CITATION: Canada (Correctional Service) v. Carlisle, 2012 ONSC 6080
DIVISIONAL COURT FILE NO.: 501/12
DATE: 20121024

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

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

AND IN THE MATTER OF AN APPLICATION PURSUANT TO SECTION 4 OF THE *JUDICIAL REVIEW PROCEDURES ACT*, R.S.O. 1990 C. J-1 TO STAY THE INQUEST HEREIN

BETWEEN:

CORRECTIONAL SERVICE OF CANADA

Applicant

– and –

DR. JOHN R. CARLISLE, Coroner at the Inquest into the Death of Ashley Smith

Respondent

Joel Robichaud and *Natalie Henein*, for the Applicant, Correctional Service of Canada

Jocelyn Speyer and *Margaret Creal*, for the Coroner

Peter Jacobsen, for CTV

Allison Thornton, for Canadian Civil Liberties Association

Paul Schabas, for the CBC, Toronto Star, National Post

J.H. McNair, for Regional Mental Health Care, St. Thomas

Mary Birdsell, Karen Spector and *C. Tess Sheldon*, for Empowerment Council

Mark J. Freiman, for Drs. Rogers, Ligate and Swaminath

Howard Rubel, for Union of Canadian Correctional Officers

Breese Davies, for Canadian Association of Elizabeth Fry Societies

Julian Falconer, for Smith Family

Richard Macklin, for the Provincial Advocate for Children and Youth

HEARD: October 24, 2012

LAX J. (ORALLY):

[1] On an urgent basis, Correctional Service Canada (CSC) has commenced an application for judicial review in the context of the Ashley Smith Coroner's Inquest which commenced September 24, 2012. The presiding coroner is Dr. John Carlisle. A previous inquest, presided over by Dr. Bonita Porter, was terminated upon her retirement and Dr. Carlisle was appointed in her place. He directed that a new inquest be convened. The inquest is scheduled to begin hearing evidence on January 14, 2013. Two motions were scheduled for hearing before the Coroner on October 23 and 24. Those motions relate to the scope of the inquest and the issuance of summonses for out-of-province witnesses.

[2] CSC brought a motion dated October 12, 2012 requesting a sealing order in relation to confidential documents, including videos and other material that was appended to affidavits filed in support of the two motions. CSC took the position that this material was protected by undertakings executed by counsel for the parties with standing at the inquest. The CSC motion was argued before Dr. Carlisle and yesterday afternoon, he delivered his ruling dismissing the motion. He also denied a request for adjournment.

[3] The application for judicial review requests an order in the nature of *certiorari* quashing the order of Dr. Carlisle in its entirety. CSC seeks a stay of Dr. Carlisle's ruling pending the hearing of the application for judicial review.

[4] Counsel for CSC, the Coroner and the parties attended in my courtroom this morning to address the stay motion. Notwithstanding the lack of material, all parties wished me to hear the stay motion on an urgent basis and to decide it, if possible.

[5] It is agreed that the test in determining whether a stay is to be granted is the three-part test that is found in *RJR Macdonald Inc. v. Canada (Attorney General)*. The moving party must demonstrate:

1. The judicial review application raises a serious question;

2. Irreparable harm will result if a stay of proceedings is denied;

3. The balance of convenience favours the granting of a stay;

[6] On the argument before the Coroner and also before me, CSC took the position that the undertakings signed by counsel for the parties protect material in the inquest brief from being disclosed to the public and the media until this becomes evidence in the inquest proper rather than on preliminary motions. The Coroner rejected this position. He said:

> On the question of the interpretation to be given to the undertakings given by counsel, it appearers [sic] to me that a plain reading of the document shows that counsel are permitted to use these materials for the purposes of the inquest.
>
> I find that today's motions are part of the inquest and that, thus, counsel may make use of these materials on those motions as they see fit and as I may permit.

[7] The Coroner then went on to consider whether or not there was a basis to grant a sealing order. He said:

> The Correctional Service of Canada submitted that if these materials were to come into the public domain during the motions for today (or at any time prior to the presentation of them to the jury, perhaps even in a *voire dire* on relevance and admissibility) some harm might occur. These were described as undue influence on the jury pool and the potential for intimidation or harassment of witnesses. Those concerns were expressed as general dangers which could happen and were not supported by any affidavit or other evidentiary basis. Case law suggests that the simple assertion alone of speculative harm without any evidentiary basis is insufficient.

[8] He concluded:

> I find that the simple assertion that a harm could happen without more evidentiary basis is an insufficient basis for the issuance of a sealing order.
>
> In view of the CSC's failure to meet the first arm of the applicable test as set out in the *Dagenais* and *Mentuck* cases in the Supreme Court of Canada, it is unnecessary for me to consider the second arm of the test involving the balancing of the salutary and deleterious effects of the proposed order.

