CORONERS COURT

IN THE MATTER OF the Coroner's Act, R.S.O. 1990, c. 37

AND IN THE MATTER OF that Inquest in the death of Ashley Smith

SUBMISSIONS OF CORRECTIONAL SERVICE OF CANADA ON REQUEST BY THE MEDIA FOR ACCESS TO THE EXHIBITS

OVERVIEW

1. The Correctional Service of Canada (CSC) does not oppose the right of the media to report on the Inquest, however objects to the media getting copies of the exhibits for broadcast until the day the jury returns its verdict at this Inquest. If the media is provided with copies of the exhibits they should still be prohibited from broadcasting their content.

2. In the alternative, whether or not the media obtains copies, the broadcast of the exhibits should be delayed until each individual exhibit is presented in context to the jury in the course of the Inquest.

3. Furthermore, conditions should be imposed on the broadcast (*e.g.*, the faces of correction officers or other person from CSC on the videotapes who did not consent to their faces being shown should be obscured).

PART I – STATEMENT OF FACTS

4. Ashley Smith died on October 19, 2007 while she was an inmate at the Grand Valley Institution for Women (GVI), a federal correctional facility in Kitchener. Ms. Smith had been in the custody of the CSC since October 31, 2006.

5. Ms. Smith had a history of self-harm using ligatures which started before she was in the custody of CSC. While she was incarcerated with CSC, Ms. Smith continued to engage in self-injurious behaviour, most commonly self-strangulation with ligatures that were fashioned with virtually any material she could obtain. In addition to engaging in self-injurious behaviour, Ms. Smith also demonstrated aggression towards staff and consistently refused to comply with the rules.

6. The commencement of the Inquest into Ms. Smith's death was adjourned several times. There are 14 parties with standing at the Inquest.

7. On May 19, 2010, the family of Ms. Smith filed a Notice of Motion to expand the scope of the Inquest. On June 1, 2010, the Provincial Advocate for Children and Youth (PACY) filed a Notice of Motion for production of certain additional material. PACY's motion was supported by the Canadian Association of Elizabeth Fry Societies (CAEFS).

8. Parties with standing were advised by counsel for the coroner on June 7 and July 27, 2010 that the Presiding Coroner held the opinion that the additional material being gathered for Volume 2 of the Inquest Brief, which had been identified to parties at the April 14, 2010 pre-inquest meeting, may be of importance to the two motions.

9. On August 24, 2010, Volume 2 of the Inquest Brief was distributed to counsel for parties with standing who had signed a confidentiality undertaking. Counsel for the family was not given a copy of either Volume 1 or 2 of the Inquest Brief because he had declined to sign the confidentiality undertaking.

10. All parties were asked for input regarding how to manage the motions hearing, given that one of the parties had not signed the confidentiality undertaking relating to the materials in the Inquest Brief that may be used as supporting materials to the motions. Counsel for PACY and for CAEFS did not see this as an issue. Counsel for the family stated that in his view, any materials filed in support of motions before the Inquest, are publicly accessible and therefore, the family could have access to those materials to assist in their preparation for the hearing of the motions.

11. In light of the above, on September 1, 2010, the Presiding Coroner issued a procedural order. The order was written to allow the party who had not signed the undertaking to fully participate and prepare for the motions and,

at the same time, to protect the Inquest Brief materials and persons anticipated to give evidence at the Inquest. It was written to achieve what a signed undertaking would have achieved, and also to prevent the material in the Inquest Brief from becoming accessible to the public prior to determinations about admissibility.

12. The September 1, 2010 order was revoked and a revised interim order was issued on September 28, 2010, with an addendum on September 29, 2010. Appropriate parties were notified. On October 28, 2010, the Presiding Coroner issued a ruling in response to submissions opposing the order and submissions supporting it.

13. The Presiding Coroner found that she had jurisdiction to issue a sealing order/publication ban. She also found that such a ban in this case was necessary to prevent a serious risk to the Inquest into the death of Ms. Smith and that there were no reasonable alternatives that could be designed. The Presiding Coroner held that the salutary effects of the ban outweighed the deleterious effects in this case. Accordingly, she found that the circumstances in this case met the necessary criteria as defined by the Supreme Court of Canada in the *Dagenais/Mentuck* standard.

14. The Presiding Coroner held that the September 28, 2010 order and addendum would continue to apply. She indicated that any future applications to vary her order should be made in writing, on notice to all

parties and coroner's counsel. CSC is not aware of any such application having been made until this request by the media on the first day of the Inquest to obtain copies of all the information in the Inquest Brief.

