and indicate whether access will be granted:

14. Where access to personal information is requested under subsection 12(1), the head of the government institution to which the request is made shall, subject to section 15, within thirty days after the request is received,

(*a*) give written notice to the individual who made the request as to whether or not access to the information or a part thereof will be given; and

(*b*) if access is to be given, give the individual who made the request access to the information or the part thereof.

* * *

14. Le responsable de l'institution fédérale à qui est faite une demande de communication de renseignements personnels en vertu du paragraphe 12(1) est tenu, dans les trente jours suivant sa réception, sous réserve de l'article 15 :

a) d'aviser par écrit la personne qui a fait la demande de ce qu'il sera donné ou non

communication totale ou partielle des renseignements personnels;

b) le cas échéant, de procéder à la communication.

32 Section 15 of the Act allows the head of a government institution to extend the time limit for complying with a request for access for a maximum of an additional 30 days:

> 15. The head of a government institution may extend the time limit set out in section 14 in respect of a request for
>
> (*a*) a maximum of thirty days if
>
> (i) meeting the original time limit would unreasonably interfere with the operations of the government institution, or
> (ii) consultations are necessary to comply with the request that cannot reasonably be completed within the original time limit, or
>
> (*b*) such period of time as is reasonable, if additional time is necessary for translation purposes or for the purposes of converting the personal information into an alternative format, by giving notice of the extension and the length of the extension to the individual who made the request within thirty days after the request is received, which notice shall contain a statement that the individual has a right to make a complaint to the Privacy Commissioner about the extension.
>
> * * *
>
> 15. Le responsable d'une institution fédérale peut proroger le délai mentionné à l'article 14 :
>
> *a*) d'une période maximale de trente jours dans les cas où :
>
> (i) l'observation du délai entraverait de façon sérieuse le fonctionnement de l'institution,
> (ii) les consultations nécessaires pour donner suite à la demande rendraient pratiquement impossible l'observation du délai;
>
> *b*) d'une période qui peut se justifier dans les cas de traduction ou dans les cas de transfert sur support de substitution. Dans l'un ou l'autre de ces cas, le responsable de l'institution fédérale envoie à la personne qui a fait la demande, dans les trente jours suivant sa réception, un avis de prorogation de délai en lui faisant part du nouveau délai ainsi que de son droit de déposer une plainte à ce propos auprès du Commissaire à la protection de la vie privée.

33 Subsection 16(3) of the Act deems the government institution to have refused the request for disclosure following the expiry of the time limits under the Act:

> 16(3) Where the head of a government institution fails to give access to any personal information requested under subsection 12(1) within the time limits set out in this Act, the head of the institution shall, for the purposes of this Act, be deemed to have refused to give access.
>
> * * *
>
> 16(3) Le défaut de communication de renseignements personnels demandés en vertu du paragraphe 12 (1) dans les délais prévus par la présente loi vaut décision de refus de communication.

34 Subsection 22(1)(b) of the Act permits the government institution to refuse to disclose personal information which by its disclosure would be injurious to the conduct of a lawful investigation:

> 22. (1) The head of a government institution may refuse to disclose any personal information requested under subsection 12(1)

(*b*) the disclosure of which could reasonably be expected to be injurious to the enforcement of any law of Canada or a province or the conduct of lawful investigations, including, without restricting the generality of the foregoing, any such information

(i) relating to the existence or nature of a particular investigation,
(ii) that would reveal the identity of a confidential source of information, or
(iii) that was obtained or prepared in the course of an investigation; or

(*c*) the disclosure of which could reasonably be expected to be injurious to the security of penal institutions.

* * *

22. (1) Le responsable d'une institution fédérale peut refuser la communication des renseignements personnels demandés en vertu du paragraphe 12(1) :

b) soit dont la divulgation risquerait vraisemblablement de nuire aux activités destinées à faire respecter les lois fédérales ou provinciales ou au déroulement d'enquêtes licites, notamment :

(i) des renseignements relatifs à l'existence ou à la nature d'une enquête déterminée,
(ii) des renseignements qui permettraient de remonter à une source de renseignements confidentielle,
(iii) des renseignements obtenus ou préparés au cours d'une enquête;

c) soit dont la divulgation risquerait vraisemblablement de nuire à la sécurité des établissements pénitentiaires.

35 Subsection 22(3) defines the term "investigation":

(3) For the purposes of paragraph (1)(*b*), "investigation" means an investigation that

(*a*) pertains to the administration or enforcement of an Act of Parliament;

(*b*) is authorized by or pursuant to an Act of Parliament; or

(*c*) is within a class of investigations specified in the regulations.

* * *

(3) Pour l'application de l'alinéa (1)*b*), "enquête" s'entend de celle qui :

a) se rapporte à l'application d'une loi fédérale;

b) est autorisée sous le régime d'une loi fédérale;

c) fait partie d'une catégorie d'enquêtes précisée dans les règlements.

36 Section 29 of the Act allows individuals or their representatives to file a complaint with the Commissioner if their request for disclosure has been refused:

29. (1) Subject to this Act, the Privacy Commissioner shall receive and investigate complaints

(*d*) from individuals who have requested access to personal information in respect of which a

time limit has been extended pursuant to section 15 where they consider the extension unreasonable;

[...]

(2) Nothing in this Act precludes the Privacy Commissioner from receiving and investigating complaints of a nature described in subsection (1) that are submitted by a person authorized by the complainant to act on behalf of the complainant, and a reference to a complainant in any other section includes a reference to a person so authorized.

* * *

29. (1) Sous réserve des autres dispositions de la présente loi, le Commissaire à la protection de la vie privée reçoit les plaintes et fait enquête sur les plaintes :

d) déposées par des individus qui ont demandé des renseignements personnels dont les délais de communication ont été prorogés en vertu de l'article 15 et qui considèrent la prorogation comme abusive;

[...]

(2) Le Commissaire à la protection de la vie privée peut recevoir les plaintes visées au paragraphe (1) par l'intermédiaire d'un représentant du plaignant. Dans les autres articles de la présente loi, les dispositions qui concernent le plaignant concernent également son représentant.

37 Section 41 of the Act gives individuals or their representatives who have been refused access to their personal records a right to apply to the Federal Court for a review of the matter following an investigation and report by the Commissioner:

41. Any individual who has been refused access to personal information requested under subsection 12(1) may, if a complaint has been made to the Privacy Commissioner in respect of the refusal, apply to the Court for a review of the matter within forty-five days after the time the results of an investigation of the complaint by the Privacy Commissioner are reported to the complainant under subsection 35(2) or within such further time as the Court may, either before or after the expiration of those forty- five days, fix or allow.

* * *

41. L'individu qui s'est vu refuser communication de renseignements personnels demandés en vertu du paragraphe 12(1) et qui a déposé ou fait déposer une plainte à ce sujet devant le Commissaire à la protection de la vie privée peut, dans un délai de quarante-cinq jours suivant le compte rendu du Commissaire prévu au paragraphe 35(2), exercer un recours en révision de la décision de refus devant la Cour. La Cour peut, avant ou après l'expiration du délai, le proroger ou en autoriser la prorogation.

38 Section 47 of the Act places the burden of justifying refusal to grant access to the applicant's personal information upon the government institution:

47. In any proceedings before the Court arising from an application under section 41, 42 or 43, the burden of establishing that the head of a government institution is authorized to refuse to disclose personal information requested under subsection 12(1) or that a file should be included in a personal information bank designated as an exempt bank under section 18 shall be on the government institution concerned.

* * *

47. Dans les procédures découlant des recours prévus aux articles 41, 42 ou 43, la charge d'établir le bien-fondé du refus de communication de renseignements personnels ou le bienfondé du versement de certains dossiers dans un fichier inconsultable classé comme tel en vertu de l'article 18 incombe à

l'institution fédérale concernée.

39 Section 48 and section 49 of the Act delineate the remedial powers of the Federal Court under the Act:

> 48. Where the head of a government institution refuses to disclose personal information requested under subsection 12(1) on the basis of a provision of this Act not referred to in section 49, the Court shall, if it determines that the head of the institution is not authorized under this Act to refuse to disclose the personal information, order the head of the institution to disclose the personal information, subject to such conditions as the Court deems appropriate, to the individual who requested access thereto, or shall make such other order as the Court deems appropriate.
>
> 49. Where the head of a government institution refuses to disclose personal information requested under subsection 12(1) on the basis of section 20 or 21 or paragraph 22(1)(*b*) or (*c*) or 24(*a*), the Court shall, if it determines that the head of the institution did not have reasonable grounds on which to refuse to disclose the personal information, order the head of the institution to disclose the personal information, subject to such conditions as the Court deems appropriate, to the individual who requested access thereto, or shall make such other order as the Court deems appropriate.

* * *

> 48. La Cour, dans les cas où elle conclut au bon droit de l'individu qui a exercé un recours en révision d'une décision de refus de communication de renseignements personnels fondée sur des dispositions de la présente loi autres que celles mentionnées à l'article 49, ordonne, aux conditions qu'elle juge indiquées, au responsable de l'institution fédérale dont relèvent les renseignements d'en donner communication à l'individu; la Cour rend une autre ordonnance si elle l'estime indiqué.
>
> 49. Dans les cas où le refus de communication des renseignements personnels s'appuyait sur les articles 20 ou 21 ou sur les alinéas 22(1)*b*) ou *c*) ou 24*a*), la Cour, si elle conclut que le refus n'était pas fondé sur des motifs raisonnables, ordonne, aux conditions qu'elle juge indiquées, au responsable de l'institution fédérale dont relèvent les renseignements d'en donner communication à l'individu qui avait fait la demande; la Cour rend une autre ordonnance si elle l'estime indiqué.

40 Section 52 of the Act grants the Court discretion to awards the costs of all judicial proceedings following the event or to the unsuccessful applicant if an important principle was raised:

> 52. (1) Subject to subsection (2), the costs of and incidental to all proceedings in the Court under this Act shall be in the discretion of the Court and shall follow the event unless the Court orders otherwise.
>
> (2) Where the Court is of the opinion that an application for review under section 41 or 42 has raised an important new principle in relation to this Act, the Court shall order that costs be awarded to the applicant even if the applicant has not been successful in the result.

* * *

> 52. (1) Sous réserve du paragraphe (2), les frais et dépens sont laissés à l'appréciation de la Cour et suivent, sauf ordonnance contraire de la Cour, le sort du principal.
>
> (2) Dans les cas où elle estime que l'objet du recours a soulevé un principe important et nouveau quant à la présente loi, la Cour accorde les frais et dépens à la personne qui a exercé le recours devant elle, même si cette personne a été déboutée de son recours.

41 Section 10 of the *Privacy Act Regulations* ("*Privacy Regulations*"), SOR/83-508 sets out who may exercise the rights to access under Act:

> 10. The rights or actions provided for under the Act and these Regulations may be exercised or performed
>
> [...]
>
> (*b*) on behalf of a deceased person by a person authorized by or pursuant to the law of Canada or a province to administer the estate of that person, but only for the purpose of such administration; and

(*c*) on behalf of any other individual by any person authorized in writing to do so by the individual.

* * *

10. Les droits ou recours prévus par la Loi et le présent règlement peuvent être exercés,

[...]

b) au nom d'une personne décédée, par une personne autorisée en vertu d'une loi fédérale ou provinciale à gérer la succession de cette personne, mais aux seules fins de gérer la succession; et

c) au nom de tout autre individu, par une personne ayant reçu à cette fin une autorisation écrite de cet individu.

ISSUES

42 The applicant raises the following issues:

a. Does the death of Ms. Ashley Smith vitiate her consent and authorization for the applicant to have access to her records?
b. Can the respondent rely on the RCMP criminal investigation to exempt the personal records from disclosure under subsection 22(1)(b) of the Act?

