Court File No: 162/11

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

AND IN THE MATTER OF an application pursuant to sections 2 and 6 of the *Judicial Review Procedure Act,* R.S.O. 1990 c.J.1

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, Regional Coroner, dated September 1, 2010

ONTARIO SUPERIOR COURT OF JUSTICE
(DIVISIONAL COURT)

B E T W E E N:

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

Applicants/Responding Party

and

DR. BONITA PORTER (Coroner at the Inquest into the Death of Ashley Smith)

Respondent

FACTUM OF THE APPLICANTS/RESPONDING PARTY

(MOTION TO QUASH)

April 15, 2011

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FACTUM OF THE APPLICANTS

(MOTION TO QUASH)

PART I: OVERVIEW

1. This factum is filed on behalf of the applicants to the herein judicial review (file no. 162/11) ("applicants"). It responds to a motion brought by the Attorney General of Canada to quash a summons to examine the Commissioner of the Correctional Service of Canada (CSC) and

require him to bring to the examination crucial evidence relevant to the underlying application for judicial review.

2. The evidence at issue is videotape recordings of extraordinary abuse of Ashley Smith committed by CSC staff and health care personnel. The underlying application for judicial review (for which the summoned evidence is relevant) seeks to quash a decision by the presiding Coroner, dated March 25, 2011 ("the Ruling") wherein she ruled as irrelevant the videotapes depicting uses of force are part of CSC procedures in how they transferred Ashley (keeping her quiet) 17 times over 11.5 months. CSC routinely videos these uses of force during transfers. There are videos of unlawful forced injections of anti-psychotic medication (not medically called for), threats by the nurse using the syringe and prolonged inhumane restraints to a gurney (12 hours). They would duct tape Ashley during transfers.

3. The applicants (responding parties on the motion to quash) have always accepted that the videotape evidence that flows from the summons would not be produced to them at first instance. Indeed, the applicants propose that a two-stage *O'Connor* style process be engaged so that the Court has access to these crucial videotapes at the hearing of the application for judicial review.

4. However, as the issue in the judicial review is the relevance of the videotapes to the Inquest proceedings, the applicants assert that a reviewing court should have access to this material to assess both its relevance and the impact that the denial of this evidence had on the fairness of the proceedings.

5. Since the applicants are required to establish a jurisdictional error in the main proceedings, they are entitled to file evidence that goes to the heart of the issue on the application and,

indeed, the jurisprudence is consistent with an applicant's right to file such materials on judicial review, even if those materials were not before the adjudicator being reviewed. In any event, the evidence is sufficiently relevant to meet the relatively modest threshold necessary to defend a motion to quash.

PART II: FACTS

6. As a motion to quash is based on the pleadings, the following facts are taken, largely, from the application for judicial review.

Overview of Issues before the Inquest

7. An Inquest serves, at a minimum, two functions. First, to obtain a verdict from an Inquest jury as to who the deceased was; how the deceased came to his or her death; when the deceased came to his or her death; where the deceased came to his or her death; and by what means the deceased came to his or her death (see s. 31(1) of the *Coroners Act*, R.S.O. 1990 c. C.43 (the "*Act*")). The fifth question ("by what means"), as a matter of long-standing practice, is answered with a phrase of either accident, natural causes, homicide, suicide or undetermined. Second, the jury may (and invariably does), based on evidence heard at the Inquest, make recommendations aimed at the avoidance of death in similar circumstances (see s. 31(3) of the *Act*).

8. At the centre of the Smith Inquest is the question of verdict, in particular "by what means" Ashley came to her death. She died from placing a ligature around her neck and asphyxiating.

9. Parties to an Inquest have a right to access and present evidence relevant to verdict. Whether the Inquest jury is contemplating a verdict of suicide or accident, the extraordinary abuse suffered by Ashley (in the case of the Joliette video evidence - less than 90 days before her death) would invariably contribute to the deterioration of her mental health and thus her state of mind at the time of her death.

10. It is anticipated that several institutional parties at the Inquest will advocate for a verdict that Ashley died as a result of suicide. The applicants, including the family of the deceased, anticipate advocating for a verdict of death by accident and as a matter of natural justice, are entitled to fully explore such an alternative "by what means" verdict in light of the significant stigma that attaches to a suicide verdict.

11. Furthermore, parties to an Inquest have a right to access and to present evidence to form a factual foundation for proposed recommendations for the jury's consideration.

