

CORONER'S INQUEST

INTO THE DEATH

ASHLEY SMITH

Held at the Coroner's Court, 15 Grosvenor Street,
Toronto, Ontario, on **Tuesday, October 23rd, 2012**,
commencing at 9:00 a.m.

Ruling on Sealing Order Motion

B E F O R E:

DR. JOHN R. CARLISLE - THE PRESIDING CORONER
("The Coroner")

A P P E A R A N C E S:

MARGARET CREAL) -- Counsel for the Coroner
JOCELYN SPEYER)

JULIAN FALCONER) -- Counsel for the Family of the
JULIAN K. ROY) late Ashley Smith
MEGAN DANIEL)

RICHARD MACKLIN -- Counsel for the Provincial
Advocate for Children and Youth

BREESE DAVIES -- Counsel for the Canadian
Association of Elizabeth Fry
Societies

MARY BIRDSELL -- Counsel for the Canadian
Foundation for Children Youth
and The Law - Empowerment Council

HOWARD RUBEL -- Counsel for the Union of
Canadian Correctional Officers

NANCY L. NOBLE) -- Counsel for the Department of
JOEL J. ROBICHAUD) Justice Canada, Correctional
SADIAN CAMPBELL) Service of Canada

ALLISON A. THORNTON -- Counsel for CCLA

MARK J. FREIMAN) -- Counsel for Drs. Loys Ligate,
NANCY M. McAULEY) Carolyn Rogers, Sam Swaminath

JOHN H. McNAIR -- Counsel for St. Joseph's
Regional Health Cente/St. Thomas

PAUL SCHABAS -- Counsel for CBC, The Star and
Post Media

PETER M. JACOBSEN -- Counsel for CTV

DETECTIVE MICHAEL McKENZIE - Investigating Officer (Peel)

CONSTABLE JAMES MURPHY -- Coroner's Constable

INDEX OF PROCEEDINGS

Ruling re Sealing Order Motion.....4

Submissions re Adjournment by Correctional Service of Canada

By Mr. Robichaud.....10
 By Ms. Speyer.....11
 By Mr. Falconer.....14
 By Mr. Rubel.....18
 By Mr. McNair.....19
 By Mr. Schabas.....20
 By Mr. Freiman.....21
 By Ms. Thornton.....24
 By Ms. Birdsell.....25

Decision on the Adjournment.....27

October 23, 2012

Ruling - 4

(Sealing Motion)

1 --- Resuming at 2:05 p.m.

2 --- Ruling on Sealing Order Motion

3 **THE CORONER:** Correctional Service of
4 Canada has made a motion for a direction that the
5 undertakings signed by counsel for the parties in the
6 inquest protect material in the inquest brief and videos
7 filed in support or in opposition to the motions (that is
8 the motions to be returnable today) from being disclosed
9 to the public and the media until they become evidence in
10 the inquest proper. In the alternative, that I exercise
11 my jurisdiction to make an order sealing the materials at
12 issue until they become evidence in the inquest proper.

13 I have read all the materials filed on the
14 motion, I have listened carefully to the submissions of
15 all counsel, I have taken the advice of my own counsel,
16 both in writing and in open court, and I have considered
17 the quotations from various courts read and submitted to
18 me.

19 My decision today is that there will be no
20 sealing order or like direction given in this matter on
21 these motions. I will give brief reasons here and more
22 extensive reasons, if required, will be delivered later.

October 23, 2012

Ruling - 5

(Sealing Motion)

1 Counsel for the Correctional Service of
2 Canada made reference to rulings made by Dr. Porter, the
3 coroner in the first inquest called in this death. It is
4 not my place to question or sit in review of those
5 directions. They may or may not have been appropriate
6 given the circumstances that existed at the time,
7 however, while they may provide some matters worthy of
8 consideration there has, in my opinion, been a
9 significant intervening factor in the decision of the
10 Ontario Court of Appeal relating directly to aspects of
11 this case and thus the circumstances are now different
12 from those when Dr. Porter made her decision, given that
13 we now have additional guidance from the court which
14 binds us and now that the family have in addition signed
15 the undertakings.

16 On the question of the interpretation to
17 be given to the undertakings given by counsel, it
18 appears to me that a plain reading of the document
19 shows that counsel are permitted to use these materials
20 for the purposes of the inquest.

21 I find that today's motions are part of
22 the inquest and that, thus, counsel may make use of these

October 23, 2012

Ruling - 6

(Sealing Motion)

1 materials on those motions as they see fit and as I may
2 permit.