PART II – ISSUES

15. The issues that must be determined by the Presiding Coroner are:

> (a) Does an application of the *Dagenais/Mentuck* standard justify delaying the broadcast of the exhibits until the day the jury returns its verdict at this Inquest;
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> (b) In the alternative, does an application of the *Dagenais/Mentuck* standard justify delaying the broadcast of the exhibits until each individual exhibit is presented in context to the jury in the course of the Inquest; and
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> (c) Should conditions be imposed on the broadcast of exhibits?

PART III – SUBMISSIONS

A. AN APPLICATION OF *DAGENAIS/MENTUCK* JUSTIFIES DELAYING THE BROADCAST OF THE EXHIBITS UNTIL THE JURY RETURNS ITS VERDICT

16. A sealing order or publication ban can be justified if it meets the necessary criteria as defined by the Supreme Court of Canada in *Dagenais/Mentuck*:

> (a) such an order is necessary in order to prevent a serious risk to the proper administration of justice because reasonable alternative measures will not prevent the risk; and
>
> (b) the salutary effects of the publication ban outweigh the deleterious effects on the rights and interests of the parties and the public, including the effects on the right to free expression, the right of the accused to a fair and public trial and the efficacy of the administration of justice.

1) <u>There is a Risk to the Administration of Justice</u>

17. Although a jury at a coroner's inquest is prohibited from making any finding of legal responsibility, the jury does exercise the important functions of ascertaining publicly the facts relating to a person's death, focussing the community's attention on those circumstances and delivering recommendations directed at the avoidance of death in similar circumstances or respecting any other matter arising out of the inquest.

> **T. David Marshall, *Canadian Law of Inquests*, (3rd ed: 2008, Thomson Canada), at pp. 2-3, citing R.C. Bennett, M.D., *"The Ontario Coroners System"* (1986 – 1987), 7 Advocates' Quarterly 53, at p. 60.**

18. Accordingly, impartiality and fair play, amongst other rules of natural justice, are fundamental components of a coroner's inquest. Much like a jury in a criminal or civil trial, the jury at a coroner's inquest must be allowed to consider and deliberate on the evidence and to make a determination in an unbiased manner.

> ***Reid v. Wigle* (1980), 29 O.R. (2d) 633 (Div. Ct.), at para. 18; *Re Evans et al. and Milton et al.* (1979), 24 O.R. (2d) 181, at 219 (C.A.), leave to appeal refused [1979] 1 S.C.R. viii; *Canadian Law of Inquests*, supra, at p. 201.**

19. If the exhibits are broadcast prior to the day the jury returns its verdict, there is a risk that the jury will be improperly influenced by the media's representation of the exhibits since the exhibits would be de-contextualized from the Inquest as a whole. This could in turn unfairly influence the recommendations of the jury and, arguably, imperil the

public's confidence in the impartiality and fairness of the findings made at the Inquest.

20. There are also reputational and public education interests at stake. The premature publication of the exhibits may unfairly jeopardise the reputations of those whose actions are the subject of this Inquest and the public may be misinformed about what occurred.

21. Considered within the framework of the *Dagenais/Mentuck* standard, these risks and the potential for misrepresentation of the evidence resulting from unfettered journalistic dissemination of the exhibits, could pose a serious threat to the proper administration of justice.

> ***Calgary Sun, a Division of Toronto Sun, Publication Corp. v. Alberta*, [1996] A.J. No. 536**

2) <u>The salutary effects of the ban outweigh the deleterious effects</u>

22. In a criminal trial, the media does not obtain copies of exhibits at the same time as the jury. The exhibits are normally released to the media once the jury retires to deliberate at which point it is sequestered. Because the jury is sequestered, it is protected from any potential misrepresentation of the evidence by the media. A jury in a coroner's inquest however is not sequestered. The risks associated with the publication of the information therefore continue to exist until the day the jury returns its verdict in the Inquest.

***The Criminal Code,* R.S.C. 1985, c. C-46, section 647(1)**

23. The public, including the media, is free to attend the Inquest. The media is not prohibited from reporting on the proceedings. A sealing order delaying the broadcast of the exhibits would also be limited. Once the jury has completed its deliberation, the media would be free to broadcast the exhibits.

24. An order which gives the media full access to the Inquest and the ability to report on the proceedings including the testimony of witnesses and, at the same time, delays the broadcast of exhibits until the jury renders its verdict satisfies the *Dagenais/Mentuck* standard, which requires a balancing of the interests when necessary to safeguard the proper administration of justice.