12. By her Ruling, it is submitted, the Coroner lost jurisdiction by prejudicing the parties' ability to lay a factual foundation for an accident verdict and removing their ability to lay a factual foundation for recommendations aimed at preventing death in similar circumstances.

13. An essential argument on the application for judicial review will be that the failure of the Coroner to review, let alone produce video evidence of this extraordinary abuse, going to the issue of her state of mind at the time of her death, constituted jurisdictional error.

Accident Evidence

14. At the heart of the suicide verdict evidence is Ashley's ligature use while she was detained in secure isolation. The evidence in support of an accident verdict centers on the

deterioration of Ashley's mental health - brought on by excessive and abusive transfers between correctional facilities. These transfers, in turn, caused her mental health to deteriorate such that she engaged in self-harming behaviours (for example, ligature tying). As demonstrated in evidence that was before the Coroner, these self-harming behaviours were not carried out by Ashley with a design to kill herself. Rather they were designed, in part, to attract attention from staff as she was otherwise housed exclusively and unendingly in secure isolation. Understood in this light, the ligature use is not suicidal but led to a death that was accidental. As stated by the psychologist retained by the Correctional Service of Canada in respect of the death of Ms. Smith, Dr. Margo Rivera:

> In attempting to halt the escalating cycle of maladaptive reaching out through tying ligatures around her neck so that staff would have to enter her cell, [prison] staff were instructed to respond with less frequency to Ms. Smith's dysfunctional cries for connection... **I consider it highly likely that this was not death by suicide, but rather by accident, and that no one intended Ashley Smith to die, least of all Ms. Smith herself [emphasis in original]**[1];

15. There was ample evidence before the Coroner in support of the assertion made by the applicants that the excessive and abusive transfers of Ashley contributed to her deteriorating mental health which, in turn (it will be submitted) caused her accidental death:

> Dr. Margo Rivera: "...during her initial placement at Nova Institution, Ms. Smith was open to developing a therapeutic relationship and to participating in DBT programming... When she was transferred within six weeks to another institution, her motivation for engaging in formal treatment had been undermined...[b]y her third move, she no longer seemed very responsive to treatment personnel or interventions."[2]

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[1] Dr. Margo Rivera, "It's Your Job to Save Me" at pg. 15.
[2] Dr. Margo Rivera, "It's Your Job to Save Me" at pg. 20.

> Mr. Howard Sapers (Correctional Investigator): "Each transfer further eroded any possibility of establishing a therapeutic relationship with Ms. Smith and negatively impacted on her willingness to co-operative with treatment staff."[3]
>
> Dr. Paul Beaudry (Psychologist retained by the Correctional Investigator to provide an opinion regarding Ms. Smith's treatment at Joliette Institution): "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 a [therapeutic alliance based on trust and cooperation]".[4]

16. In any event, whichever verdict a jury is inclined to consider, evidence of extraordinary abuse going to the deceased's state of mind on her death, was clearly relevant and ought not to have been excluded.

17. The Coroner ruled that the transfer-related evidence of illegal forced medication and restraint at Joliette Institution is not relevant and neither is any video evidence depicting transfers of Ms. Smith between institutions. Indeed, the Coroner, her counsel and her investigators have not viewed the Joliette videos or other videos at issue.

18. The Joliette evidence that, as things presently stand, will not be seen by the Inquest jury is particularly disconcerting and thus vitally important to the parties seeking to assert a death by accident verdict. As described by CAEFS Director Kim Pate, video evidence of the Joliette incidents and another inter-regional transfer, reveal:

> 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

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[3] Mr. Howard Sapers, "A Preventable Death" at pg. 6-7.
[4] Dr. Paul Beaudry, "Ms. Ashley Smith: Psychiatric Opinion Based on Record Review" at p. 38.

> 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. ...
>
> 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.

19. Based on the above, it will be submitted that the production and evidentiary ruling made on March 28, 2011 was unreasonable and resulted in the Coroner losing jurisdiction.