3 Correctional Service of Canada submitted
4 that these materials have not been yet subjected to any
5 ruling as to relevance and admissibility, and that is
6 true. Nevertheless, on these motions - and indeed on any
7 subsequent voire dices in this inquest which will also be
8 part of the inquest - a consideration of the content of
9 these materials may be helpful and/or necessary to the
10 resolution of important issues.

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

October 23, 2012

Ruling - 7

(Sealing Motion)

1 evidentiary basis is insufficient.

2 I find that the simple assertion that a
3 harm could happen without more evidentiary basis is an
4 insufficient basis for the issuance of a sealing order.

5 In view of the CSC's failure to meet the
6 first arm of the applicable test as set out in the
7 *Dagenais* and *Mentuck* cases in the Supreme Court of
8 Canada, it is unnecessary for me to consider the second
9 arm of the test involving the balancing of the salutary
10 and deleterious effects of the proposed order.

11 I also find it unnecessary to determine
12 whether I have the power to make a sealing order, but if
13 I had found that I had such power I would not in the
14 circumstances of this case have exercised it in favour of
15 the issuance of such an order.

16 Just at the end of the submissions counsel
17 for the Correctional Service of Canada asked that I
18 consider an "interim-interim" sealing order of an
19 undetermined length to permit Correctional Service of
20 Canada to consider my decision. In view of the lack of
21 any affidavit or other evidentiary evidence supporting
22 the existence of any palpably serious or fundamental

October 23, 2012

Ruling - 8

(Sealing Motion)

1 danger to the inquest process or to any person, I do not
2 find that this is an appropriate case in which to issue
3 such an order.

4 That's my decision on the motion.

5 Now then, Ms. Speyer, do you have any
6 proposal as to how to proceed from here?

7 **MS. SPEYER:** Well, sir, the next issue
8 that arises ---

9 **MR. ROBICHAUD:** Excuse me, Dr. Carlisle,
10 would it be possible to have a 15-minute break to
11 consider what the decision you issued?

12 **THE CORONER:** A 15-minute break to do
13 what?

14 **MR. ROBICHAUD:** To discuss with my
15 colleague and my client the decision that you just
16 issued?

17 **THE CORONER:** I can give you give you
18 five minutes.

19 **MR. FALCONER:** It'll take that long for
20 me to finish speaking.

21 **THE CORONER:** I think in the
22 circumstances I'm inclined to accede to counsel's

October 23, 2012

Ruling - 9

(Sealing Motion)

1 request, simply because the submissions on the question
2 will consume far more than the 15 minutes he requests.
3 So with everybody's indulgence we'll have 15 minutes for
4 CSC to consider the matter.

5 -- Recess at 2:10 p.m.

6 -- Resuming 2:25 p.m.

7 **THE CORONER:** Now then you wish to make
8 remarks, please.

9 **MR. ROBICHAUD:** Dr. Carlisle, my
10 instructions are to seek judicial review of your
11 decision. And we would therefore ask for written reasons
12 from you.

13 **THE CORONER:** Fine.

14 **MR. ROBICHAUD:** And we also therefore
15 seek an adjournment or a stay of hearings of the motion
16 so that we can complete judicial review. And we submit
17 that to proceed with the hearings of the motions today
18 and tomorrow would make any judicial review moot,
19 obviously, because there is no interim sealing order and
20 so the information would be out there.

21 **THE CORONER:** Is there anything in your
22 materials or in that of others supporting your motion on

October 23, 2012

Ruling - 10

(Sealing Motion)

1 scope that is of the nature that you object to?

2 MR. ROBICHAUD: There are materials.

3 THE CORONER: Point it out, please. I'm
4 not speaking of that which may be in the argument of
5 others, I'm speaking of that which is in your argument.

6 MR. ROBICHAUD: Oh, in our argument, no.

7 THE CORONER: Then I would like to
8 proceed with your argument on the scope motion next.

9 MR. ROBICHAUD: Sorry?

10 THE CORONER: On this motion which was
11 returnable today, you've made your submissions, if there
12 is nothing in your argument that is offensive in the
13 manner that you've suggested in your previous motion then
14 there seems to me to be no reason not to proceed with
15 your argument.

16 MR. ROBICHAUD: So the request for an
17 adjournment is denied?

18 THE CORONER: Well I'm asking you if
19 there's anything in your material that is ---

20 MR. ROBICHAUD: I'm told that my co-
21 counsel has been responding to - when she presents her
22 oral submission in responding to other parties' arguments

October 23, 2012

Ruling - 11

(Sealing Motion)

1 that she will have to refer to some of the information to
2 which they have referred.

3 **THE CORONER:** So where in your
4 submissions are any of such materials? I'd like to see
5 them, please.

