CITATION: Smith v. Porter (Judicial Review) 2011 ONSC 2844
DIVISIONAL COURT FILE NO.: 162/11
DATE: 20110519

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

ASTON, LOW & LEDERER JJ.

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

AND IN THE MATTER OF an application pursuant to section 2 of the *Judicial Review Procedure Act*, R.S.O. 1990 c. J1

AND IN THE MATTER OF an application for relief in the nature of *certiorari* and *mandamus* in respect of the ruling of Dr. Bonita Porter, Coroner, dated March 28, 2011

BETWEEN:

CORALEE SMITH, PROVINCIAL ADVOCATE FOR CHILDREN AND YOUTH and THE CANADIAN ASSOCIATION OF ELIZABETH FRY SOCIETIES Applicants	*Julian Falconer* and *Julian Roy*, for the Applicant, Coralee Smith *Richard Macklin*, for the Applicant, Office of the Provincial Advocate for Children and Youth *Breese Davies* for the Canadian Association of Elizabeth Fry Societies
– and –	
BONITA PORTER, Coroner at the Inquest into the Death of Ashley Smith (the "Coroner") Respondent	*Michael T. Doi* and *Michelle Kushniri*, for the Respondent, Dr. Bonita Porter *Victoria Yankou* and *Joël Robichaud*, for The Correctional Service of Canada *John McNair*, for St. Joseph's Health Care *Nancy McAuley*, for Drs. Ligate and Rogers

HEARD: May 3, 2011

ASTON AND LOW JJ.

[1] This application for judicial review seeks an order setting aside a pre-hearing decision by the coroner refusing to issue a summons or compel the production of certain videos which depict Correctional Services staff interactions with Ashley Smith in the months that preceded her death.

Background

[2] Ashley Smith strangled herself while she was in the custody of the Correctional Service of Canada ("CSC"). Although she died by her own hand, the applicants believe her death was accidental and not a suicide. They posit that her action was an attempt to attract interaction with the facility staff and that Ashley Smith believed the staff would remove the ligature from around her neck before she died. The expanded scope of the inquest will allow the jury to hear evidence about Ashley's state of mind. The applicants contend that the videos may provide important evidence for the jury in that regard.

[3] A motion was brought before the Coroner seeking access to specific videos depicting the use of duct tape to restrain Ashley during an institutional transfer April 12, 2007, and the involuntary injection of medication at the Joliette institution on four occasions in July 2007. The motion was determined on written submissions.

[4] In denying the applicants' request, the Coroner wrote:

> I have knowledge of the material that is to be 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.
>
> 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.
>
> 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...that took place in April 2007. (Item #6)

[5] The Coroner refused to seize the videos or issue a summons to permit the applicants to adduce the evidence, concluding, at paragraph 9 of her reasons, that "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."

Standard of Review

[6] There is no significant difference in the way counsel describe the standard of review—only in their conclusions on whether there is an error warranting interference. Generally the court will only intervene and set aside an interlocutory order such as the coroner's decision in this case if there is a breach of procedural fairness amounting to a denial of natural justice or a clear jurisdictional error. The applicants submit they will be denied a fair right to be heard if they are unable to obtain evidence that, on reasonable grounds, is material to the issues they wish to present to the jury.

[7] In *Sears Canada Inc.* v *Davis Inquest (Coroner of)*, (1997), 102 O.A.C. 60 (Div. Ct.) Adams J. noted, at para. 11: "this court has repeatedly said that it will not intervene during the course of proceedings of an inferior tribunal except in exceptional circumstances .... The exception to this procedural deference is where an application for judicial review raises serious concerns, which, if they materialized, would likely result in a fundamental failing of justice". Thus, an application for judicial review of an interlocutory ruling may be obtained where the adverse consequences of continuing a flawed proceeding to completion outweigh the advantages associated with waiting for a final decision by the tribunal.

Prematurity

[8] Counsel for the respondents submit it is premature to judicially review the Coroner's ruling. They point out that the Coroner did not foreclose re-visiting the issue later in the course of the inquest. They point to her statement, at para. 10 of the ruling, that:

> 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.