20. In addition, the Ruling was unreasonable in light of the Coroner's November 12, 2010 ruling that expanded the scope of the Inquest. The scope of the Inquest had initially been limited to events that occurred in Ontario between May 12, 2007 and October 19, 2007. The parties were forced to move before the Coroner to expand the scope of the Inquest and filed notices of motion in June 2010. Dr. Porter did finally rule to expand the scope of the Inquest on November 12, 2010. Dr. Porter wrote as follows in her ruling:

> **Therefore the scope of this inquest will include an examination of factors that <u>may have</u> impacted Ms. Smith's state of mind on October 19, 2007**. The information that is presented to the jury will not necessarily be restricted by her age, geography, date or nature of the institution that was tasked with her care. [emphasis added]

21. The steps subsequently taken by the Coroner and other dispositions made (including the March 28, 2011 ruling) have not been consistent with her finding that the scope should be expanded. Specifically:

    i) The Coroner has not altered the witness list which is the same as it would be had the scope of the Inquest not been expanded;

    ii) The Coroner has not, to the parties' knowledge, interviewed one witness that she would not have interviewed had the scope of the Inquest not been expanded;

    iii) The Coroner's refusal to even obtain copies of the Joliette and other transfer-related videotapes raises the apprehension that the Parties' success on the motion to expand the scope of the Inquest was a hollow one. It appears that the Coroner has no intention of calling evidence that is materially different from what would have been called under the narrow scope of the Inquest that pre-dated the Ruling of November 12, 2010;

    iv) The motion to expand the scope of the Inquest focused on dubious transfer decisions made by CSC (outside of Ontario) and the Joliette incidents. The motion was granted, yet no decision maker regarding a non-Ontario transfer is being called. No witness from Joliette is being called and the Joliette videos have not been obtained; and

    v) The "will say" of Coroner's Constable Patrick Colagiovanni reflects a one-sided summary of evidence that fails to address key facets of the "accident" arguments stemming from the excessive and abusive transfers and indeed, many of those facets of evidence have now been ruled irrelevant by the impugned Ruling.

22. It must be kept in mind that an Inquest is not like a criminal or civil trial. Parties are not free to marshal their case by obtaining summonses issued by the Ontario Court and having witnesses bring documents (or videos) under those summonses. Only the coroner can issue a summons for an Inquest. If the coroner does not act, parties are at an enormous disadvantage.

Commissioner Head's knowledge of the events

23. In the Correctional Service of Canada's argument, it is noted that Don Head was only appointed Commissioner of CSC on June 27, 2008, eight months after Ashley's death and is "in no position to offer relevant evidence."[5] It is conceded, as is pointed out by CSC, that Commissioner Head is not the author of the videos in question.

24. While it is true that Mr. Head was only appointed Commissioner of CSC in June 2008, Mr. Head held the position of Senior Deputy Commissioner of CSC from 2002 until June 2008, and was also responsible for the Incident Investigation Branch.[6]

25. It is the applicants' submission that Commissioner Head has relevant evidence to offer on the general topic of use of force on transfers, but more importantly, is intimately aware of the controversy surrounding the events depicted in the Joliette videos.

26. On April 19, 2010, Commissioner Head received a letter from Howard Sapers, the Correctional Investigator. Mr. Sapers notified Commissioner Head that upon receiving the CSC's Section 20. *Board of Investigation Regarding Allegations of Inappropriate Injections Administered at Joliette Institution between June 27 and July 26, 2007*, he noted several inconsistencies between the Board of Investigation's findings and his office's review of the video evidence. Faced with what he called, "an irreconcilable interpretation of the events under scrutiny",[7] Mr. Sapers commissioned an independent expert, Dr. Paul Beaudry to provide his opinion. Attaching the Beaudry Report to his letter to Commissioner Head, Mr.

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[5] CSC factum, para.12 and 19
[6] http://www.csc-scc.gc.ca/text/organi/org03-16-eng.shtml
[7] Dr. Paul Beaudry, "Ms. Ashley Smith: Psychiatric Opinion Based on Record Review"

Sapers finally noted his availability to discuss the Beaudry Report and the next steps in addressing, "these critical issues."[8]

27. On August 24, 2010, Commissioner Head received a second letter from Mr. Sapers. He noted that the CSC's response to the Beaudry report was to convene a National Board of Investigation to be chaired by a Mr. Mario Dion. He noted further his concerns regarding the lack of acceptance of his Office's recommendations pursuant to the Beaudry Report, and the perceived need of the CSC to conduct yet another review of these matters prior to responding to Dr. Beaudry's findings.[9]

PART III: ISSUES AND THE LAW

28. The issues on the motion herein are as follows:

Issue 1: Is the evidence sought relevant to the judicial review application?

Issue 2: Is the examination an abuse of process?

