Ruling on motion to obtain additional material for inquest into the death of Ms. Ashley Smith

Background

1. Ms. Ashley Smith died on Oct 19, 2007. She was an inmate at the Grand Valley Institution for Women in Kitchener, a federal correctional facility. She arrived at Grand Valley in May of 2007. She remained in Ontario until June 27, 2007, when she was transferred to a federal institution (Joliette) in Quebec. Ms. Smith was transferred from Joliette to Nova Institution in Nova Scotia on July 26, 2007. She remained in Nova Scotia until August. On August 31, 2007, she returned to the Grand Valley Institution in Ontario and remained there until her death.

2. The circumstances of her death require a mandatory inquest under Section 10 (4) of the *Coroners Act* of Ontario. The hearing of evidence before the jury is scheduled to begin on April 4, 2011.

3. Parties that have been granted standing at this inquest are:

Correctional Service of Canada (CSC)
Union of Canadian Correctional Officers (UCCO)
Mr. Blaine Phibbs
Mr. Travis McDonald
Ms. Karen Eves
Ms. Cindy Berry

St. Joseph's Health Care (Regional Mental Health Unit – St. Thomas)
Canadian Association for Elizabeth Fry Societies (CAEFS)
Provincial Advocate for Children and Youth (PACY)
Family of Ms. Smith
Drs. Ligate, Rogers and Swaminath
Registered Nurses of Ontario (RNAO)

4. The original scope of the inquest was limited to Ms. Smith's time as an inmate in Ontario. The scope was varied following a motions hearing on November 1 and 2, 2010. In my ruling of November 12, 2010, it is stated that the scope of the inquest will include an examination of factors that may have impacted Ms. Smith's state of mind on October 19, 2007, the date of her death.[1] Following the ruling, additional materials were obtained and produced to parties.

5. Parties were advised in the November 12th ruling that the additional production should not be interpreted as a predetermination of admissibility nor an indication that the material would be presented by viva voce evidence. [2]

6. Parties were also advised in paragraph 18 of that ruling that I would obtain additional materials as per the authority of Section 16 of the *Coroners Act.*

Investigative powers

16. (1) A coroner may,

(a) examine or take possession of any dead body, or both; and

(b) enter and inspect any place where a dead body is and any place from which the coroner has reasonable grounds for believing the body was removed. R.S.O. 1990, c. C.37, s. 16 (1); 2009, c. 15, s. 8.

Idem

(2) A coroner who believes on reasonable and probable grounds that to do so is necessary for the purposes of the investigation may,

[1] Ruling to expand scope of inquest. November 12, 2010 Page 7. Paragraph 10.
[2] ibid. Page 8. Paragraph 12.

(a) inspect any place in which the deceased person was, or in which the coroner has reasonable grounds to believe the deceased person was, prior to his or her death;

(b) inspect and extract information from any records or writings relating to the deceased or his or her circumstances and reproduce such copies therefrom as the coroner believes necessary;

(c) seize anything that the coroner has reasonable grounds to believe is material to the purposes of the investigation. R.S.O. 1990, c. C.37, s. 16 (2).

7. As a result of the ruling, another Volume of the brief containing potentially relevant material was provided to parties in the middle of December.

8. Two pre-inquest planning meetings were held by coroner's counsel with parties with standing in February of this year. At those meetings additional materials were requested by some of the parties with standing. My counsel was able to advise the parties on February 9th, that I had no plans to seize any additional material. He also described the process to follow if parties wished me to reconsider.

9. Given the proximity to the start of the inquest, options were provided to the parties as to how a motion relating to the specific request for videotapes of the events of July 22, 23, and 26, 2007 at the Joliette Institution involving Ashley Smith would be heard. Options to be considered included written vs oral submissions and the timing of hearing the motion. [3] Counsel were advised of my inability to set a date for an oral hearing prior to April 4th. The options were: written submissions if the issues required rulings prior to the beginning of the hearing of evidence, or I would set aside some time for an oral hearing during the

[3] Memo from Mr. Siebenmorgen to parties with standing dated February 11, 2011

week of April 4th. Parties with standing were asked to respond, indicating their preferred option by February 16, 2011.