[9] This is a compelling argument if the coroner has applied the correct legal test in the refusing to issue a summons. If, however, the coroner has applied an incorrect legal test the result of which is to restrict unreasonably the right of a party to adduce arguably relevant evidence, there is a serious risk that the inquest may have to be repeated (see. *Beckon (Re)*, [1992] O.J. No. 1463 (C.A.) While this court is generally loath to interfere in an ongoing process, it will do so to avoid this outcome. This is precisely the consideration mandated by the *Sears Canada* case.

The Issue

[10] The narrow issue at this juncture is whether the Coroner applied the correct test in refusing the applicants access to the videos through the summons process and, if not, whether the application of an incorrect test amounts to jurisdictional error, a breach of natural justice or "raises serious concerns, which if they materialize, would likely result in a fundamental failure of justice" (see *Sears* ibid).

Analysis

[11] The Coroner gave three reasons for her ruling: (a) she found nothing in the inquest brief that suggested a nexus between the events shown in the videos and the pattern of ligature use which eventually led to Ashley's death; (b) she was not aware of any information that suggested a nexus between the events shown in the transfer videos and Ashley's state of mind that led to the use of ligatures and her death, and (c) she found that denying access to the videos would not "eliminate" the opportunity to present evidence of an alternative theory than suicide.

[12] She did not analyze whether the videos would be admissible if found relevant as questions of privilege and other factors impacting on admissibility were not the focus of the motion before her.

[13] In our view, the coroner set the bar too high when the issue was whether the applicants should be accorded the ability to adduce to evidence through the summons process.

[14] Two parts of the *Coroners Act*, R.S.O. 1990, c. C.37 are engaged:

Section 16 (2)(c) of the *Coroners Act* provides:

> (2) A coroner who believes on reasonable and probable grounds that to do so is necessary for the purposes of the investigation may,
>
> ....
>
> (c) seize anything that the coroner has *reasonable grounds to believe is material to the purposes of the investigation.*
>
> [Emphasis added.]

[15] Section 41(2) of the Act provides:

> (2) A person designated as a person with standing at an inquest may
>
> ....
>
> (b) call and examine witnesses and present arguments and submissions;

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

[16] In our view, the ambit of materiality governing the coroner's power to seize under s. 16(2)(c) is equally applicable to the right of a person with standing to adduce evidence, subject always to the question of admissibility which the parties are at liberty to dispute at the inquest hearing.

[17] The purposes of the inquest include a determination by the jury of the means by which the deceased came to her death. (See s. 31(1)(e) of the *Coroners Act*.)

[18] In an earlier ruling dated November 12, 2010 expanding the scope of the inquest, the Coroner stated, at para. 10, that the scope of the inquest was "to include an examination of the factors that may have impacted the state of mind of Ashley Smith on October 19, 2007, the date of her death". It is difficult to understand why the coroner would conclude that the videos are irrelevant to the subject matter of the inquest given the scope of the inquest as she herself has defined it.

[19] Requiring that there be a demonstrated "nexus", or causal connection, goes beyond establishing a reasonable belief that the potential evidence may be "material". Requiring the applicants to show that the unavailability of the videos would "eliminate" and not merely impair the ability of the applicants to present their own perspective to the jury also sets too stringent a standard. Finally, requiring that there be something in the inquest brief that suggests a nexus between the events shown in the videos and the pattern of ligature use presupposes that the material in the brief is the totality of facts from which insights may legitimately be drawn and fails to admit of the possibility of alternative theories, supportable by other evidence.

[20] The Coroner has applied the wrong test. She has required a standard that is too stringent. Instead of allowing for the investigation to continue, through the inquest, she has unreasonably restricted the examination of potentially relevant evidence in finding that there is no demonstrated nexus between the death of Ashley Smith and the incidents shown on videos.

[21] If the events depicted in the videos could reasonably have had an impact on Ashley's state of mind or, alternatively, if the events depicted are revelatory of her state of mind, and it is difficult to see that they would not be, then materiality and relevance are shown.

[22] At the investigative and discovery level, parties are entitled to have access to material that may be admissible as evidence. This is not a lawsuit in which parties have the right to summons witnesses on their own. In a coroner's inquest the parties must obtain a summons from the coroner as the gatekeeper of the process. Though there is good reason to give such a responsibility to the coroner, particularly in a high profile case such as this one, the exclusion of access to potential evidence may be difficult to justify. There must be a better reason than has been given to date.