STANDARD OF REVIEW

43 In *Dunsmuir v. New Brunswick*, 2008 SCC 9, 372 N.R. 1, the Supreme Court of Canada held at paragraph 62 that the first step in conducting a standard of review analysis is to "ascertain whether the jurisprudence has already determined in a satisfactory manner the degree of (deference) to be accorded with regard to a particular category of question": see also *Khosa v. Canada (MCI)*, 2009 SCC 12, per Justice Binnie at paragraph 53.

44 Applications under section 41 are for review of a decision not to disclose personal information. While seeking an opinion from the Privacy Commissioner is a prerequisite to filing an application under section 41, the Commissioner's determination is not the subject of the review: see my decision in *Cemerlic v. Canada (Solicitor General)*, 2003 FCT 133, at para. 7. Despite the non-binding nature of the Commissioner's report, this Court has held that its opinions are an important consideration in the proceedings under section 41 of the Act: *Richards v. Canada (Minister of National Revenue)*, 2003 FC 1450, per Justice Lemieux at paragraph 9; *Gordon v. Canada (Minister of Health)*, 2008 FC 258, per Justice Gibson at paragraph 20; *Canada (Attorney General) v. Canada (Information Commissioner)* (2004), 32 C.P.R. (4th) 464 (F.C.), per Justice Dawson at paragraph 84.

45 In *Savard v. Canada Post Corp.*, 2008 FC 671, Justice Blanchard set out at paragraph 17 the standard of review in an application under section 41 of the Act:

> para17 In this matter, the Court is invited to review a decision made by the respondent on an issue of disclosure of personal information under the PA. It is a two-step analysis (*Kelly v.Canada (Solicitor General)*, [1992] F.C.J. No. 302 (Lexis) at paragraph 5). The first is to determine whether the statement of mailing is in fact the applicant's "personal information" within the meaning of paragraphs 3(*g*) and (*h*) of the PA. The goal is to determine whether the information at issue falls under a legal exception (*Blank v. Canada (Minister of the Environment)*, 2006 FC 1253, [2006] F.C.J. No. 1635 (Lexis), at paragraph 26). The appropriate standard at this stage is that of correctness (*Elomari v. Canada (Space Agency)*, 2006 FC 863 at paragraph 19; and *Thurlow, supra* at paragraph 28). If this first question is answered in the affirmative, we then move on to the second step. This step involves determining whether the discretionary power exercised by the respondent in regard to the refusal to disclose the statement of mailing was reasonable. On this issue, it should be noted that the PA does not contain any privative clause, that the decision-maker does not have special expertise in the matter and that the nature of the question is essentially discretionary. Taking these factors into account, it is my opinion that the appropriate standard at this stage is that of reasonableness.

(See also *Blank v. Canada (Minister of Justice)*, 2009 FC 1221 per Justice de Montigny at paragraph 27).

46 The parties and the Court are in agreement that Ms. Smith's records are "personal information" and thus governed by the Act. The first issue in this application is whether Ms. Smith's consent to the disclosure of her personal information was vitiated by her death. In other words, the question is whether the respondent made the correct decision in law in determining that Ms. Smith's records are wholly exempted by reason of her vitiated consent. This issue is determinable on a correctness standard. The second issue, whether section 22(1)(b) of the Act operates to exempt Ms. Smith's records, if her consent is not vitiated, is also reviewable on a correctness standard.

BURDEN OF PROOF

47 Section 48 of the Act places the burden of justifying an exemption under the Act on the respondent government organization. Therefore, the respondent must satisfy the Court that, on a balance of probabilities, that the CSC's decision to refuse to disclose Ms. Smith's personal records was correct: see my decision in *Canada (Information Commissioner) v. Canada (Minister of Industry)*, 2006 FC 132, at paragraph 25.

ANALYSIS

The importance of privacy in a free and democratic society

48 Privacy is a fundamental right in a free and democratic society. The Canadian Charter of Rights and Freedoms protects a person's privacy from unreasonable search and seizure by government authorities. Government cannot interfere with the privacy of an individual unless there are reasonable grounds to believe that that person has committed an offence, and it is necessary for the government to enter the private domain of that person. As well as this privacy right of an individual, the *Privacy Act* sets out two quasi-constitutional rights of privacy for an individual:

a. it protects personal information held by government institutions from disclosure to any third parties. This protects the individual's privacy; and,
b. it provides individuals with a right to access their personal information which any government institution holds about them. This ensures that an individual knows what information the government has about them. It is in this context that Ashley Smith consented and authorized the Correctional Services of Canada to disclose to the Canadian Association of Elizabeth Fry Society enumerated personal information about Ashley Smith.

49 The purpose of the Privacy Act was set out by the Supreme Court of Canada in *Lavigne v. Canada (Office of the Commissioner of Official Languages)*, 2002 SCC 53, [2002] 2. S.C.R. 773, per Justice Gonthier at paragraphs 24-25:

> para24 The Privacy Act is also fundamental in the Canadian legal system. It has two major objectives. Its aims are, first, to protect personal information held by government institutions, and second, to provide individuals with a right of access to personal information about themselves (s. 2)...
>
> para25 The Privacy Act is a reminder of the extent to which the protection of privacy is necessary to the preservation of a free and democratic society...

50 Any exceptions to the right of access must be interpreted narrowly with a view to the purpose of the Act: *Davidson v. Canada (Solicitor General)*, [1989] 2 F.C. 341 (F.C.A.), per Justice MacGuigan at paragraph 17.

51 Privacy is a fundamental right in our democracy and exemptions from that right are to be strictly construed against the government institution. There is a reverse onus on the government to show that the personal information sought by an individual is not subject to disclosure under the *Privacy Act*.

Issue No. 1: Does the death of Ms. Ashley Smith vitiate her consent and authorization for the applicant to have access to her records?

52 The respondent submits that:

a. The applicant no longer has standing to make a request for disclosure pursuant to section 12 of the Act on behalf of Ms. Smith because her consent has been vitiated by her death;

b. Personal information of a deceased individual is protected for a minimum of 20 years and can only be released for the purpose of administrating their estate, absent exceptional circumstances; and

c. The applicant had a valid agency relationship on behalf of Ms. Smith however that relationship ended upon Ms. Smith's death.

The respondent adduced no evidence that explains the CSC's reasoning at the time it made its decision to refuse the applicant access on the basis of Ms. Smith's passing. Its submissions on this issue are made *de novo* before the Court.

53 The respondent submits that the applicant has no standing to bring the application at bar because Ms. Smith, the applicant's principal, died on October 19, 2007 and the consent for disclosure and authorization for the applicant to act on its behalf has been automatically revoked. It further submits that any agency relationship between Ms. Smith and the applicant ended upon her death.

54 The Court finds that the law of agency or standing has no application to the facts at bar. The *Privacy Act*, similar to the *Access to Information Act*, R.S.C. 1985, c. A-1, is a complete code of procedure: *St-Onge v. Canada* (1995), 62 C.P.R. (3d) 303 (F.C.A.), per Justice Décary at paragraph 3; *Information Commissioner v. Commissioner of the RCMP*, 2003 SCC 8, [2003] 2 S.C.R. 66, per Justice Gonthier at paragraph 22 ["*Information Commissioner v. Commissioner of the RCMP*"]. This application was properly brought by the applicant before the Court pursuant to section 41 of the Act.

55 Section 41 of the Act allows "any individual" or "complainant" who has been refused access under this Act, to apply to the Court following receipt of the Commissioner's report. Section 41 encompasses by reference subsection 29(2), which allows anyone who is authorized to act on behalf of the individual whose records have been requested to complain to the Commissioner. This section is broad enough to encompass the applicant since the applicant was still clothed with Ms. Smith's authorization to act at the time the initial request was made on June 18, 2007, at the time the respondent was deemed to have refused the request for disclosure on August 17, 2007, at the time CSC explicitly stated its refusal on May 26, 2008, and at the time the applicant filed its complaint with the Commissioner on August 22, 2008.

What is the date of the decision which is the subject of this application for judicial review

56 There are three possible dates. First, on August 17, 2007 the head of the Canadian Correctional Service, the respondent, is deemed for the purposes of the *Privacy Act*, under subsection 16(3) of the Act, to have refused to give access to the applicant the personal records of Ms. Smith as requested by Ms. Smith and consented to by Ms. Smith. Of course, this date is before Ms. Smith committed suicide so that the date of death of Ms. Smith had not yet happened, and the respondent cannot argue that her death vitiated her consent at that time.

57 Second, on May 26, 2008, the Canadian Correctional Service explicitly for the first time refused to provide the applicant with the personal documents of Ms. Smith for the reason, which was not explained, that the information has been exempted pursuant to section 22 of the *Privacy Act*. (The other reason stated in the letter was section 26 of the *Privacy Act*, which the respondent no longer relies upon). Accordingly, in the letter dated May 26, 2008, the respondent did not state that the death of Ms. Smith vitiated the consent.

58 Third, the other possible date is the date of the hearing before the Court, March 29, 2010. On this date, the Court reviews *de novo* the correctness of the decision to deny the applicant access on the facts before the Court on this date.

Consent not vitiated by death

59 Regardless of the relevant date of the decision which is being reviewed by the Court, the Court concludes that the applicant has standing to bring this application. On August 17, 2007, Ms. Smith had not yet died, and the applicant clearly had standing. On May 26, 2008, the Court is satisfied that the consent was not intended to lapse or be of no force and effect because Ms. Smith had died. That consent had a valid purpose when it was given by Ms. Smith on June 18, 2007, and that purpose continued after Ms. Smith's death. That purpose was to explore how the penitentiary authorities were treating Ms. Smith. While that exploration will be too late for Ms. Smith to benefit from it, that exploration may assist the applicant learn how to deal with other female prisoners like Ms. Smith in the future.

60 The respondent advised the Court that this issue arises for the first time before this Court. I conclude that the Act intended that an individual's right to grant access to their personal information survives their death.

61 The authorities on point are the Commissioner's report in the present case and an administrative decision by the Ontario Information and Privacy Commissioner (OIPC) decided under the *Municipal Freedom of Information and Protection of*

Privacy Act (MFIPDA), R.S.O. 1990, c. M-56: *Order M-1048*, [1997] O.I.P.C. No. 348 ["*M-1048*"]. In both cases the Commissioners held that the statutes intended that a deceased person's consent for disclosure survive their death. In *M-1048*, the OIPC held that 54(a) of the MFIPDA, which is nearly similar to subsection 10(b) of the *Privacy Regulations*, was not an exemption, but rather an independent right of access granted to a deceased person's estate: *M-1048*, *supra*, at paragraphs 9-11.

62 The respondent bases its argument on the same grounds as the respondent in *M-1048*. The respondent relies on the equivalent Federal provision found at subsection 10(b) of the *Privacy Regulations* to exempt Ms. Smith's records except "for the purpose" of administering her estate.

63 In my view the reasons of the OIPC in *M-1048* are equally applicable in the case at bar. Subsection 10(b) of the *Privacy Regulations* does not bar the release of any deceased person's personal information, except "for the purpose of administrating their estate". This subsection is simply an avenue of access to a deceased person's personal information by the deceased person's estate without any means of ascertaining consent. Section 10 of the *Privacy Regulations* provides for three avenues of access to another person's personal information:

> 10. The rights or actions provided for under the Act and these Regulations may be exercised or performed
>
> (*a*) on behalf of a minor or an incompetent person by a person authorized by or pursuant to the law of Canada or a province to administer the affairs or estate of that person;
>
> (*b*) on behalf of a deceased person by a person authorized by or pursuant to the law of Canada or a province to administer the estate of that person, but only for the purpose of such administration; and
>
> (*c*) on behalf of any other individual by any person authorized in writing to do so by the individual.
>
> * * *
>
> 10. Les droits ou recours prévus par la Loi et le présent règlement peuvent être exercés,
>
> *a*) au nom d'un mineur ou d'un incapable, par une personne autorisée en vertu d'une loi fédérale ou provinciale à gérer les affaires ou les biens de celui-ci;
>
> *b*) au nom d'une personne décédée, par une personne autorisée en vertu d'une loi fédérale ou provinciale à gérer la succession de cette personne, mais aux seules fins de gérer la succession; et
>
> *c*) au nom de tout autre individu, par une personne ayant reçu à cette fin une autorisation écrite de cet individu.