10. Eight parties responded to the request to provide input. Those parties were: CSC, UCCO, Mr. Blaine Phibbs, Ms. Cindy Berry, St. Joseph's – St. Thomas Hospital, CAEFS, Drs. Swaminath, Ligate and Rogers, and the RNAO. Having regard to all input that had been received up to February 22, 2011, I issued a direction through my counsel on that date based on the persuasive requests to deal with the matter prior to the April 4th date.

11. A submission was received from Canadian Association of Elizabeth Fry Societies (CAEFS) requesting a production order for "any materials relevant to the Inquest into the Death of Ashley Smith, including but not necessarily limited to the videotapes of Ms. Smith receiving forced injections on July 22, 23 and 26, 2007; and videotapes of Ms. Smith being transported between institutions".[4]

12. A notice of motion was received from the Provincial Advocate for Children and Youth (PACY) requesting production of the videos from July 22, 23 and 26, 2007 pertaining to the injections administered to Ms. Smith; the provision of copies of those videos to all parties; in the alternative the issuance of a summons to the Commissioner of the Correctional Service of Canada, compelling attendance with the videos; all documents and information relating to an incident

[4] Submissions of the Canadian Association of Elizabeth Fry Societies Tab 1 Page 1

on April 12, 2007 involving the duct–taping of Ms. Smith; all documents relevant to the inquest and documents that touch and concern matters raised in correspondence from counsel to CAEFS to coroner's counsel dated January 28, 2011. [5]

13. A notice of motion was received from the family of Ms. Smith requesting: an oral hearing; the seizure of all videos depicting restraints, forced administration of medications and/or uses of force on Ashley Smith at the Joliette Institution between June 27, 2007 and July 27, 2007; in the alternative, a summons to the Commissioner of the Corrections Service of Canada to require attendance with the videos described above; and, in the alternative, an order to Corrections Service of Canada as a party to the proceedings to produce all the videos described above.[6]

14. Responses to the notices of motion were received from CSC, UCCO, and coroner's counsel. Counsel for the physicians - Drs. Ligate, Rogers and Swaminath advised that they were taking no position on the motions.

15. Reply submissions were received by counsel for CAEFS, PACY and the family of Ms. Smith. To complete the record an additional letter from coroner's counsel to counsel to the family was also submitted.

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[5] Submissions of PACY
[6] Submissions of the family of Ms. Smith

Discussion

Purpose of an inquest

An inquest in Ontario is a public hearing. It is a quasi-judicial proceeding held in the public interest to present evidence to a jury about a death. It is the role of the jury to consider that evidence and answer five questions: who died (the identity of the deceased), where did death occur, when did death occur, how did death occur (that is, what was the medical cause of the death) and, by what means did the death occur (natural, accident, suicide, homicide or undetermined). The jury **must** answer those five questions. The jury **may** make recommendations directed toward the avoidance of death in similar circumstances or to any other matter arising out of the inquest. The jury **shall not** make any findings of legal responsibility or express any conclusion of law. The manner in which information is gathered and presented to the jury is defined by the *Coroners Act*, relevant case law and the principles of administrative law.

I refer to my ruling of November 12, 2010 with respect to the purpose of an inquest. [7] I reiterate the aspects described as referenced by the courts:

"an inquest is not a free wheeling inquiry; the presiding coroner must set the framework and assemble and present the essential evidence for consideration of the jury; the coroner must consider the public interest; the coroner must prevent the sideshow from taking over the circus".

[7] Ruling on expanding the scope of the inquest Paragraph 8 page 6

Issues

List of issues to be determined:

1. Will I convene an oral hearing to deal with these motions?

2. Will I issue an authority to seize the videotapes of the July 22, 23 and 26, 2007 incidents at Joliette institution?

3. Will I issue an authority to seize other materials and videos depicting restraints, forced administration of medication and uses of force from Joliette between June 27 and July 26, 2007?