25. The salutary effects of delaying the broadcast of the exhibits until the jury returns its verdict in this Inquest outweigh any deleterious effects of the freedom of expression to those affected by the ban. The broadcast of the exhibits should, therefore, be delayed until the jury returns its verdict in this Inquest.

26. The media should not be provided with copies of the exhibits but if they are they should still be prohibited from broadcasting their content until the jury renders its verdict in this Inquest.

B. IN THE ALTERNATIVE THE BROADCAST OF THE EXHIBITS SHOULD BE DELAYED UNTIL THEY ARE PRESENTED IN CONTEXT TO THE JURY IN THE COURSE OF THE INQUEST

27. In her October 28, 2010 Ruling, the Presiding Coroner held that:

- **para. 54:** there is no guarantee that all [material in the Inquest Brief] will be considered to be admissible and relevant, or not unduly repetitious (*Coroner's Act*, Section 44). These decisions will be made by me at the appropriate time. It would be premature for me to make such evidentiary decisions at this stage of the process. This is a factor that I take into account in determining whether it is necessary for me to make an order to prevent a serious risk to the administration of justice;

- **para. 55:** it is not unusual for the issues to be examined at the inquest by the jury to change as the witnesses begin to give evidence and are skilfully examined in chief by coroner's counsel and skilfully cross-examined by other parties to the process. If the media were to report on materials ... that were subsequently deemed at the time of the inquest before the jury to be "inadmissible", I may be forced to present additional evidence to the jury to correct the misinformation, i.e. the press would be controlling the conduct of the inquest;

28. The Inquest is a fluid process and the jury will only appreciate the true value of the evidence when it has been placed in context for them with the benefit of the testimony of witnesses who have knowledge about the evidence, including their cross-examination. If the media broadcasts the exhibits before the jury has the opportunity to hear all of the evidence placed in the appropriate context, their function could be undermined.

29. In this situation, the *Dagenais/Mentuck* standard would also be satisfied. The salutary effects of delaying the broadcast of the exhibits until the exhibits are presented in context to the jury would outweigh any deleterious effects of the freedom of expression to those affected by the ban. This principle should apply whether or not the media is provided with copies of the exhibits.

C. CONDITIONS SHOULD BE IMPOSED ON THE BROADCAST OF THE EXHIBITS

30. A trial judge (or in this case the Presiding Coroner) has the authority to establish conditions on access to exhibits.

> ***Canadian Broadcasting Corp. v. The Queen*, [2011] S.C.J. No. 3, para. 14.**

31. It is not contradicted that the information in the exhibits is subject to various privileges which have not been waived. It may also contain third party, privacy, security and other information which ought not to be released.

32. In *R. v. Canadian Broadcasting Corporation*, Mr. Justice G.E. Taylor imposed the following conditions on the release of exhibits, including videotapes, that had been presented in a preliminary inquiry into the charges of four CSC employees in the death of Ms. Smith, to the Canadian Broadcasting Corporation for use in its *Fifth Estate* program:

> (a) the faces of any CSC officer or any other individual who did not consent to their faces being shown was to be digitally obscured;
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> (b) the audio recordings were to be edited to remove the names of any corrections officers or other person who did not consent to their name being broadcast;
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> (c) the copying and editing of the video and audio recordings was to be done so as to maintain the integrity of the original recordings;
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> (d) the exhibits are to be used solely for use in a documentary by The Fifth Estate;
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> (e) no copies are to be made of the exhibits other than for that use; and
>
> (f) copies of the exhibits are not to be posted on any Internet site except as part of a documentary by the Fifth Estate.
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> ***R. v. Canadian Broadcasting Corporation*, [2010] O.J. No. 526, para. 55 [overturned by the Ontario Court of Appeal, [2010] O.J. No. 4615, on other grounds]**

33. Similar conditions to those imposed by Taylor J. should be imposed by the Presiding Coroner on the broadcast of the exhibits to maintain the privacy interests of the parties involved. In particular, the faces of correction officers or other person from CSC on the videotapes who did not consent to their faces being shown should be obscured. No valid reasons were presented to vary this position.

PART IV – ORDER SOUGHT

34. The broadcast of the exhibits should be delayed until the day the jury returns its verdict in this Inquest or, alternatively, until each individual

exhibit is presented in context to the jury in the course of the Inquest. Furthermore, conditions should be imposed on the broadcast of the exhibits.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated at Toronto this 13th day of May, 2011.

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