[23] We are of the view that in refusing to issue a summons to permit the applicants to have production of the videos, the coroner applied an incorrect test and arrived at an incorrect

conclusion. This inquest is expected to involve considerable time and expense. The applicants, as parties with standing, have a statutory right to adduce evidence and to be heard. The denial of access to material evidence will have the effect of depriving these parties of a fair opportunity to be fully heard, may ultimately constitute a denial of natural justice and runs the risk of having to repeat the inquest process.

Conclusion

[24] We would quash the decision of the Coroner and remit the issue back to her for a re-consideration in light of these reasons.

Aston J.

Aston J.

Low J.

Low J.

LEDERER J. (Concurring in the result):

[25] I have reviewed the reasons of the other members of the panel. I agree with the analysis. The Coroner applied the wrong test. I agree with the conclusion. The issue should be remitted to the Coroner, to be reconsidered by her, in light of the reasons delivered by this court.

[26] My concern is narrow, but I believe fundamental.

[27] If left standing the decision of the Coroner will, as the reasons of my colleagues say, deprive parties to this inquest of an opportunity to be "fully heard". To me, this is not something that "*may* ultimately constitute a denial of natural justice" [Emphasis added]; it is a denial of natural justice. The right to be heard, expressed as *audi alterem partem* (hear the other side), is a fundamental rule of natural justice. In this case, it has been breached and, to my mind, it is important that this error be recognized for what it is.

[28] The case of *Gentles v. Gentles Inquest (Coroner of)*, [1998] 165 D.L.R. (4th) 652 is demonstrative of my concern and this approach. Robert Gentles was an inmate at a federal penitentiary. He died either during or immediately following his forcible restraint and removal from a cell by five correctional officers. An inquest commenced. Evidence was to be produced that Robert Gentles died from smothering by a pillow. It was suggested that this confirmed the presence of a subculture among correctional officers that condoned improprieties among the staff and inmates. A motion was brought for production by CSC of any and all correspondence, memoranda, any policies and other documents that arose from the report that had initially identified the presence of the subculture. Having said that he would conduct a *voir dire* into the relevance of the report, at the last moment and without hearing from counsel, the Coroner determined that the report was not relevant and that the documents would not be produced. A judicial review was heard. The Court expressed the view that the material being sought was relevant and that its rejection produced a breach of natural justice. There was an excess of jurisdiction that required the quashing of the orders of the Coroner. The Court ordered the Coroner to conduct the *voir dire* he had failed to conduct at the outset, bearing in mind the Court's expressed concern that the refusal to order that the evidence be produced was a denial of natural justice.

[29] It is on the basis that there has been a denial of natural justice that I would grant the application for judicial review and join the other members of the panel in returning the issue of whether the videos should be produced to the Coroner to be reconsidered by her, bearing in mind these reasons.

Lederer J.

Released: May 19, 2011

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CORALEE SMITH, PROVINCIAL ADVOCATE FOR CHILDREN AND YOUTH and THE CANADIAN ASSOCIATION OF ELIZABETH FRY SOCIETIES

Applicants

– and –

BONITA PORTER, Coroner at the Inquest into the Death of Ashley Smith (the "Coroner")

Respondent

JUDGMENT

Aston, Low and Lederer JJ.

Released: May 19, 2011

CORALEE SMITH ET AL. -and- Dr. BONITA PORTER

Applicants Respondent

Court File No: 162-11

SERVICE OF A COPY
ADMITTED THIS 18TH DAY OF April 2011
Crown Law Office (Civil)
MINISTRY OF THE ATTORNEY GENERAL
FOR ONTARIO
Per: Time: 1:07pm
8th Floor, 720 Bay Street
Toronto, Ontario M5G 2K1

DIVISIONAL COURT

BEFORE: Aston J, Lederer J, Low J

DATE: May 02, 2011

DISPOSITION: THIS APPEAL/APPLICATION IS

May 19/11
Application allowed in part.
The decision of the Coroner dated March 25, 2011 is quashed and the matter remitted to the Coroner for reconsideration in accordance with the reasons released today. If counsel are unable to agree on costs, submissions may be made in writing by Applicants (no more than 5 pages) by May 27 and by Respondent by June 6/11
Aston J/Low J.

ONTARIO
SUPERIOR COURT OF JUSTICE
(DIVISIONAL COURT)
Proceedings Commenced in Toronto

APPLICANTS' APPLICATION RECORD
VOLUME 1

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