Subsections 10(a) and (b) are very different from subsection 10(c). The first two subsections grant access without consent to another individual's personal information for limited purpose. The third subsection grants access to any person authorized in writing for any purpose. Subsection 10(c) is in my view broad enough to encompass authorization by a person who is no longer alive. As long as the consent is in writing, the requesting party can rely on subsection 10(c) regardless of the individual's living status.

64 Ms. Smith's consent is valid despite the lapse of time. The respondent is deemed to have refused her validly consented and authorized request on August 17, 2007. The refusal to provide access is a continuous refusal which is not interrupted by the act of complaining to the Commissioner and the subsequent issuance of a report: *Moar v. Canada (Privacy Commissioner)*, 1992 1 F.C. 501, 45 F.T.R 57, per Justice Reed.

65 As explained above, subsection 16(3) of the *Privacy Act* deems the respondent to have refused the request for disclosure following the expiry of the time limits under the Act. In this case, the expiry of the time limit took place on August 17, 2007, and for the purpose of this judicial review, the Court is satisfied that this is the key date under the law upon which the Court

should review the decision of the respondent to refuse access to the applicant. At this date, no death had occurred and there can be no argument that the death vitiated the consent.

Respondent breached sections 14 and 15 of the Act

66 The respondent's failure to provide the personal information to the applicant within the 30-day extension is a breach of sections 14 and 15 of the Act. Section 14 of the Act provides that the requester shall be given access to his or her personal information within 30 days. Section 15 of the Act provides that the government institution may extend this time limit to a maximum of 30 days if meeting the original time limit would unreasonably interfere with the operations of the government institution. It is ironic and illogical that the respondent would, delay the disclosure of these personal records, and then argue that the consent and authorization for the disclosure is vitiated upon the suicide of Ms. Smith 62 days after the personal information was legally required by the respondent to be produced to the applicant.

67 The respondent submits that these delays in production of personal information "happen all the time". The Court understands that the volume of such requests may overwhelm the limited resources given by the government to the respondent for fulfilling such requests. At the same time, the fact that the delay is normal does not excuse the respondent from being in breach of the law by not fulfilling the request within the prescribed time period under the *Privacy Act*.

Issue No. 2: Can the respondent rely on the RCMP criminal investigation to exempt the personal records from disclosure under subsection 22(1)(b) of the Act?

68 The respondent submits that the fact that there was at one time an ongoing criminal investigation is sufficient to meet the exemption under subsection 22(1)(b) of the Act and exclude the Ms. Smith's records in their entirety. There is no basis in law for this submission.

69 Of course, there was no investigation in place on August 17, 2007, the date that the respondent is deemed to have refused the applicant access to the personal information of Ms. Smith under sections 14 and 15 of the Act.

70 In the alternative, that the respondent's decision is that communicated to the applicant by letter dated May 26, 2008, it is clear that this short letter provides no explanation, does not provide sufficient evidence to support a subsection 22(1)(b) exemption, does not set out how the disclosure of the personal information could reasonably have caused injury to the criminal investigation, and provides no rationale for the exemption. This letter does not provide a valid basis to claim the exemption because it does not provide concrete reasons which meet the requirements imposed by subsection 22(1)(b), does not provide what is the reasonable expectation of injury from the disclosure, does not provide any specific facts to establish any likelihood of injury to the investigation, does not provide what would be the harmful consequences of disclosing the personal information. Moreover, after this case was commenced, when the witness for the respondent filed his affidavit, the investigation had been concluded and this basis for the exemption had passed. When the affidavit was sworn, the deponent did not state that the investigation was over, and continued to suggest that this exemption was still valid.

71 The Supreme Court of Canada has previously set out the proper application of the exemption found in subsection 22(1)(b) of the Act in *Lavigne*, *supra*, at paragraphs 60-61:

> para60 As I have said, s. 22(1)(b) is not an absolute exemption clause. The decision of the Commissioner of Official Languages to refuse disclosure under s. 22(1)(b) must be based on concrete reasons that meet the requirements imposed by that paragraph. Parliament has provided that there must be a reasonable expectation of injury in order to refuse to disclose information under that provision. In addition, s. 47 of the Privacy Act provides that the burden of establishing that the discretion was properly exercised is on the government institution. If the government institution is unable to show that its refusal was based on reasonable grounds, the Federal Court may then vary that decision and authorize access to the personal information (s. 49)...
>
> para61 ... The Commissioner's decision must be based on real grounds that are connected to the specific case in issue... The appellant does not rely on any specific fact to establish the likelihood of injury. The fact that there is no detailed evidence makes the analysis almost theoretical. Rather than showing the harmful consequences of disclosing the notes of the interview with Ms. Dubé on future investigations, Mr. Langelier tried to prove, generally, that if investigations were not confidential this could compromise their conduct, without establishing specific circumstances from which it could reasonably be concluded that disclosure could be expected to be injurious. There are cases in which disclosure of the personal information requested could reasonably be expected to be injurious to the conduct of investigations, and consequently the information could be kept private. There must

nevertheless be evidence from which this can reasonably be concluded...

72 *Lavingne, supra*, affirmed the prior case law of this Court, which held that in order to justify the refusal to disclose information pursuant to subsection 22(1)(b) of the Act, the head of the government institution must demonstrate that there is a reasonable expectation of probable harm from disclosure to the conduct of lawful investigations: *Canada (Information Commissioner) v. Canada (Immigration and Refugee Board)* (1997), 140 F.T.R. 140, per Justice Richard (as he then was) at paragraph 37. As Justice John Richard held, there must be tangible evidence of harm from the disclosure of the personal information. In the case at bar, there is none.

73 In *Kaizer v. Minister of National Revenue*, [1995] F.C.J. No. 926 (QL), Justice Rothstein (as he then was) set out at paragraphs 2 and 3 of his reasons the evidentiary burden required to justify an exception under subsection 22(1)(b) of the Act:

> para2 ...The Court must be given an explanation of how or why the harm alleged might reasonably be expected to result from disclosure of the specific information. This is not a case where harm from disclosure is self-evident. I have been asked to infer that harm will result if disclosure is allowed. In order to make such an inference, explanations provided by the Minister must clearly demonstrate a linkage between disclosure and the harm alleged so as to justify confidentiality.
>
> para3 In the present case, the deponent for the Minister of National Revenue sets forth narratives with respect to the specific paragraphs and pages which are sought to be kept confidential. However, an explanation such as "disclosure of this information would prejudice the integrity of the investigation and therefore be injurious to the enforcement of the Income Tax Act" is insufficient. That is not an explanation but only a conclusion. Indeed, there may be reasons why disclosure would prejudice the integrity of an investigation, but an explanation has to be given as to why that is so. No such explanation has been given...

74 The case law is clear: the Court will not infer injurious harm on a theoretical basis from the mere presence of an investigation, whether past or present, without evidence of a nexus between the requested disclosure and a reasonable expectation of probable harm.

75 The evidentiary deficiencies in the respondent's case are sufficient to dismiss subsection 22(1)(b) as a valid exemption and to order the full disclosure of the requested documents. The Court nevertheless considers it worthwhile to provide some guidance with respect to the particular facts in this case.

76 At the time the request was deemed refused, on August 17, 2007, there was no investigation. Subsection 22(1)(b) could not have applied. The Court was asked to take judicial notice of the fact that the investigation around May 26, 2008 into Ms. Smith's death led to criminal charges against four CSC employees. The respondent submitted that the CSC's decision to exempt Ms. Smith's records from disclosure were therefore reasonable at the time. The Court cannot agree with this submission. The investigation did not relate to the information in the requested records, which predated Ms. Smith's death by a few months.

77 Lastly, this Court is carrying out a review of the matter *de novo*. It is clear that now there are no ongoing investigations or criminal proceedings where disclosure of the requested materials could cause injurious harm.

CONCLUSION

78 The Court will therefore order the disclosure of Ms. Smith's personal records as requested to the applicant. The personal records of Ms. Smith, as contained in the confidential Affidavit of Mr. Fabiano, shall be provided forthwith to the applicant.

COSTS

79 The respondent submits that this was an unusually complex piece of litigation involving important new principles of law in relation to the *Privacy Act*, and that Parliament contemplated in section 52 of the Act that the applicant ought be awarded its legal costs even if the applicant is not successful. The respondent supports the award of costs to the applicant on this basis, and agrees that the applicant ought be entitled to full reimbursement of its legal costs.

80 In this case the applicant has been successful. The arguments raised by the respondent in opposing this litigation, and in denying the applicant access to the personal records, were not well-founded. The respondent caused delay and legal expense for the applicant. Moreover, the respondent produced an affiant with little knowledge of the case who was not able to answer

questions on cross-examination. This unnecessarily increased the costs.

81 The Court considers it just and equitable that the applicant have its costs on either a solicitor and client basis or at the highest number of units under Column III of Tariff B, including the counsel fee at the hearing for the second counsel at 50% of the counsel fee at the hearing for the first counsel under Column III. At the hearing, it was evident that the applicant received some of its legal services on a *pro bono* basis, and the respondent ought not to benefit from this *pro bono* arrangement. Accordingly, the applicant is entitled to its legal costs calculated on either a solicitor and client basis, or at the highest number of units under Column III of Tariff B, whichever is greater.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. The application for judicial review is allowed with costs either on a solicitor and client basis, or under Column III of Tariff B of the *Federal Courts Rules, 1998*, whichever is higher as explained herein; and
2. The personal records of Ms. Ashley Smith contained in the confidential affidavit of Mr. Fabiano filed with the Court shall be disclosed to the applicant forthwith.

KELEN J.

cp/e/qlecl/qljxr/qlaxw/qlcas/qlced

THIS IS EXHIBIT " B " REFERRED TO IN THE
AFFIDAVIT OF KIM PATE
SWORN BEFORE ME THIS 28TH DAY
OF FEBRUARY 2011

A Commissioner, etc

ANTOINETTE BUDZINSKI
Notary Public, State of New York
No. 02RU5001560
Qualified in Dutchess County
Certificate Filed in New York County
Commission Expires Sept. 8, 2014

Federal Court Cour fédérale

Date: 20100823

Docket: T-1040-09

Ottawa, Ontario, August 23, 2010

PRESENT: The Honourable Mr. Justice Beaudry

BETWEEN:

CANADIAN ASSOCIATION OF ELIZABETH FRY SOCIETIES

Applicant

and

MINISTER OF PUBLIC SAFETY CANADA AND CORRECTIONAL SERVICE CANADA

Respondent

ORDER

UPON reviewing the motion record filed by the Applicant;

AND UPON considering that this Court's Judgment dated April 29, 2010 in this matter was made based on a misunderstanding by the Applicant as to what information was before the Honourable Mr. Justice Kelen at the hearing of the Application;

AND UPON receipt of the Respondent's consent;

THIS COURT ORDERS that

1. The judgment of the Honourable Mr. Justice Kelen, dated April 29, 2010, in this proceeding be varied, such that new paragraphs are added to the judgment, which shall read as follows:

3. The Respondent shall disclose to the Applicant, (subject to any appropriate redactions made pursuant to the *Privacy Act*), the personal records of Ms. Ashley Smith for the period from June 14, 2007 – October 4, 2007 and requested by the Applicant in correspondence dated October 4, 2007, consisting of:

a) Police and court (youth and adult/ordinary), youth custody records, and other information on file, particular any/all that were used as part of the Intake assessment and penitentiary placement process;

b) Correctional treatment plan;

c) Charges (internal and external) incident reports; and any additional institutional preventative security information;

d) All assessment and referral rationale pertaining to the review of Ms. Smith for placement on the 'Management protocol';

e) Documentation, including rationale for decisions, long term plan, and weekly review reports;

f) Segregation review reports;

g) Health records, as well as Psychiatric and Psychological reports;

h) Transfer orders between prisons for federally sentenced women, and psychiatric or provincial temporary detention;

i) Institutional programming and release planning.