4. Will I issue a summons for the Commissioner of CSC to attend at the inquest with the items identified in #3?

5. Will I order CSC as a party with standing at this inquest to produce the materials identified in #3?

6. Will I issue an authority to seize all videos depicting transfers of Ms. Smith between institutions, particularly the transfer of April 12, 2007?

7. Will I issue an order that CSC produce any relevant materials relevant to the death of Ms. Ashley Smith, notably, documents listed in a letter from counsel to CAEFS dated January 28, 2011?

Discussion

Item #1

1. Counsel for the family of Ms. Smith have submitted a motion "to be heard in open court in a full, fair and public hearing in respect of the herein issues".[8] Parties were invited to have input into the manner in which I would deal with the motion to seize the Joliette videos of July 22, 23, and 26, 2007. When originally requested, counsel for the family did not provide input into the consideration of timing or manner, either by February 16th or at any time prior to February 22nd,

[8] Notice of motion of the Family of Ms. Smith item #1.

the date on which coroner's counsel advised the parties that I would be issuing my directions as to motion procedure. The Ontario Divisional Court has held that the Coroner is master of his or her procedures. [9] This is a procedural matter. Counsel for the family has suggested that the open court principle is compromised by written submissions. I do not agree. Matters of efficiency and occasionally, the proper use of information, require consideration of written submissions. This approach has been supported by the courts.[10, 11] Written submissions do not, by their nature alone, merit descriptive and pejorative labels such as unfair or secret.

2. Receipt of an inquest brief by parties who have been granted standing to allow preparation for the inquest or who are considering applying for standing is contingent on the signing of an undertaking. The undertaking is designed to ensure the proper use of information seized by the coroner under the authority of the *Coroners Act*. Proper use of that information also maintains confidence in the conduct of the inquest and ensures the proper administration of justice within the meaning of administrative law (i.e. to prevent an abuse of the inquest process). Use of materials in the brief that have not yet, and indeed, may never be presented as evidence before the jury, may be required in the formation of submissions on matters that are to be determined. By necessary implication, the

[9] Sears Canada Inc. v. Davis Inquest (Coroner of), [1997] O.J. No 1424 (Div.Crt) at para 12
[10] Nishnawbe-Aski Nation v. Eden; Pierre v. McRae [2009] O. J. No 3202 (Div. Ct) at paras 83-87
[11] Nishnawbe-Aski Nation v. Eden [2011] O.J. No 988, 2011 ONCA 187. (C.A.) – did not reverse lower court on issue of written submissions

presiding coroner has the jurisdiction to make orders or directives to ensure proper use of that information to prevent an abuse of process. [12]

3. Having reviewed all the submissions (notices of motion, responses and replies), I have not found any materials in any of the documents that in my opinion satisfy the criteria of the *Dagenais/Mentuck* test to prohibit release to the public. The written materials relating to this matter were released to the media on Tuesday, March 15th.

Item #2, #3, #4, #5, #6 (seizure of additional videos)

4. In my ruling of November 12, 2010 I stated that additional materials would be obtained under the authority of Section 16 of the *Coroners Act*. It states:

> ***16.*** *(1) A coroner may,*
>
> *(a) examine or take possession of any dead body, or both; and*
>
> *(b) enter and inspect any place where a dead body is and any place from which the coroner has reasonable grounds for believing the body was removed. R.S.O. 1990, c. C.37, s. 16 (1); 2009, c. 15, s. 8.*
>
> ***Idem***
>
> *(2) A coroner who believes on reasonable and probable grounds that to do so is necessary for the purposes of the investigation may,*
>
> *(a) inspect any place in which the deceased person was, or in which the coroner has reasonable grounds to believe the deceased person was, prior to his or her death;*
>
> *(b) inspect and extract information from any records or writings relating to the deceased or his or her circumstances and reproduce such copies therefrom as the coroner believes necessary;*
>
> *(c) seize anything that the coroner has reasonable grounds to believe is material to the purposes of the investigation. R.S.O. 1990, c. C.37, s. 16 (2).*

[12] Ibid

Delegation of powers

(3) A coroner may authorize a legally qualified medical practitioner or a police officer to exercise all or any of the coroner's powers under subsection (1). R.S.O. 1990, c. C.37, s. 16 (3).