[9] The Coroner's appreciation of the case law is correct and amply supported by the cases referred to by Mr. Schabas in his submissions today and found in the brief that was before the Coroner yesterday and handed up to me in court today: *R. v. Mentuck*, 2001 S.C.C. 76; *Toronto Star Newspapers Ltd. v. Ontario*, 2005 S.C.C. 41. See also, *R. v. Canadian Broadcasting Corp.*, 2010 ONCA 726.

[10] While the first branch of the *RJR* test has a low threshold, the Coroner correctly concluded that that this was not an appropriate case in which to issue a sealing order given the lack of any affidavit or other evidentiary evidence supporting the existence of any palpable or serious error or fundamental danger to the inquest process or to any person.

[11] In the motion for adjournment that followed the dismissal of CSC's motion, the Coroner reviewed the same test that I must apply to the motion before me. I can do no better than adopt his reasons.

> On the basis of the submissions and materials before me, there does not appear to me to be significant merit in the arguments advanced in favour of the sealing application which is why I found that it did not meet even the first test in *Dagenais* and *Mentuck*.
>
> The second arm of the test requires that I consider whether there will be irreparable harm to Correction Service of Canada if I do not grant the motion for adjournment and consequently the hearing of these motions goes forward today.
>
> I must observe that all of the inquests where I have presided this is one where by far the greatest amount of information about the circumstances of the death is already public.

The report of the Correctional Investigator of Canada which describes in great detail the circumstances is already public. There has been a criminal case, the evidence about which is public. There has been extensive broadcast of videotapes of the very incidents leading up to the death itself, after the court directed the release of this material to the media. There have been a number of court hearings in the matter itself, the records of which are all public.

The information about the facts and circumstances of the death are widely known to the public.

What harm is to be suffered? It is said that the jury pool may be tainted or the witnesses intimidated. Both bear assertions of possibility without evidentiary support.

I conclude that there will be no substantial or irreparable harm suffered by Correctional Service of Canada if we continue these motions and if I am wrong on the motion regarding the sealing order.

The third arm of the test requires that I consider which of the parties would suffer great harm if I refuse the application for retirement or stay, that is that I determine the balance of convenience.

As I have said, I do not find that Correctional Service of Canada would suffer irreparable harm in that case. Indeed, I do not think that much harm will occur to that agency of government.

I incorporate by reference the list of materials in issue on the motions set out in the submissions of my counsel ... This shows that there are ten items already on the public domain and seven not yet public. The harm to be suffered by Correctional Service of Canada is that these items may become public, along with some videos. And that putatively may taint the jury pool or cause witnesses to be intimidated, these being mere assertions of possibility.

The harm to be suffered by the other parties, the public and the inquest is that this already long delayed proceeding in which there is great public interest for good reason will be yet again delayed for an indeterminant period.

The concerns raised regarding the safety of other inmates in the prison system revealed by the circumstances of the death of Ms. Smith are not trivial or merely of prurient interest. It is real and substantial and the need to get on with examining the circumstances of the death and obtaining well thought through recommendations to prevent such deaths in future is a very important public goal and far outweighs, in my view, any harm to be suffered by the Correctional Service of Canada if we proceed now. The recommendations have the real potential to save lives.

...

[12] I also agree with and adopt the opinion expressed by this Court in *Canada (Attorney General) v. Gentles Inquest (Coroner of)*:

> 22 There is no automatic stay of an inquest pending an application for judicial review. It is a serious matter to stay an inquest before hearing on its merits an application for judicial review. Inquests cannot be turned on and off like a tap at the will of ever disaffected party.
>
> 26 This motion appears to be based on the misconception that anyone who disagrees with a coroner's ruling can rush out of the inquest and into court and shut down the inquest automatically. A serious case must be demonstrated that there is a jurisdictional defect that will produce irreparable harm and that the balance of convenience favours the shutting down of the inquest. This court is not obliged to stay the inquest automatically simply because someone disagrees with a ruling or because the evidence may embarrass one of the parties.

[13] No serious case has been demonstrated and no irreparable harm will be suffered. CSC takes the position that if a stay is refused the judicial review application will be moot. To the extent there is an issue about the interaction between undertakings given by counsel in an inquest and the open court principle, this is a matter that could be reviewed by the Divisional Court at any time. The case for a stay is not made out.

[14] For these reasons, the motion for stay is dismissed with costs in the amount of $1,000 payable to the following parties who appeared today:

- CTV
- Canadian Civil Liberties Association
- CBC, Toronto Star and National Post
- St. Joseph's Regional Mental Health Centre/St. Thomas
- Empowerment Council
- Union of Canadian Correctional Officers
- Canadian Association of Elizabeth Fry Societies
- Smith Family

- Provincial Advocate for Children and Youth
- Drs. Rogers, Ligate and Swaminath, if demanded.

LAX J.

DATE OF REASONS FOR JUDGMENT: October 24, 2012

DATE OF RELEASE: October 26, 2012

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LAX J.

DATE OF REASONS FOR JUDGMENT: October 24, 2012

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