4. The personal records described in the immediately preceding paragraph shall be provided to the Applicant on or before September 17, 2010.

2. That the costs of this motion be fixed at $2,000.00 payable to the Applicant.

"Michel Beaudry"
Judge

THIS IS EXHIBIT " C " REFERRED TO IN THE
AFFIDAVIT OF KIM PATE
SWORN BEFORE ME THIS 28th DAY
OF FEBRUARY 2011

A Commissioner, etc

ANTOINETTE RUDZINSKI
Notary Public, State of New York
No. 02RU5001560
Qualified in Dutchess County
Certificate Filed in New York County
Commission Expires Sept. 8, 2014

Ms. Ashley Smith

Psychiatric opinion based on record review

Paul Beaudry, MD, FRCPC
Psychiatrist

Translation – check against French original

JANUARY 2010

Brunet
Guérin
Beaudry

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CONFIDENTIAL

January 31, 2010

Mr. Ivan Zinger
Executive Director and General Counsel
Office of the Correctional Investigator
Government of Canada
PO Box 3421, Station D
Ottawa Ontario K1P 6L4

Name: **Ms. Ashley Smith, deceased**
DOB: January 29, 1988

PSYCHIATRIC OPINION BASED ON RECORD REVIEW

I reviewed the late Ms. Ashley Smith's case on the request of Maître Ivan Zinger, Executive Director and General Counsel, Office of the Correctional Investigator, Government of Canada.

The content of this review is strictly confidential. Under the legislation currently in effect, unauthorized persons are strictly prohibited from reading this report and in particular to make any use of it whatsoever.

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Identification

Ms. Ashley Smith was 19 years old when she died on October 19, 2007, while she was in custody at the Grand Valley Institution for Women, a secure federal facility. Ms. Smith had spent the last four years of her life in custody. She was 13 when she first became involved with the youth criminal justice system.

In December 2003, Ms. Smith was sentenced to secure custody at the New Brunswick Youth Centre, where she spent considerable time in the Therapeutic Quiet Unit (in segregation). While serving her sentence at the New Brunswick Youth Centre, Ms. Smith incurred several charges related to various incidents where correctional or health professionals were attempting to prevent or stop her self-harming behaviours. In January 2006, when she was 18, it was agreed that any criminal conviction she incurred from that point forward would result in an adult sentence.

In October 2006, Ms. Smith was convicted to a custodial sentence as a result of new offences against the custodial staff involving her challenging behaviour. In October 2006, she was transferred to Nova Institution for Women, a federal facility. During her 11.5 months in federal custody, Ms. Smith continued to present disruptive and maladjusted behaviours primarily involving attempts at self-harm, namely self-strangulation with ligatures, head-banging and superficial cuts to her arms. Over this period, Ms. Smith was involved in approximately 150 security incidents.

During her incarceration in federal institutions, Ms. Smith was transferred seventeen times in less than one year from one to another of three federal institutions, two treatment centres, two external hospitals and a provincial correctional facility. These transfers were related to administrative issues such as cell availability, incompatible inmates and staff fatigue. Ms. Smith often refused to consent to or cooperate with assessments. She was certified four times under the Saskatchewan *Mental Health and Services Act* and four times under the Ontario *Mental Health Act* as a result of her maladjusted, disruptive, and self-harming behaviours.

Purpose of the psychiatric opinion based on record review

The purpose of this work is to provide a medical opinion on the treatment received by Ms. Smith while she was in custody at Joliette Institution (Quebec) from June 27, to July 26, 2007, more specifically, on July 22, 2007, and July 23, 2007, when Ms. Smith was physically restrained and received medication following a self-injury attempt, and on July 26, 2007, when she received medication prior to an inter-institutional transfer.

Documents consulted

1. Canadian Charter of Rights and Freedoms;
2. Charter of Human Rights and Freedoms;
3. Civil Code of Québec;
4. Corrections and Conditional Release Act (CCRA);
5. Corrections and Conditional Release Regulations (CCRR);
6. An Act respecting health services and social services (R.S.Q. c. S-4.2, section 118.1);
7. An Act to amend the Act respecting health services and social services as regards the safe provision of health services and social services (S.Q., 2000, c. 71);
8. An Act to amend the Professional Code and other legislative provisions as regards the health sector (S.Q., 2002, c. 33);
9. Professional standards documentation on the use of physical handling and chemical control measures:
   - 9.1. Cadre de référence – utilisation exceptionnnelle des mesures de contrôle: contention et isolement [Terms of reference – exceptional use of control measures: restraint and isolation], prepared by the Association des hôpitaux du Québec, revised edition, 2004;
   - 9.2. Mesures de contrôle: contentions physiques, isolement et contentions par médication psychotrope, directives médico-nursing administratives [Control measures: physical restraints, isolation and restraint through psychotropic drugs, medical and nursing administrative guidelines], Centre hospitalier Pierre-Janet; Protocole interprofessionnel relatif à l'utilisation de contention physique la moins contraignante possible [Interprofessional protocol on the use of the least restrictive physical restraint], McGill University Health Centre (MUHC), 2008.
10. The Ashley Smith Report: June 2008 report of the New Brunswick Ombudsman and Child and Youth Advocate;

11. A Preventable Death, paper prepared by Mr. Howard Sapers, Office of the Correctional Investigator, dated June 20, 2008;

12. Final report on Ms. Smith's psychiatric assessment and stay at the Institut Philippe-Pinel in Montreal from April 13 to May 8, 2007, prepared by

13. Commissioner's Directives – Correctional Service of Canada: Management of Security Incidents (567), Use of Force (567-1), Use of Restraint Equipment for Health Purposes (844) and Recording and Reporting of Security Incidents (568-1);

14. Documents produced concerning the treatment received at Joliette Institution, Quebec, from June 27 to July 26, 2007:

    14.1. Report produced by Canada's correctional system concerning the use of force on Ashley Smith;

    14.2. Correctional Investigator's preliminary report on the incidents of June 27 to July 26, 2007;

    14.3. Reports on the incidents of July 22, 23 and 26, 2007, produced by Joliette Institution, the regional level (Institutional Operations, Quebec Region) and Health Services, Mental Health Sector;

    14.4. Videos of use of force during injections administered to Ashley Smith on July 22, 23 and 26, 2007;

All reference documents, with the exception of the documents related to the psychiatric opinion were shared and handled according to their level of sensitivity/confidentiality.

15. Review of relevant scientific literature.

Summary of documents consulted

The legal framework surrounding the use of restraints and isolation emphasizes respect for the individual and his or her basic rights and most personal values. Everyone's right to life, liberty and security of the person and to the protection of this right against any treatment not consistent with the principles of fundamental justice is at the heart of the various charters and legislation.

1. Canadian Charter of Rights and Freedoms

The following are sections from the *Canadian Charter of Rights and Freedoms*:

"7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."

"9. Everyone has the right not to be arbitrarily detained or imprisoned."

"12. Everyone has the right not to be subjected to any cruel and unusual treatment or punishment."

2. Charter of Human Rights and Freedoms

The following are sections from the *Charter of Human Rights and Freedoms*:

"1. Every human being has a right to life, and to personal security, inviolability and freedom."

"5. Every person has a right to respect for his private life."

"10. Every person has a right to full and equal recognition and exercise of his human rights and freedoms, without distinction, exclusion or preference based on race, colour, sex, pregnancy, sexual orientation, civil status, age except as provided by law, religion, political convictions, language, ethnic or national origin, social condition, a handicap or the use of any means to palliate a handicap."

3. Civil Code of Québec

The following are three articles from the *Civil Code of Québec*:

"10. Every person is inviolable and is entitled to the integrity of his person. Except in cases provided for by law, no one may interfere with his person without his free and enlightened consent."

"11. No person may be made to undergo care of any nature, whether for examination, specimen taking, removal of tissue, treatment or any other act, except with his consent. If the person concerned is incapable of giving or refusing his consent to care, a person authorized by law or by mandate given in anticipation of his incapacity may do so in his place."

I would like for example to highlight some paragraphs in the report, as follows:

Paragraph 17. While in federal custody over 11.5 months, Ms. Smith was involved in approximately 150 security incidents, many of which revolved around her self-harming behaviours. These incidents consisted of self-strangulation using ligatures and some incidents of head-banging and superficial cutting of her arms. Whenever attempts to negotiate the removal of a ligature failed, staff would (on most occasions) enter Ms. Smith's cell and use force, as required, to remove it. This often involved the use of physical handling, inflammatory spray, or restraints. Ms. Smith was generally non-compliant with staff during these interventions.

Paragraph 20. Ms. Smith would often not cooperate or consent to assessment, and she continued engaging in maladaptive, disruptive and self-injurious behaviours. She was certified four times under the Mental Health Services Act of Saskatchewan and four times under the Mental Health Act of Ontario. The fact that it was necessary to have Ms. Smith certified eight times in less than one year of incarceration should have highlighted to the Correctional Service the urgent need to have a comprehensive mental health assessment completed for this young woman.

Paragraph 24. In addition, despite having Ms. Smith in its custody for over 11 months, and despite having access to previous mental health records, the Correctional Service never made any advancements in its treatment of Ms. Smith. A concrete, comprehensive treatment plan was never put into place for this young woman, despite almost daily contact with institutional psychologists. The attempts that were made to obtain a full psychological assessment were thwarted in part by the Correctional Service's decisions to constantly transfer Ms. Smith from one institution to another.
[...]

Paragraph 26. What mental health care Ms. Smith did receive differed from one institution to another; there was no consistency. [...]

Paragraph 29. On eight occasions, Ms. Smith was certified under provincial mental health legislation and was admitted to psychiatric facilities; however, she was usually released after a very short period of time without having been fully assessed or meaningfully treated. This left the Correctional Service with a dilemma because its own *Mental Health Strategy for Women*, and its *Intensive Intervention Strategy for Women* were not appropriately designed or resourced to provide assistance to women who required specialized mental health care and intervention.

12. **Final report on Ms. Smith's psychiatric assessment and stay at the Institut Philippe-Pinel in Montreal from April 13 to May 8, 2007, prepared by**

indicates that she assessed Ms. Smith twice during her stay at the Institut Philippe-Pinel, specifically on April 14 and 18, 2007. She starts her report by summarizing the report sent by the Prairie Regional Psychiatric Centre, where Ms. Smith had been admitted to the *Intensive Healing Program* from December 20, 2006, to April 12, 2007. notes that the diagnosis issued by at the time Ms. Smith left the Prairie Regional Centre was the following:

Axis I: None
Axis II: Antisocial personality disorder with borderline traits
Axis III: Under examination for Wilson's disease
Axis V: GAF: over 50

Given Ms. Smith's prior history, a pre-admission plan, to which she had consented in writing, had been prepared. However, as soon as she was admitted, Ms. Smith became agitated and had to be placed in restraints. She was not compliant with the treatment plan, refused to change to put on her security gown, tried to harm herself by cutting her forearms or by throwing herself against her room door, tried to hit, grab, pinch and spit on the staff, and damaged her bed to remove pieces of wood. Restraints were used on a daily basis. From April 27 to May 8, 2007, Ms. Smith attempted to strangle herself three times with elastic bands or cloth ties, and spit on and bit the staff members who were trying to take away her ligatures. The staff suspected that Ms. Smith was hiding objects in her body cavities.

Ms. Smith received various medications every day while she was checked in; the following medications were prescribed as required (PRN) and not on a regular basis:

- Diphenhydramine (Benadryl) 50 mg, PO or IM q1h, PRN, max: 3 doses per 24 hours
- Lorazepam 2 mg, PO or IM, q1h, PRN, max. 3 doses per 24 hours
- Loxapine 50 mg, PO or IM, q1h, PRN, max. 3 doses per 24 hours
- Quetiapine 50 mg, PO, q1h, PRN, max. 3 doses per 24 hours

At the end of her report, concludes that her clinical observations of Ms. Smith support those of Ms. Smith began to present with conduct

disorder at the age of 13 and continued experiencing adjustment difficulties since then. She was repeatedly diagnosed with antisocial personality disorder. An investigation for Wilson's disease must be completed since such a condition could have an impact on her behaviour.