Idem

(4) A coroner may, where in his or her opinion it is necessary for the purposes of the investigation, authorize a legally qualified medical practitioner or a police officer to exercise all or any of the coroner's powers under clauses (2) (a), (b) and (c) but, where such power is conditional on the belief of the coroner, the requisite belief shall be that of the coroner personally. R.S.O. 1990, c. C.37, s. 16 (4).

Return of things seized

(5) Where a coroner seizes anything under clause (2) (c), he or she shall place it in the custody of a police officer for safekeeping and shall return it to the person from whom it was seized as soon as is practicable after the conclusion of the investigation or, where there is an inquest, of the inquest, unless the coroner is authorized or required by law to dispose of it otherwise. R.S.O. 1990, c. C.37, s. 16 (5).

Obstruction of coroner

(6) No person shall knowingly,

(a) hinder, obstruct or interfere with or attempt to hinder, obstruct or interfere with; or

(b) furnish with false information or refuse or neglect to furnish information to,

a coroner in the performance of his or her duties or a person authorized by the coroner in connection with an investigation. R.S.O. 1990, c. C.37, s. 16 (6).

I look specifically to s.16. (2) (c) to consider whether or not I have the jurisdiction to seize the additional materials requested. To comply with s.16. (2) (c) I must have reasonable grounds to believe the additional tapes are "material to the investigation".

5. I refer to my ruling of October 28, 2010 where the issue of the knowledge of the coroner was discussed.[13] I have knowledge of the material that is to be

[13] Ruling on the sealing of materials form the inquest brief and procedural directions for the oral hearing- paragraph 20. October 28, 2010.

presented to the jury regarding the circumstances of Ms. Smith's state of mind on October 19, 2007 and the details of her death. I am not aware of any information in the voluminous inquest brief (including a page from that brief which was submitted by counsel for the family of Ms. Smith following the deadline for reply submissions) that suggests a nexus between the events as depicted in the videos as requested in Item #2, 3, 4 and 5 and the pattern of ligature use which eventually led to her death.

6. Parties have submitted that the absence of the requested videos would eliminate the opportunity to present evidence of manners of death to the jury other than suicide. I do not agree. I believe that the information currently in the brief offers potentially relevant evidence that other manners of death are open to the jury.

7. Similarly, I am not aware of any information that suggests a nexus between her state of mind that led to the use of ligatures and the details of her death on October 19, 2007 and the events of the transfer between the Regional Psychiatric Centre in Saskatchewan and the Pinel Institution that took place in April of 2007. (Item #6).

8. In my ruling of November 12, 2010, I accepted the arguments before me relating to the expansion of the scope of the inquest to events that took place outside Ontario and in federal institutions. I was convinced that I would not be acting outside my legal authority, providing the events could be potentially

significant to the circumstances of the death or form the substance of recommendations made by a jury to prevent deaths in similar circumstances. [14]

Item #4

9. Section 40. (1) of the *Coroners Act* gives the grounds on which I may issue a summons.

> **Summonses**
> ***40.*** *(1) A coroner may require any person by summons,*
>
> > *(a) to give evidence on oath or affirmation at an inquest; and*
> > *(b) to produce in evidence at an inquest documents and things specified by the coroner, relevant to the subject-matter of the inquest and admissible. R.S.O. 1990, c. C.37, s. 40 (1).*

In order for me to issue a summons I must have formed the opinion that the materials are relevant to the subject matter of the inquest and admissible.
I have not formed that opinion for reasons similar to those given in paragraphs 5 and 7.