General Principles applicable to Rule 39.03(1)

29. There is a prima facie right under Rule 39.03(1) to examine a witness on a pending motion or application.[10]

30. The onus on the party seeking to conduct an examination under this rule is not a high one.[11] The examining party is required only to "show on a reasonable evidentiary basis that the

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[8] Dr. Paul Beaudry, "Ms. Ashley Smith: Psychiatric Opinion Based on Record Review"
[9] Dr. Paul Beaudry, "Ms. Ashley Smith: Psychiatric Opinion Based on Record Review"
[10] *CanWest Media Works Inc. v. Canada (Attorney General)*, 2007 ONCA 567; *Payne v. Ontario Human Rights Commission* (2000), 136 O.A.C. 357, 2000 CarswellOnt 2717 at para. 70 (C.A.)

examination would be conducted on an issue relevant to the application and that the proposed witness is in a position to offer relevant evidence"[12].

31. An opposing party may move to quash a summons to examine a witness on the grounds that the evidence sought is not relevant to the application or that the examination or the underlying proceeding would amount to an abuse of process. The onus is on the party attacking the summons to show that exercising this right would be an abuse of process.[13] If the party seeking the examination cannot satisfy the relevancy and evidentiary screening, then the summons is regarded as a fishing expedition and an abuse of process.[14]

32. In considering whether to strike a summons to a witness, the court will consider the nature and grounds for the motion, application, or action to determine what the issues are for which the examination is in aid.[15]

33. Once the party seeking to conduct the examination shows that the proposed examination is about an issue relevant to the pending motion or proceeding and that the party to be examined is in a position to offer possibly relevant evidence, it not necessary for the party to go further and show that the proposed examination will yield evidence helpful to that party's cause.[16]

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[11] *Bearden v. Lee* (2005), 13 C.P.C. (6th) 364 (S.C.J.)
[12] *Airport Taxicab (Pearson Airport) Assn. v. Toronto (City)*, [2009] O.J. No. 2144 at para. 26; *Ontario Federation of Angler & Hunters v. Ontario (Ministry of Natural Resources)* (2001), 211 D.L.R. (4th) 741 (C.A.), leave to appeal to the S.C.C. refused [2002] S.C.C.A. No. 252 (S.C.C.)
[13] *Manulife Securities International Ltd. v. Societé Générale*, (2008), 90 O.R. (3d) 376 (S.C.J.) at para 19
[14] *Airport Taxicab (Pearson Airport) Assn., supra* at paras. 27-28
[15] *Airport Taxicab (Pearson Airport) Assn., supra* at para.29; *Juvenile Products Inc. v. Bern* (1994), 76 O.A.C. 54, 1994 CarswellOnt 1065 at para.30 (Div. Ct.).
[16] *Airport Taxicab (Pearson Airport) Assn., supra* at para.30

A party seeking judicial review may summons evidence that was not before the tribunal below where a breach of natural justice is alleged

34. Contrary to what is submitted by CSC at paragraph 20 of its factum, a reviewing court is not restricted to evidence that was before the tribunal below. Where, as in this case, the judicial review is based on an allegation that a party was deprived of natural justice, the reviewing court "has the right to have before it evidence that may be relevant to the natural justice issue, even if it was not contained in the Board's record".[17]

35. Similarly, where the alleged jurisdictional error is based on the failure to consider evidence available to the tribunal, the reviewing court may receive such evidence even where it was not considered by the tribunal.[18]

Application to the Case at Bar

36. The applicants submit that there is at minimum a "reasonable evidentiary basis" that the examination of Commissioner Head will be "conducted on an issue relevant to the application" and that Commissioner Head "is in a position to offer relevant evidence". The applicants further submit that the examination of Commissioner Head does not constitute an abuse of process as alleged by the respondent.

Issue 1: The evidence sought is relevant to the application

37. The applicants respectfully submit that the evidence sought from Commissioner Head is relevant to the judicial review application.

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[17] *Hamilton (City) v. United Brotherhood of Carpenters and Joiners of America, Local 18*, [2007] O.J. 270 (Div. Ct.) at para. 15

[18] *Hanna v. Ontario (Attorney General)*, [2010] O.J. No. 3081 at paras.12-13

38. In part, this judicial review application alleges that the applicants were denied natural justice by virtue of the Coroners' ruling that certain videos depicting abuse of Ashley by CSC health care professionals and prison guards were not relevant to the inquest. The applicants allege that the process the Coroner engaged in the course of ruling the videos irrelevant was flawed because she failed to review the evidence before so ruling.