- concludes her report by indicating that the Institut Philippe-Pinel would be prepared to re-admit Ms. Smith to their unit if she developed treatment goals. However, at the time of her discharge, Ms. Smith had no personal insights on her condition and she had not even reached the stage where she could start considering a change model. Therefore, it was not possible to influence her in any way.

13. **Commissioner's Directives – Correctional Service of Canada: Management of Security Incidents (567), Use of Force (567-1), Use of Restraint Equipment for Health Purposes (844) and Recording and Reporting of Security Incidents (568-1)**

These documents are very clear and I will not summarize them. However, I would like to highlight certain specific points that are pertinent to the situation considered here.

Various paragraphs in the document entitled "Commissioner's Directive 567 - Management of Security Incidents" warrant special attention, as follows:

- Assessment of the situation, paragraph 23: "The inmate's current behaviour, situational factors (e.g. location, presence of weapons, other inmates, social history, etc.), tactical considerations (past behaviour, size of inmate, skills of the officer, availability of backup, etc.) and the risk relating to the incident must be assessed on an ongoing basis." According to CSC's bulletin 2009-11, "past behaviour includes an offender's history of self-harm and the potential for future or cumulative self-harm when determining whether immediate intervention is required."

- Inmate behaviour, paragraphs 26 to 31: these paragraphs provide clear definitions of inmate behaviour during incidents involving security and safety. I find the differences between paragraph 28 (physically uncooperative) and paragraph 29 (assaultive) particularly relevant.

It would also be useful to highlight a number of paragraphs from "Commissioner's Directive 844 – Use of Restraint Equipment for Health Purposes," as follows:

– Roles and responsibilities, paragraph 11:

"In accordance with professional standards, relevant legislation and CSC policy:

a. licensed physicians, psychiatrists, psychologists and nurses may authorize the use of soft restraints when it is determined that not doing so will result in serious bodily injury; and

b. the on-call physician or psychiatrist shall be contacted immediately when a health care professional other than a physician or psychiatrist (i.e. nurse or psychologist) authorizes the application of soft restraint equipment as they are the treating physician directing the inmate's care."

- Chemical constraints, paragraph 20: "Chemical restraint shall never occur."

- Chemical constraints, paragraph 21: "Medication shall only be prescribed and administered when indicated for the treatment of an underlying medical diagnosis established by a physician/psychiatrist and according to CD 803."

- Assessment and monitoring, paragraph 30: "A psychiatrist, psychologist or physician must assess the inmate's mental health status within two hours of the application of restraints."

- Assessment and monitoring, paragraph 36: "Food and fluids shall be offered at least every four hours during the day and evening shifts and as required on the midnight shift."

- Assessment and monitoring, paragraph 37: "The inmate shall be offered the opportunity to meet his/her elimination needs at least hourly while awake [...]"

14. Documents produced concerning the treatment received at Joliette Institution, Quebec, from June 27 to July 26, 2007

14.1. Report produced by Canada's correctional system concerning the use of force on Ashley Smith

This is the Board of Investigation report on the allegation of inappropriate injections administered to Ms. Smith at Joliette Institution (Quebec) from June 27 to July 26, 2007, revised version, dated September 30, 2008. The

convening order and terms of reference of this Board were signed by Mr. Keith Coulter, Commissioner, Correctional Service of Canada.

The Board particularly focused on the incidents of July 16, 22 and 23, 2007, during which Ms. Smith had presented self-harm behaviours, and on the incident of July 26, 2007, involving Ms. Smith's inter-regional transfer to the Nova Institution for Women.

In regard to the incidents of July 16, 22 and 23, 2007, the Board of Investigation found that Ms. Smith had displayed self-harm behaviours that presented a threat to her life and that the immediate security and medical action and the use of four-point restraints were necessary to preserve Ms. Smith's life and integrity.

During the incident of July 22, 2007, prescribed medications were administered to Ms. Smith against her will. The Board found that administering this medication was warranted by the situation, which was an emergency as defined in article 13 of the *Civil Code of Québec*. Under this article, consent to medical care is not required in case of emergency if the life of the person is in danger or his/her integrity is threatened and the person's consent cannot be obtained in due time.

According to the Board, the medications prescribed by the psychiatrist on July 16, 22 and 23, 2007, were necessary as a result of a medical diagnosis for which such treatment was indicated and agreed to. Ms. Smith willingly accepted an injection of medication on July 26, 2007, without force being used.

The Board also noted that during these four interventions, the members of the Institutional Emergency Response Team (IERT) demonstrated considerable self control, respect and compassion for Ms. Smith, even though she often displayed aggressive behaviour such as spitting on staff members and trying to strike and grab them.

The investigation report contains a section describing a detailed chronology of certain events that took place from June 27 to July 26, 2007, more specifically those of July 16, 22, 23 and 26, 2007.

In page 40 of the document, the Board reports that Ms. Smith was diagnosed at the Regional Psychiatric Centre (Prairie) and at the Institut Philippe Pinel de Montréal (IPPM) as suffering from:

- Axis I: None
- Axis II: Borderline personality
- Axis III: Under examination for Wilson's disease (CPR)
- Axis V: Global Assessment of Functioning (GAG): over 50

In page 41 there is a table outlining the medication prescribed by the institution's physician on Ms. Smith's arrival to facilitate her transition to the institution and also by the psychiatrist, who was under contract to the institution, one week later, and throughout her stay at the institution. On July 6, 2007, the prescription issued by the psychiatrist was as follows: Benzotropine 2 mg three times a day, PRN; Benadryl 50 mg, intramuscular, three doses per 24 hours, PRN; Loxapac 10 mg twice a day, PRN; Seroquel 300 mg HS (at bedtime); and Risperdal 2 mg once a day + PRN.

In page 44 of the report there is a table describing the various medications that Ms. Smith was given during the day on July 22, 2007, as well as the use of physical constraints. This table indicates that Ms. Smith received four injections of medication between the psychiatrist's first prescription at 10:45 a.m. and the last injection at 3:15 p.m. The first injection prescribed by the psychiatrist at 10:45 a.m. was for Clopixol Acuphase 50 mg, intramuscular. At 1:30 p.m. Ms. Smith was administered Haldol 5 mg, Ativan 4 mg, and Benadryl 25 mg, intramuscular, and Cogentin 2 mg per os liquid. At 1:55 p.m. she received Haldol 5 mg, Ativan 2 mg, and Benadryl 25 mg, intramuscular.

In page 45, the Board reports that during their investigation, the workers and Acting Chief of Health Services who were on the day shift on July 22, 2007, stated that the inmate's consent was not necessary at that point because they believed she was unable to give informed consent and that there was a risk to Ms. Smith's health, as demonstrated by her significant level of agitation. Ms. Smith was unable to stop moving, she constantly pulled and tried to release her restraints, she rocked the stretcher, was unable to maintain eye contact with the nurse during the medical examinations, had trouble acting appropriately with the nurse and members of the emergency team and, lastly, would not calm down. Staff hoped that Ms. Smith would stop her behaviour for her own protection and that of others because they thought she was in possession of objects in her body cavities that could injure her or others. Their decision to treat her against her will was based on the *Civil Code of Quebec*, as set out under article 13. The Board of Investigation found that during the incident of July 22, 2007, Ms. Smith's conduct posed a danger to her life and threatened her personal integrity, and medical and security interventions were necessary, even without her consent, to preserve her integrity.

In regard to the incident of July 23, 2007, the Board reports that Ms. Smith had refused the injections but said she was prepared to take orally the medications she had refused that morning. Ms. Smith agreed to receive the injections after a nurse explained to her that the three injections were necessary and why the three medications could not be given in one single injection. The Board found that Ms. Smith had consented to care after she was informed by the nurse of the prescribed treatment.

Concerning the incident of July 26, 2007, the Board reports that on July 24, 2007, in preparation for Ms. Smith's transfer to Nova Institution for Women, the psychiatrist prescribed a medication to be given as required (PRN) before departure and during the trip in case she became too agitated or lost control. The following medications were prescribed: Loxapac 50 mg + Ativan 2 mg + Benadryl 50 mg, with the first dose being administered thirty minutes before departure and the second two hours afterwards. Ms. Smith agreed to the injections after the nurse explained the reasons for administering them and that she had to remain clam during the flight because the pilot would not accept the kind of behaviour she had displayed on the previous occasion she had travelled by air. The Board of Investigation found that that the treatment proposed by the psychiatrist was a prescription in case Ms. Smith became highly agitated or lost control; in fact, the prescription was interpreted as having to be administered right away, before departure.

In page 50 of the report, the Board of Investigation states that there was a lack of detail concerning the information given to the psychiatrist on the inmate's behaviour when she prescribed the injections. The psychiatrist based her assessment of the patient on the information received by telephone. She subsequently determined the procedure for the effective treatment of the patient. Those details are essential and must be noted in the clinical documentation.

In page 93, the Board of Investigation reports that in all the investigations, including this one, that injections were prescribed by telephone and that the physicians/psychiatrists were not on site. They relied on the explanations of the health professionals on site to make their diagnosis and prescribe what they considered to be appropriate treatment. The Board of Investigation reports that a memo dated November 1, 2007, requested that the institutional on-call physician be on site to assess whether the inmate met the criteria for treatment against her will, but not CD 844. The Board of Investigation found that if the Service wants this Directive to be a national policy implemented by all institutions, this requirement should be clearly established in CD 844.

14.2. Correctional Investigator's preliminary report on the incidents of June 27 to July 26, 2007

The Office of the Correctional Investigator produced this report after reading the report issued by the Correctional Service of Canada on the use of force on Ashley Smith during her stay at the Joliette detention centre from June 27 to July 26, 2007, and after viewing the videos focusing on these incidents and reading the incident reports prepared by the various administrative authorities (institutional, regional, national, Women Offender Sector).

In its findings, the Office of the Correctional Investigator claims to be concerned about certain observations contained in the report of the Canadian correctional system because they are inconsistent with their own observations to the effect that

1. immediate security and medical intervention was necessary to preserve Ms. Smith's life;

2. in the incidents of July 22 and 23, 2007, prescribed medications were administered to Ms. Smith against her will. The rationale used in administering those medications was that staff members were dealing with an emergency as defined in article 13 of the *Civil Code of Québec;*

3. the medications were prescribed by the psychiatrist on July 16, 22 and 23, 2007, that they were necessary, based on a medical diagnosis for which such treatment was indicated and agreed to;

4. there is no CSC policy or guideline to inform the operational units of the various regions on the relevant provincial legislation to ensure a balance between the offender's rights and CSC's obligations. Every institution and region is left to its own devices and must scrutinize the acts and their applicability;

5. Ms. Smith accepted the injection of medications on July 26, 2007, of her own free will and without force being used;

6. in those four interventions, the members of the IERT acted in accordance with the Situation Management Model. They also demonstrated considerable self-control, respect and compassion for Ms. Smith, **even though she often displayed aggressive behaviour such as spitting on staff and trying to strike and grab them;**

7. medical treatment does not constitute a use of force and should not be subject to review as specified in CD 567 1, "Use of Force." This kind of medical intervention should be reviewed by a committee of persons with expertise in the health field, such as the medical review committees of the Health Institutions in the Province of Quebec.

14.3. Reports on the incidents of July 22, 23 and 26, 2007, produced by Joliette Institution, the regional level (Institutional Operations, Quebec Region) and Health Services, Mental Health Sector

These various reports contain certain points related to medical issues that warrant special attention, as follows:

- Incident of July 22, 2007

At 9:45 a.m. Ms. Smith first tried but failed to obstruct the camera and then injured herself by pulling out the electrical plate. She then struck her cell window with the object and played with the cable leads and electric wires.