10. An inquest is a fluid process. What may seem to be of vital importance to the purpose of an inquest at the beginning of the evidence, may become less so as the testimony continues. In contrast, what may seem to have no relevance and be outside the scope at the beginning of the hearing may become of importance to the jury during the proceeding.

11. The materials that are currently in the possession of the parties provide

[14] Ruling on expanding scope paragraph 2 page 5

information from the utterances of Ms. Smith as to her reasons for her actions. I am not aware of any utterance that relates to the events that are the subject of these motions. If such materials can be pointed out to me or are revealed during the testimony of witnesses, we will revisit the substance of these motions.

Item #7

12. Coroner's counsel have advised in their response to the motion that the additional documents requested by counsel for CAEFS have been provided and their location identified.

13. The inquest is expected to last many months. More that eighty witnesses are likely to be called. There will be ample time to consider and reconsider what is necessary for the jury to fulfill their function and for the public to have confidence that the inquest has fulfilled the purpose as defined by the *Coroners Act*. Following the receipt of the reply submissions three moving parties requested that I delay the ruling. I have considered the request and the reasons for the request and believe that the reasons have been addressed above in my ruling.

14. An inquest is held in the public interest. There is no stratification of standing.[15] A presiding coroner cannot make investigative decisions, evidentiary or jurisdictional rulings based on any one party's belief of entitlement or issues of advocacy (however well-intentioned). These decisions must be based on what

[15] People First v Porter, Regional Coroner Niagara, [1991] O.J. No. 3389 (Div.Ct) reversed in part [1992} O. J. No. 3 (C.A.)

is necessary for the inquest jury to fulfill its legislated duty, for the verdict and recommendations of the jury to be credible, and, for the public to have confidence that the inquest process was fair and fulfilled its legislated purpose, and not that of another legal proceeding. Counsel for the family acknowledged this in reply submissions for the scope hearing on November 2, 2010.

> *Coroner:* "Is it your position or the position of the family, Mr. Falconer, that an inquest can adequately look at all of the issues of which they believe require investigation and examination?
>
> *Mr. Falconer:* *"No, with great respect, and its meant no disrespect to you, Dr. Porter. ...The coronial system is not capable of doing what needs to be done here, with great respect.....This needs both the criminal investigation and the criminal proceedings to do their job. Once that's over, this needs a royal commission of inquiry that looks at how our correctional services continues to fail the people of Canada..."* [16]

Decision:

The motions are dismissed. Should new evidence arise as the inquest proceeds and a potentially relevant nexus is identified, I will reconsider in a manner to be determined.

March 25, 2011

Dr. Bonita Porter
Presiding Coroner

[16] Transcript of reply submissions of Mr. Falconer, Nov 2, 2010 page 19 line 3-19

Authorities and References

A. Ruling to expand scope of the inquest November 12, 2010.
B. Memo from Mr. Siebenmorgen to parties of interest with standing dated February 11, 2011.
C. Submissions of the Canadian Association of Elizabeth Fry Societies Tab 1 Page 1.
D. Submissions of PACY.
E. Submissions of the family of Ms. Smith.
F. Sears Canada Inc. v. Davis Inquest (Coroner of) [1997] O.J. No 1424 (Div. Crt).
G. Nishnawbe-Aski Nation v. Eden; Pierre v McRae [2009] O.J. No 3202 (Div. Crt.).
H. Nishnawbe-Aski Nation v. Eden [2011] O.J. No 988, 2011 ONCA 187 (C. A.).
I. Ruling on the sealing of materials from the inquest brief and procedural directions for the oral hearing October 28, 2010.
J. People First v Porter, Regional Coroner Niagara [1991] O.J. No 3389 (Div. Crt) reversed in part [1992] O.J. No 3 (C.A.).
K. Transcript of reply submissions of Mr. Falconer November 2, 2010.