39. It is not in dispute that the potential verdicts before the jury are suicide, accident or undetermined. The central question with respect to verdict is what Ashley intended at the time she applied the ligature to her neck on the date of her death. The applicants anticipate that they will advocate for a verdict of accident based on the conclusions of a series of reports that conclude that Ashley did not likely commit suicide, but rather that her self harming behaviour was a response to her isolation and mistreatment by CSC health care professionals and guards.

40. The Ontario Court of Appeal has recognized the profound consequences for both the family of the deceased and the deceased's dignity arising from a suicide verdict. The Smith Family's entitlement in natural justice to contest a suicide verdict is enhanced.

41. The governing jurisprudence provides that not every determination by a tribunal as to the relevance of evidence will constitute a jurisdictional error, and therefore warrant judicial review. As stated by Lamer C.J.C. in *Université du Québec à Trois-Rivières v. Larocque*:

> For my part, I am not prepared to say that the rejection of relevant evidence is automatically a breach of natural justice. A grievance arbitrator is in a privileged position to assess the relevance of evidence presented to him and I do not think it is desirable for the courts, in the guise of protecting the right of parties to be heard, to substitute their own assessment of the evidence for that of the grievance arbitrator. It may happen, however, that the rejection of relevant evidence has such an impact on the fairness of the

proceeding, leading unavoidably to the conclusion that there has been a breach of natural justice.[19]

42. As such, the applicants are required to demonstrate in the judicial review application that not only did the Coroner err in ruling the videos irrelevant, but that the denial of access to the videos had a sufficiently serious impact on the fairness of the proceeding that there has been a breach of natural justice.

43. The applicants submit that the videos sought before the Coroner should be before the panel hearing the judicial review application so that the court is in a position to assess the impact of the Coroner's ruling on the fairness of the proceeding. It is essential that the videos be before the panel in order that the applicants have a fair opportunity to meet the significant threshold required of them on the judicial review.

44. It is submitted that the Coroner's failure to review the videos for herself should not place the applicants at a disadvantage in seeking the intervention of this Honourable Court to redress what they allege to be a serious breach of procedural fairness. The applicants took all available steps in the proceeding below to convince the Coroner to review this material. The videos were readily available to the Coroner by way of warrant or summons, prior to her ruling that the evidence was irrelevant.

45. The admission of the videos on this judicial review application is necessary in order for the panel to assess the full dimension of the denial of natural justice alleged by the applicants, and determine whether the denial meets the threshold required under *Université du Québec à Trois-Rivières*. The full impact on the fairness of the proceedings occasioned by the

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[19] *Université du Québec à Trois-Rivières v. Larocque*, [1993] 1 S.C.R. 471 at para. 46.

Coroner's decision not to review the videos can only be appreciated by the panel reviewing what the applicants allege ought to be reviewed before the determination as to relevance was made.

Issue 2: The examination is not an abuse of process

46. The respondent has failed to meet the high onus imposed by the governing jurisprudence to demonstrate that the summons constitutes and abuse of process.

47. Contrary to CSC's submission at paragraphs 26 through 28 of its factum, the summons does not represent an effort by the Applicants to "usurp the role of the reviewing court". It is has never been the applicants' position that the videos be simply produced to them in response to the summons without process supervised by this Honourable Court.

48. The applicants are seeking a two stage process with respect to the videos akin to an *O'Connor* application. At the first stage, the applicants should be required to show that the videos are possibly relevant to the judicial review. If this threshold is met, the videos should be produced to the court. At the second stage, the applicants submit that an *O'Connor* style process should unfold, whereby the court can determine whether the applicants' fair hearing rights access the videos for the purpose of making full argument on the judicial review are over-ridden by some other interest advanced by CSC or other parties. There would be an opportunity for the court to impose conditions and safeguards on access and use of the material.

49. Further, CSC's abuse of process argument is premised, with respect, on an incomplete reading of the Coroner's ruling and the scope of the judicial review. The Coroner did more

than rule that she would not obtain the videos by warrant, summons or production order. The Coroner made a determination that the videos were irrelevant to the subject matter of the inquest. She did so without reviewing the videos she determined deemed to be irrelevant.

50. The applicants seek on judicial review a determination that the videos are relevant to the subject matter of the inquest. The ruling sought, and the issue before the panel, goes well beyond the issue of whether the videos should be produced to the court and/or the applicants. As submitted above, the panel cannot be in a position to assess the degree to which the denial of the videos has impacted the rights of the parties without viewing the videos.