The nurse in charge received a call at 10:1 5 a.m. informing her of Ms. Smith's behaviour, and indicating that she had apparently injured herself and inserted an object in a body cavity. During the very cursory assessment

the nurse reported observing about ten drops of blood on the floor. She was not able to determine the source of the blood or the extent of the injuries. Ms. Smith did not present any clinical signs of hemorrhaging and her life did not seem to at risk for the time being.

The nurse informed the psychiatrist of the situation at 10:30 a.m. The nurse prescribed physical restraints to the limbs, chemical restraints and a possible transfer to the emergency department at the CHRDL (Lanaudière Regional Hospital) so the inmate (who might have been concealing an object inside a body cavity) could be examined.

At about 11 a.m. an officer tried to negotiate with Ms. Smith. After first refusing, she agreed to let him look at her injuries and to give him the heavily bloodied piece of metal. However, she refused to take off her security gown so she could be searched for other hidden objects. In the face of her refusal, Ms. Smith was advised that the Institutional Emergency Response Team (IERT) would have to intervene. After viewing a videotape of this incident, the management at Joliette Institution indicated that Ms. Smith refused to cooperate and engaged in non-violent negative behaviour.

The IERT became involved after the SMEAC was presented at 12:30.

After taking the decontamination shower, Ms. Smith was willingly led away to be placed in restraints. She cooperated all through this movement. The subject was then taken to health services so she could be given the injections prescribed by the psychiatrist.

Following decontamination, an officer reported that [TRANSLATION] "Ms. Smith was willingly led away to be placed in restraints. She was compliant throughout this movement. The subject was then taken to health services so she could be given the injections prescribed by the psychiatrist." Another officer reported that [TRANSLATION] "the inmate offered slight resistance but everything went well."

When she arrived at health services, Ms. Smith was reported to have been agitated. She tried to grab equipment and bite or spit at the staff, attempted to remove her wrist restraints on two occasions, tried to rock the stretcher several times, tried to bang her head against the wall and on the stretcher rails and attempted to bite the mattress, revelling in her mischief.

The health services report points out that Ms. Smith was not informed of the type of medications administered to her or why they were being used, other than being told it was to calm her down. Ms. Smith clearly refused to take the

medication, while the nurse told her that she had no choice but to take it, since this was a medical action. The nurse used a threatening tone to ask Ms. Smith whether she wanted another injection, knowing full well that the inmate did not want it, and to tell her, [TRANSLATION] "if you don't calm down you will get another injection" (when Ms. Smith was calm, at that moment) or, on another occasion, "if you don't calm down, you will get a third injection, a bigger one." At 2:29 a.m. Ms. Smith was given an injection when she appeared to be calm. At 5:21 a.m. the nurse informed her that the psychiatrist had ordered that the restraint measures be extended for another four hours, while she was relatively calm, which raises the question of what kind of information the health care staff was providing the psychiatrist. In addition, the film recordings of the situation indicate that the time intervals between the injections seemed to be too short and not necessarily warranted.

- Incident of July 23, 2007

  At approximately 4:50 p.m. Ms. Smith is reported to have broken an object and tried to injure her wrists. An order was issued to take the inmate, conduct a strip search and monitor her while work was done to repair her cell. She would have to be placed in restraints if she became agitated.

  The IERT intervened at 6:15 p.m. to extract the inmate from her cell. Since Ms. Smith was not cooperating, a chemical agent was used and she had to be subsequently decontaminated. During the decontamination, she struck the radiator in the shower room several times and refused to stop despite the staff's orders to do so. She was informed that the nurse had found she was upset and that she should be placed in restraints. She decided to be compliant and the application of restraints went smoothly. Once she arrived at health services Ms. Smith was given three injections prescribed by the psychiatrist despite having refused them. Ms. Smith had however verbally agreed to take medication orally. It is noted that "despite a few snags when she arrived at health services, the inmate was quite cooperative."

- Incident of July 26 2007

  This was a planned intervention to carry out Ms. Smith's transfer. The inmate was compliant during the incident. She was somewhat recalcitrant, but agreed to receive the medications through an injection administered by the nurse. The nurse threatened that she would be given more injections if she became agitated. The psychiatrist had been consulted the day before the transfer.

The regional report (Institutional Operations, Quebec Region) found that staff used the force necessary to carry out Ms. Smith's transfer.

14.4. Videos of use of force during injections administered to Ashley Smith on July 22, 23 and 26, 2007

On October 30, 2009, I saw the videos related to the use of force on July 22, 23 and 26, 2007, at the Office of the Correctional Investigator in Ottawa. Without going into the full detail of the events, which are clearly described in the Correctional Service of Canada's investigation report from pages 20 to 37, I will provide a few observations that I feel will be useful from a medical standpoint.

- Incident of July 22, 2007

At the beginning of the video that starts at 11:41 a.m. we learn that Ms. Smith was in her cell, was disorganized, had pulled a metal plate off the wall and began to injure herself at 9:45 a.m.

The IERT arrived at the door of Ms. Smith's cell at 12:28 p.m. Ms. Smith refused to cooperate and obey the order to drop down on her knees, face to the wall, hands on her back. They then used a chemical agent.

Ms. Smith was calm when she left her cell at 12:33 p.m., handcuffed with her hands behind her back. She remained calm during her decontamination shower.

After taking her shower, she expressed her refusal to see the nurse; also, she at first refused to place her hands behind her back to be handcuffed, but ended up agreeing to do so. An IERT member told her that "everything was going fine."

Ms. Smith was relatively calm while she was being restrained on the stretcher (12:52 p.m.). She moved her arms and legs a bit and complained they hurt because there was too much pressure on them, but she was not agitated, did not utter threats and did not shout insults at the staff.

At 1:02 p.m. the nurse can be heard saying: "She is so angry." There was a concern that if she became too agitated, the stretcher could fall on the ground. (However, Ms. Smith was not particularly agitated at that time and there were at least five workers around her). The nurse said she was going to give her an injection and Ms. Smith replied, "No."

At 1:09 p.m. Ms. Smith was given the first antipsychotic injection (Clopixol Acuphase 50 mg intramuscular) even though she said, "No, no injection." She became somewhat more agitated in the stretcher by moving her limbs.

At 1:10 p.m. the nurse said, "I'm calling the psychiatrist, that will not be enough, she is super-agitated." It was noted that she had cut herself on her right middle finger when she had pulled off the metal plate.

At 1:19 p.m. Ms. Smith refused the intramuscular injection. She received another injection containing an antipsychotic and an anxiolytic drug prescribed by the psychiatrist (Haldol 5 mg and Ativan 4 mg intramuscular) but agrees to take an oral medication (Cogentin 2 mg).

At 1:24 p.m. the nurse asked her, "Do you feel good now?"

At 1:32 p.m. when Ms. Smith moved a bit in her stretcher, the nurse told her, "Do you want to pass out from the injections? Stop moving!"

From 1:39 p.m. to 2:08 p.m. the IERT members tried to leave to see if Ms. Smith would calm down. They had to come back when she tried to free her wrist or leg from the restraints. She made spitting gestures several times when she was held down.

At 2:08 p.m. the nurse told her that she would be given another injection if she did not calm down.

At 2:25 p.m. she tried to free a limb from her restraints and rocked the stretcher as if to tip it over.

At 2:29 p.m. a third intramuscular injection was administered (Haldol 5 mg, Ativan 2 mg, and Benadryl 25 mg).

At 3:19 p.m. the nurse told her, "I don't know what to do with you anymore. We will let you rest, you stay calm or we will give you another injection."

At 3:21 p.m. the nurse told her, "Relax, or I'm coming in with another injection. If you do anything at all, we will come back to give you an injection. Do you want another injection? (Ms. Smith answered, "No"). You are not being very cooperative. Lie down, close your eyes, this is your last chance!"

Ms. Smith tried to sit up, said she needed to change her sanitary tampon, played with the edge of the bed and smiled.

At 3:29 p.m. she was given a fourth injection (Haldol 5 mg, Ativan 2 mg, Benadryl 25 mg).

From 3:30 p.m. to 7:57 p.m. Ms. Smith was restless in her stretcher. She tried a few times to remove her wrist from the restraint and to bite the mattress.

A transfer to the CHRDL emergency department to do a body cavity examination was refused because Ms. Smith was not psychotic.

At 7:57 p.m. the nurse told her that the psychiatrist had prescribed another injection because she was still agitated. Ms. Smith replied, "I don't want it!" The injection was administered (an anxiolytic, according to the Correctional Service of Canada's investigation report).

A transfer to Pinel was requested but was not possible.

From 8:00 p.m. to 10:30 p.m. Ms. Smith continued to struggle now and then on her stretcher. She tried to climb down, sat up, tried to remove one limb or another from her restraints, bit the mattress, and lightly banged her head on the edges of the stretcher.

She calmed down at 11:00 p.m. She was smiling and told a joke to the staff.

Throughout these events of July 22, 2007, Ms. Smith understood the instructions she was given and never appeared to be hallucinating or delirious, or speaking incoherently, presenting signs of an underlying psychotic or organic disorder that could have affected her capacity to make decisions or her behaviour, or her ability to give free and informed consent.

- Incident of July 23, 2007

At 4:50 p.m. Ms. Smith was reported to have removed a metal plate. Blood was seen on her gown. She tried to obstruct her camera. She had a new injury in her wrists.

The IERT intervention started at 6:18 p.m. The nurse commented that Ms. Smith was disorganized and was not listening.

During decontamination, Ms. Smith learned that she could not return to her cell right away because of the repairs that had to be done. She headed towards the radiator in the shower room and tried to break it. Health services

notified the psychiatrist, who prescribed the application of restraints and an injection of Loxapac 50 mg, Ativan 2 mg, and Benadryl 50 mg.

Ms. Smith offered slight resistance to being placed in restraints but she was not agitated, and did not make threats or offensive comments.

She became somewhat more agitated when the nurse tried to examine her and acted as if she was going to spit on her. She refused the intramuscular injection, but said that she would agree to take an oral medication. The intramuscular injection was administered at 7:10 p.m. as prescribed.

At 9:00 p.m. Ms. Smith was calm and removal of the restraints was authorized.

- Incident of July 26, 2007

The video starts at 4:43 a.m. The IERT leader presented the SMEAC to the Acting Warden, with a psychologist and a nurse in attendance. The objective was to control Ms. Smith's behaviour very closely during her transfer because it was suspected that she could have hidden objects in her body cavities and that she could became unstable and act out by injuring herself or assaulting a staff member.

Although she agreed to the transfer, she was likely to change her mind, as she often did. Negotiations worked when she was not in a "dysregulated" behaviour state. However, after the first few days, she was in a "dysregulated" behaviour state and only very slowly returned to a calmer level. The medication was mandatory and not debatable. Thirty minutes before her departure she would receive an injection against her will and the use of force was an option if necessary.

The Acting Warden asked why the psychiatrist had prescribed an involuntary injection. The nurse replied that Ms. Smith had to remain clam during the air transfer. She had not been calm during her previous air transfer, and that could endanger the lives of everyone on board.

In fact, on July 24, 2007, the psychiatrist had prescribed injections of Loxapac 50 mg, Ativan 2mg, and Benadryl 50 mg, to be administered as required, in preparation for her transfer, in case Ms. Smith became too agitated or lost control. One injection was to be administered half an hour before departure, the next two injections two hours apart, and then another injection four hours after the third, for a maximum of four doses.

Ms. Smith woke up at 5:32 a.m. and went to the bathroom. A strip search was conducted. Her cooperation was good. She refused the injection at first, saying that the medication made her sleep. She agreed to the injection after the nurse explained that she had no choice but to take it and that the air trip would be easier for everyone.

15. Review of relevant scientific literature

The following are the diagnoses made by [redacted] and [redacted] who examined Ms. Smith many times:

Axis I: None
Axis II: Antisocial Personality Disorder with Borderline traits
Axis III: Under examination for Wilson's disease
Axis V: GAF: Over 50

The multiaxial system of DSM-IV-TR[4] classifies all mental disorders under Axis I with the exception of personality disorders and mental retardation. Axis I includes, among others, organic disorders, substance use disorders, schizophrenia and other psychotic disorders, and mood (affective) disorders. Axis II is reserved for personality disorders and mental retardation. Disorders classified as Axis II are not considered to be medical conditions.

The DSM-IV-TR defines personality disorders as "an enduring pattern of inner experience and behaviour that deviates markedly from the expectations of the individual's culture, is pervasive and inflexible" and affects cognition, affectivity, impulse control and need gratification. This pattern has an onset in adolescence or early adulthood, is stable over time, and causes distress and impairment in functioning. Individuals afflicted by personality disorders are typically not aware that their personality traits are problematic.

Antisocial Personality Disorder is characterized by a pattern of disregard for, and violation of, the rights of others, while Borderline Personality Disorder is characterized by very poor impulse control and instability in interpersonal relationships, self-image, and emotions. These two types of personality disorder, or at least traits related to each personality type, can co-occur within the same individual.

There is little evidence to suggest antisocial personality disorder can be successfully treated by psychiatric interventions. To date, no psychiatric treatment

has proved effective. Individuals do not learn much from the painful consequences of their behaviour. Those who are successful in forming a therapeutic alliance with a psychotherapist can show positive changes, as can those who manifest certain depressive traits or capacity for introspection when confronted by their peers in a prison or military setting.[5] Hospitalization has few beneficial effects.

Although there are no studies showing that antisocial personality disorder can be altered through pharmacological treatment, certain symptoms and behaviours may respond positively to medication if compliance to treatment can be enhanced through institutional or community supervision. Psychotic symptoms in certain individuals who have been diagnosed with schizophrenia and antisocial personality disorder respond well to antipsychotic medication, just as certain symptoms of depression and anxiety may respond to antidepressant or anxiolytic medication.[6]

Various psychotherapeutic approaches for antisocial personality disorder have been investigated, including family therapy, residential therapy, cognitive-behavioural therapy and the psychodynamic approach. Cognitive-behavioural therapy is the most frequently used method and can help certain individuals presenting with less severe psychopathology. Psychoanalytical therapy is not usually effective but a psychodynamic approach can provide a better understanding of the psychodynamics of these individuals. Certain clinical features have been identified as contraindications to psychiatric treatment, specifically a history or sadistic and violent behaviour; total absence of remorse; intelligence two standard deviations from the mean; no history of attachments; and fear of predation on the part of experienced clinicians without any overtly threatening behaviour by the patient.[6]

Kernberg also indicates that antisocial personalities have a very poor prognosis for the entire range of psychological treatments. He raises, among others, the problem of self-destructive tendencies in certain individuals with borderline personality organization; these tendencies lead them to self-destroy or destroy any help offered by those around them, with the ultimate goal of triumphing over them, even if they themselves succumb in the process.[7]

The primary psychiatric treatment for borderline personality disorder is psychotherapy, complemented by symptom-targeted pharmacotherapy. There is no empirical evidence establishing that any one approach is more effective than another. Long-term or extended psychotherapy helps attain and maintain improvement in patient personality, interpersonal problems and overall functioning. Pharmacotherapy helps reduce symptoms such as affective instability, impulsivity, psychotic-like symptoms and self-destructive behaviour.[8]

Clinical experience indicates that a combination of both psychotherapy and pharmacotherapy is the most beneficial approach for patients with borderline personality disorder. Two psychotherapy approaches have been shown in randomized controlled trials to be effective, namely psychoanalytic/psychodynamic therapy and dialectical behaviour therapy (DBT).

There is no specific pharmacological treatment currently approved but pharmacotherapy can diminish the severity of symptoms and optimize functioning. However, medications do not cure character. Commonly used medications include antidepressants, mood stabilizers, and low-dose neuroleptics. Since this treatment is long-term, patient participation must be voluntary.

The treatment of chronic self-destructive behaviour and the association of antisocial traits and violent behaviour present particular challenges, depending on the severity of these features. In milder cases, individual cognitive therapy may encourage individuals to weigh the risks against the benefits of their behaviour as well as its long-term consequences. In more severe cases, residential treatment may be indicated, including group therapy and medication to control episodic outbursts of anger. When the threat of violence is imminent, psychotherapy becomes ineffective and voluntary or involuntary hospitalization is necessary. It should be kept in mind that certain patients with borderline personality disorder with co-occurring antisocial traits may not be good candidates for therapy, in particular those presenting with narcissistic traits such as grandiosity, conning, lack of remorse, lying and manipulativeness.

Violence is the most troublesome symptom associated with antisocial personality disorder. Some researchers have developed a pharmacological approach to the treatment of violence and aggression based on an understanding of the neurobiological systems involved in the manifestation of these symptoms. Making a distinction between affective aggression (featuring high levels of emotion and in response to an imminent threat) and predatory aggression (emotionless and planned), they suggest various pharmacological interventions acting on the gamma-aminobutyric acid (GABA) system (benzodiazepines), noradrenergic system (lithium, propranolol), serotonergic system (lithium, fluoxetine), and electrical "kindling" (phenytoin, carbamazepine). These are symptom-targeted treatments that elicit widely varied responses from one individual to another. In all cases, these treatments require the patient's agreement and cooperation because they are long term and the medication has to be taken on a daily basis.[6]

In acute violence settings the use of intramuscularly administered medication is indicated to reduce risks for the patient and the staff. Benzodiazepines are quick-acting and efficacious. They are the first-line drugs for moderate to severe agitation and for cases where there is a potential for escalating behavioural dyscontrol.

Antipsychotics are also effective in reducing agitation and violence in both psychotic and non-psychotic patients. High-potency neuroleptics such as Haloperidol, and more recently atypical antipsychotics including olanzapine, ziprasidone and risperidone, are being increasingly used in combination because of the synergy of the drugs' efficacy and rapid onset of action.[9]

The use of seclusion and restraint in correctional psychiatry is complicated by the fact that correctional services have procedures regarding the use of these measures for non-medical purposes. The use of these control measures for clinical purposes must occur in response to patients exhibiting behaviour that is dangerous to self or others as a result of mental illness. Certain definitions can help make this distinction clearer, as follows:

> "Clinically ordered restraint is a therapeutic intervention initiated by medical or mental health staff to use devices designed to safely limit a patient's mobility. Custody restraint is not the same as clinically ordered restraint. When custody staff orders the use of restraints, medical staff monitor the health status of inmates while in custody restraint, and mental health staff respond to security or medical staff requests for consultation regarding the use of, or response to, custody ordered restraint.
>
> Clinically ordered seclusion or "time-out" is a therapeutic intervention initiated by medical or mental health staff to use rooms designed to safely limit a patient's mobility. It is not the same as segregation or isolation as generally applied in corrections (i.e., [...] used primarily for punitive purposes)."[10]

Isolation is a less restrictive procedure than restraint. It is used with individuals who retain a certain degree of control. They may be placed in a security room without concern that their degree of agitation will pose a risk of injury. Restraint becomes appropriate in cases where there is no minimal control and patients are extremely agitated, posing a risk of injuring themselves or others or a risk of damaging objects.[11] In both cases, medication to reduce agitation should be offered. When a patient in restraints remains agitated and refuses the medication, it should be administered involuntarily until the patient has calmed down.[12]

Discussion

The Ombudsman and Child and Youth Advocate provides a clear overview of Ashley's journey in page 8 of his investigation report, as follows:

"Ashley Smith became involved in the youth criminal justice system at the age of thirteen when she was charged with assault and disturbance in a public place, offences under the *Criminal Code of Canada*. From that point on, the events involving a young teenager, unconsciously relying on the services provided by a number of provincial governmental stakeholders, went spiralling into an increasingly frustrating and disturbing experience for all parties involved. From conventional education to alternative programs, open custody to secure custody, youth detention centre to adult correctional facility, Ashley Smith appears to have remained the one constant in an ever changing series of initiatives taken by various interveners to have her fit a mould of stability that only resulted in mind-boggling unstable results."

From a psychiatric perspective, Ms. Smith suffered from antisocial personality disorder with borderline traits. She presented with long-term traits that were stable over time and characterized by violation of the rights of others, contempt, impulsivity, instability in interpersonal relationships and emotions, and lack of self-examination regarding her behaviour, which was often disruptive, oppositional and self-destructive. The co-occurrence of these two types of personality made her management difficult from both psychiatric and correctional perspectives. Attempts to offer her psychiatric treatment in various health care units failed because she did not cooperate and acted out several times. Prospects for a positive response to psychotherapeutic and/or pharmacological treatments were therefore very limited in her case, particularly in view of her inability to commit to and follow a treatment plan. Ms. Smith was almost always kept in segregation and often placed in physical restraints in care units and correctional facilities because of her self-destructive and hetero-aggressive behaviours.

Ms. Smith was incarcerated at the Joliette Detention Centre from June 27 to July 26, 2007. On July 22 and 23, 2007, she was placed in restraints and received injections of antipsychotic and anxiolytic medication after being extracted from her cell because she had pulled a metal plate off the wall and had hurt herself or deliberately injured herself with screws, and did not follow the staff's instructions. The nursing staff who assessed her found she was agitated and posed a danger to herself and others. The psychiatrist on duty was contacted and prescribed the use of physical restraints and injections of antipsychotic and anxiolytic medication, on the basis of the information provided to him. The institutional emergency response team became involved to extract Ms. Smith from her cell, place her in restraints and observe her until she calmed down.

In these two incidents, the use of restraints and involuntary administration of the injection were warranted under article 13 of the *Civil Code of Québec*, which sets out that "consent to medical care is not required in case of emergency if the life of

the person is in danger or his integrity is threatened and his consent cannot be obtained in due time," and under article 118.1 of the Quebec *Act respecting health services and social services*, which is states that "Force, isolation, mechanical means or chemicals may not be used to place a person under control in an installation maintained by an institution except to prevent the person from inflicting harm upon himself or others. The use of such means must be minimal and resorted to only exceptionally, and must be appropriate having regard to the person's physical and mental state." This Act has be complemented by certain departmental orientations that guide institutions in developing their protocols for the application of control measures, including the following: "Chemical substances, restraints and isolation are used as control measures purely for ensuring safety in situations where risk is imminent."

A review of the video recordings of the incidents of July 22 and 23, 2007, helped determine that there was no medical condition affecting Ms. Smith's capacity to give free and informed consent and that there was no serious or imminent risk placing her life in danger of threatening her integrity or the integrity of others. First, during the incident of July 22, 2007, there was a delay of slightly over two and a half hours between the time when Ms. Smith was seen with the metal plate in her hands and blood on her gown and the IERT's intervention to extract her from her cell (9:45 a.m. and 12:28 a.m.). In addition, Joliette Institution managers who viewed the video recording of this period found that Ms. Smith "refused to cooperate and engaged in non-violent negative behaviour." It is difficult to conclude, on the basis of these observations, that this was a situation involving serious and imminent risk.

Ms. Smith was calm when she exited her cell at 12:33 a.m., her hands handcuffed behind her back. Also, she remained calm while taking her decontamination shower.

After taking her shower, Ms. Smith voiced her refusal to see the nurse and initially refused to put her hands behind her back to be handcuffed, although she eventually agreed to do so. An IERT member told her that "everything was going fine."

Ms. Smith was relatively calm while being placed in restraints on the stretcher (12:52 p.m.). She moved her limbs a bit and complained that she was being hurt and there was too much pressure on her limbs, but she was not agitated, did not utter threats and did not shout insults at the staff.

Throughout these events of July 22, 2007, Ms. Smith understood the instructions she was given and never appeared to be hallucinating or delirious, or speaking

incoherently, presenting signs of an underlying psychotic or organic disorder that could have affected her capacity to make decisions or her behaviour.