PART IV: ORDER REQUESTED

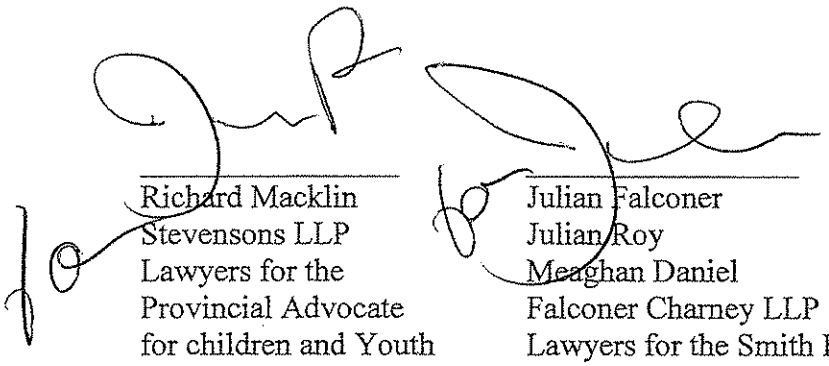
51. The Applicants' respectfully seek an Order:

    a. dismissing the Motion to set aside and quash the Applicants' Summons pending the Judicial Review;

    b. granting the Applicants' costs of this motion on a substantial indemnity basis, together with post-judgment interest thereon pursuant to s. 129 of the *Courts of Justice Act*; and

    c. for such further and other relief as counsel may request and that seems just to this Honourable Court.

ALL OF WHICH IS RESPECFULLY SUBMITTED THIS 15th DAY OF APRIL, 2011.



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SCHEDULE A – "Authorities"

1. *CanWest Media Works Inc. v. Canada (Attorney General)*, 2007 ONCA 567

2. *Payne v. Ontario Human Rights Commission* (2000), 136 O.A.C. 357, 2000 CarswellOnt 2717

3. *Bearden v. Lee* (2005), 13 C.P. C. (6th) 364 (S.C.J.)

3. *Airport Taxicab (Pearson Airport) Assn. v. Toronto (City)*, [2009] O.J. No. 2144

4. *Ontario Federation of Angler & Hunters v. Ontario (Ministry of Natural Resources)* (2001), 211 D.L.R. (4th) 741 (C.A.), leave to appeal to the S.C.C. refused [2002] S.C.C.A. No. 252 (S.C.C.)

5. *Manulife Securities International Ltd. v. Societé Générale* (2008), 90 O.R. (3d) 376 (S.C.J)

6. *Juvenile Products Inc. v. Bern* (1994), 76 O.A.C. 54, 1994 CarswellOnt 1065 (Div. Ct.).

7. *Hamilton (City) v. United Brotherhood of Carpenters and Joiners of America, Local 18*, [2007] O.J. 270 (Div. Ct.)

8. *Hanna v. Ontario (Attorney General)*, [2010] O.J. No. 3081

9. *Université du Québec à Trois-Rivières v. Larocque*, [1993] 1 S.C.R. 471

SCHEDULE B – "Statutes and Regulations"

Rule 39.03 (1), *Rules of Civil Procedure*

EVIDENCE BY EXAMINATION OF A WITNESS

Before the Hearing

39.03 (1) Subject to Rule 39.02(2) a person may be examined as a witness before the hearing of a pending motion or application for the purpose of having a transcript of his or her evidence available for use at the hearing.

(2) A witness examined under subrule (1) may be cross-examined by the examining party and any other party and may then be re-examined by the examining party on matters raised by other parties, and the re-examination may take the form of cross-examination.

To be Exercised with Reasonable Diligence

(3) The right to examine shall be exercised with reasonable diligence, and the court may refuse an adjournment of a motion or application for the purpose of an examination where the party seeking the adjournment has failed to act with reasonable diligence.

At the Hearing

(4) With leave of the presiding judge or officer, a person may be examined at the hearing of a motion or application in the same manner as at a trial.

Summons to Witness

(5) The attendance of a person to be examined under subrule (4) may be compelled in the same manner as provided in Rule 53 for a witness at a trial.

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

Applicants **Respondent**

Court File No: 162-11

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

FACTUM OF THE APPLICANTS/RESPONDING PARTY

(MOTION TO QUASH)

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