At 1:02 p.m. her nurse is heard saying, "She is so angry." There was a concern that if she became too agitated, the stretcher could fall on the ground. (However, Ms. Smith was not particularly agitated at that time and there were at least five workers around her). The nurse said she was going to give her an injection and Ms. Smith replied, "No."

The description of Ms. Smith's status at that time, specifically "She is so angry," does not agree with what is seen in the video. This is also the case a few minutes later at 1:10 p.m. when the nurse is heard saying, "I'm calling the psychiatrist, that will not be enough, she is super-agitated."

Afterward, Ms. Smith's behaviour, while she was in four-point restraints, can be characterized as negative, uncooperative and non-violent (as mentioned previously) rather than agitated and disorganized. In my opinion, her behaviour matched the description provided in paragraph 28 of CD 567, *Management of Security Incidents*, specifically that of a physically uncooperative inmate ("The inmate refuses to comply with staff directions or orders or refuses to move from an area or leave a cell. The inmate may offer active physical, but not assaultive, resistance by pulling or running away or resisting staff attempts to move him or her to a standing position"), and not that of an assaultive inmate, as outlined under paragraph 29 of the same document ("The inmate threatens verbally, or implies through physical behaviours, actions or gestures, the intent to apply force to harm or injure another person. The inmate, directly or indirectly, applies force against another person in a manner that causes or has the potential to cause harm or injury").

It is therefore pertinent to question the information about Ms. Smith's status given to the psychiatrist by telephone, since this information was the basis for placing Ms. Smith in physical restraints and giving her several medications through injections, which were administered against her will, rather quickly at the beginning, and in large doses, even though this was not clinically warranted by Ms. Smith's status. Over a seven-hour interval, Ms. Smith received the following medications:

1:09 p.m.:	Clopixol 50 mg IM
1:23 p.m.:	Haldol 5 mg IM, Ativan 2 mg IM, Cogentin 25 mg PO
2:29 p.m.:	Haldol 5 mg IM, Ativan 2 mg IM, Benadryl 50 mg IM

3:30 p.m.: Haldol 5 mg IM, Ativan 2 mg IM, Benadryl 50 mg IM

7:59 p.m.: Injection of anxiolytic medication, whose nature I could not determine from the information available.

The injection of four doses of antipsychotic medication over a period of two and a half hours is also disturbing. Usually injections of tranquilizers are prescribed to be given once on the hour except in cases of very severe agitation, which was certainly not the case here.

The protocols for the application of restraints and segregation defined by the two institutions mentioned (Pierre-Janet and MUHC) do not specify how often a patient in restraints must be assessed by medical staff. All that is mentioned is that the interprofessional team must conduct and record an assessment on every shift. Otherwise, article 30 of Commissioner's Directive 844 ("Use of Restraint Equipment for Health Purposes") states that a "psychiatrist, psychologist or physician must assess the inmate's mental health status within two hours of the application of restraints." This directive is dated May 27, 2008, and I am not able to determine whether it was in effect when the incidents of July 22, 2007, occurred. During these incidents the on-call psychiatrist did not go on site to assess Ms. Smith's mental status, although she was kept in physical restraints for just under 12 hours and received large doses of medication. I can only agree with the directive of May 27, 2008, and urge its implementation.

Ms. Smith was kept in physical restraints for a period of just under 12 hours. The protocol seeing to the fluids, food, elimination and personal hygiene needs of a patient placed in restraints was not consistently observed during this period.

On several occasions Ms. Smith tried to rock her stretcher as if to tip it over. This behaviour was assessed as agitation. It could be surmised that she would have been more comfortable and would not have acted that way had she been placed on a suitable, sufficiently large bed.

During the incident of July 22, 2007, Ms. Smith was placed in restraints and received antipsychotic and anxiolytic medications involuntarily, although she did not pose a serious or imminent danger to her health.

During the incident of July 23, 2007, there was a delay of one and a half hours from the moment when it was observed that Ms. Smith had again pulled apart a metal plate and there was blood on her gown, and the IERT's intervention to extract her from her cell. Once again, had there been imminent danger, a major incident would have occurred during this period; however, nothing happened. Ms.

Smith became somewhat more agitated during the decontamination and struck the radiator when she learned she could not immediately return to her cell because of the repair work. The nurse called the psychiatrist, who prescribed she be placed in physical restraints and be given an injection of medication. Ms. Smith offered some non-violent resistance to being placed in restraints and made a spitting gesture when the nurse examined her. She refused to receive an injection but said she would agree to take medication orally. The injection was administered anyway.

Throughout this entire incident, and similarly during the incident of July 22, 2007, Ms. Smith understood the instructions she was given and never appeared to be hallucinating or delirious, or speaking incoherently, presenting signs of an underlying psychotic or organic disorder that could have affected her capacity to make decisions or her behaviour.

The degree of agitation observed in the video recording during this incident certainly does not meet the criteria of serious and imminent risk and did not warrant the use of physical restraints or the intramuscular administration of medication against her will. Ms. Smith agreed to take the medication orally. The prescription should have been flexible enough to allow for this option.

The incident of July 26 involves the fact that Ms. Smith was told that she did not have the choice to refuse the medication because it had been prescribed by the psychiatrist as being mandatory, while in fact it seems that the psychiatrist had prescribed it on a PRN (as-required) basis, to be given only if she was agitated before her departure and later during the transfer. Ms. Smith then agreed to take a medication that was not medically indicated because she was calm both when she woke up and at the time of departure. The situation would have been clinically different and more ethically defensible had Ms. Smith agreed to take a regularly prescribed medication to better control her aggressiveness and impulsivity.

On this last point, I was not able to determine from the information on file whether Ms. Smith was taking the antipsychotic medication that had been regularly prescribed during her incarceration at Joliette Institution. The Correctional Service of Canada's Board of Investigation report contains a table on page 40 indicating that on July 6 a psychiatrist prescribed Risperdal 2 mg DIE + PRN, and Seroquel 300 mg HS. The reports indicate at various times that Ms. Smith did not cooperate with the assessments. There is no mention of whether she was taking this medication on a regular basis as prescribed or of its effects, if she was indeed taking it.

In the three incidents of July 22, 23 and 26, 2007, two other factors were raised to justify the interventions carried out, namely the fear that Ms. Smith had hidden objects in her body cavities that she could use to harm herself or injure the staff,

and the fact that she had a history of serious self-destructive and hetero-aggressive behaviour. In my view, the strip search could have been conducted without placing her in physical restraints, as had been done before her transfer on July 26. Furthermore, I feel that the act of using control measures such as physical and chemical restraints "because of her history," when the clinical situation did not warrant such an action does not seem to be medically indicated and leads us rather to the use of control measures for correctional purposes. It seems to me that the threatening tone used at times by the nursing staff during the incidents of July 22 reflect this attitude.

Control measures could have been used preventively as part of a planned intervention within a care plan with Ms. Smith's consent as described in the terms of reference on the exceptional use of control measures: restraint and isolation, prepared by the Association des hôpitaux du Québec. In the absence of Ms. Smith's consent, the intervention fell under the classification of unplanned intervention and therefore should have met the criterion of imminent danger to the safety and security of the person or of others.

Conclusion

Ms. Smith suffered from very complex problems characterized by a combination of antisocial personality disorder and borderline personality traits. Her journey through the correctional system and the various care units was marked by her disruptive, oppositional, maladaptive, aggressive and self-injurious behaviours. Given that personality disorders are not considered to be medical conditions for which there are specific and effective treatments, the attitudes of staff working within the correctional system towards these disruptive behaviours can easily vary according to their understanding, training and capacity for tolerance. The self-destructive acts and repeated assaults can severely test even the most experienced of workers and the line separating interventions intended as therapeutic from correctional interventions can become rather blurred.

In my view, there were several ethical, clinical and equipment-related shortcomings in the way the events of July 22, 23 and 26, 2007, involving Ms. Smith, were managed at Joliette Institution.

From my observations, gathered from watching the video recordings of these three days, nothing indicates that Ms. Smith was incapable of giving her free and informed consent; also, her behaviour did not pose an imminent danger to her life, or a threat to her integrity or the integrity of others, as set out in article 13 of the *Civil Code of Québec* to obviate the necessity for consent to care. Ms. Smith was therefore placed in

restraints and received antipsychotic and anxiolytic medications that were not medically indicated during these events.

Several comments made by the nursing staff on Ms. Smith's state of health during the incidents of July 22 and 23, 2007, do not match the state she presented and raises doubts about the information that was given over the telephone to the psychiatrist on call and on the basis of which this psychiatrist prescribed that Ms. Smith be placed in restraints and given injections of medication. Sometimes these comments were made in a threatening tone of voice, which could have further provoked Ms. Smith, whose behaviour was oppositional by nature. The medication injections were administered to Ms. Smith without any explanation of what they were, since it had been determined that she was not capable of giving consent. I recommend that the knowledge and information on the understanding, assessment and approaches used for states of agitation be regularly reviewed with staff members, especially where related to severe personality disorders where the boundary between medical and correctional concerns is not always clear.

The protocols for the use of physical and chemical restraints do not specify how often a patient in restraints must be assessed by medical staff. On July 22 and 23, 2007, the on-call psychiatrist received information from the nursing staff by telephone, but never reported on site to assess Ms. Smith in person. Paragraph 30 of Commissioner's Directive 844 (Use of Restraint Equipment for Health Purposes) states that a psychiatrist, psychologist or physician must assess the inmate's mental health status within two hours of the application of restraints. Because this directive is dated May 27, 2008, I am unable to determine whether it was in effect when the July 22, 2007, incidents occurred. I recommend, however, that the implementation of this directive be ensured because the nursing staff or any other personnel working in the correctional system cannot be expected to have the same level of knowledge and expertise as hospital staff. Therefore it is particularly advisable to have health care staff conduct assessments on site during emergency situations.

On July 22, 2007, while Ms. Smith was kept in physical restraints for just under 12 hours, the protocol indicating how to meet the fluids, food, elimination and personal hygiene needs of a patient was not consistently observed. In addition, Ms. Smith's was kept in restraints on a stretcher that was prone to overturning if she moved too much. Restraints applied for such a long time should have been applied on an adequate bed. Someone must ensure that the protocols on the care to be provided are observed and the equipment and space required are available in detention centers to facilitate the use of physical and chemical constraints and the monitoring of patients.

In my view, during the incidents of July 22 and 23, 2007, the IERT members could have extracted Ms. Smith from her cell to examine her injuries, conduct a strip search and then place her in segregation as it was often done under such circumstances.

In my opinion, during the incident of July 26, 2007, Ms. Smith was forced to take the medication, although she took it involuntarily, because she was told that she had no choice but to take it, although this medication had been prescribed only on an as-required basis, in case she became agitated. The nursing staff and the psychologist had decided to modify the psychiatrist's prescription in the expectation that Ms. Smith would exhibit disruptive behaviours at the time of her transfer, given her history of such behaviours in similar situations. It cannot be determined from the video whether this modification had been discussed with and approved by the psychiatrist.

These comments concern only the three incidents of July 22, 23 and 26, 2007, and obviously do not address the problems posed by Ms. Smith's multiple disruptive, self-injurious and hetero-aggressive behaviours throughout her incarceration in the correctional system and her stays in health care facilities.

A review of the literature indicates that antisocial personality disorder does not respond favourably to psychiatric intervention. The combination of borderline personality with significant narcissistic traits such as grandiosity, conning, lack of remorse, lying and manipulativeness makes the prognosis even more guarded. Cases where psychotherapy and pharmacotherapy had a beneficial effect featured certain basic elements such as a multidisciplinary approach integrated in a long-term and consistent intervention plan fostering the development of a therapeutic alliance based on trust and cooperation. The use of physical and chemical restraint measures may even be considered in these circumstances with the patient's consent. In Ms. Smith's case, it is very likely that the fact that she was continually kept in isolation without an adequate care plan and transferred seventeen times over an eleven-month period from one detention facility to another in the federal correctional system hindered the formation of such an alliance.

(original signed)

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Psychiatrist

PB/jd

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