6 **MS. NOBLE:** It'll be in my oral
7 submissions, Dr. Carlisle.

8 **THE CORONER:** All right. I'll hear
9 submissions on this. Ms. Speyer, do you have any advice
10 for me?

11 **MS. SPEYER:** Sir, we're all here today
12 and counsel have set aside their time to be here to argue
13 issues before you today. And it's my suggestion that we
14 make the most productive use that we can of the time that
15 we have.

16 It seems, on the face of it, that this
17 application because, as I understand Mr. Robichaud's
18 position, he asking that we stand down until after a
19 judicial review application is determined. I don't know
20 how long that's going to take, but that appears to me to
21 be something that might delay this, as has now become
22 much said often, much delay in proceeding.

October 23, 2012

Ruling - 12

(Sealing Motion)

1 It would be, I think, fair to afford the
2 Correctional Service of Canada an opportunity to bring an
3 application before a reviewing court for a stay of your
4 Order, and I would suggest that that can be done on a
5 very short turnaround time, but in the meantime we have a
6 scope application that's ready to be argued.

7 The Correctional Service of Canada filed
8 no record in support of that application and the doctors,
9 who I understand is to have the lead on this argument,
10 did file one affidavit, but it doesn't raise any of the
11 kind of concerns that Correctional Service has identified
12 as a concern on their sealing application and, as I
13 recall it, generally just speaks to otherwise publicly
14 available facts.

15 So I would propose, sir, that we begin to
16 hear the arguments on the scope application. It's my
17 understanding that the doctors were going to take the
18 lead on that in any event. And that we use the time that
19 we have available to us today in that fashion.

20 It may be that some of the responding
21 parties - and it may be prudent to do a roll call to see
22 who's where on this - may be able to make their

October 23, 2012

Ruling - 13

(Sealing Motion)

1 submissions without reference to any kind of a record
2 that's going to engage the concerns of Correctional
3 Service has. That way we make productive use of our
4 time. Then we can come back tomorrow and see whether
5 Corrections has had any luck going to a higher court to
6 try and get some kind of an order staying your decision.

7 But in my submission, there needs to be
8 some urgency afforded to this. And if we merely say
9 adjourn sine die until whenever, they bring their
10 application and get a ruling, that that is manifestly not
11 in the public interest in having this inquest move
12 forward.

13 It may be that some of the other parties
14 have some insights as well, as to how we might manage
15 this because I know that other counsel have also
16 expressed to me their desire to get this matter moving.
17 We have a January 14th target start date and it's a date
18 that many of us would very much like to meet, and some
19 other counsel may have some helpful ideas about how we
20 can move this forward as well. So I would suggest that
21 they be afforded an opportunity to indicate at least
22 whether they can proceed with their arguments on the

October 23, 2012

Ruling - 14

(Sealing Motion)

1 scope application without engaging any concerns.

2 **THE CORONER:** Thank you, Ms. Speyer.
3 Are there other parties that wish to make a submission on
4 this? Mr. Falconer?

5 **MR. FALCONER:** If I may address you?
6 Dr. Carlisle, and I'm going to be slightly lengthier
7 because I've had discussions with Ms. Davies and Mr.
8 Macklin in terms of a joint position of the Smith Family
9 case and PACY.

10 Dr. Carlisle, my understanding of the law
11 in this area - and I have on occasion had to bring
12 motions similar to Mr. Robichaud - this is about merit,
13 this is about merit.

14 The *R.J. MacDonald* case around stays
15 raises the notion of a serious question to be tried, it's
16 the injunction law and it's the stay law. And I can't
17 emphasize enough how an important issue before any
18 adjudicator contemplating adjourning to permit Superior
19 Court proceedings, is always faced with the question of a
20 disruption. In other words, one always wants to be fair
21 and not render an issue moot, but that's to be balanced
22 against potentially frivolous or meritless applications

October 23, 2012

Ruling - 15

(Sealing Motion)

1 disrupting a proceeding.

2 A party will always, a losing party, will
3 always have an interest in stopping things, that is life.

4 It doesn't mean that Mr. Robichaud is unethical, but
5 that is life. But that doesn't make it automatic, there
6 is no such thing as an entitlement to an automatic stay.

7 The issue is, among other things, what we refer to as
8 irreparable harm, balance of convenience, but ultimately
9 a serious issue to be tried is where things really fall
10 on this one.

11 Now I say this, first of all, it was not
12 lost on any of us that Correctional Service was the only
13 party seeking this order in the first place. It has now
14 not been lost on any of us that their record was
15 literally non-existent in terms of a reason for a
16 concern. And frankly though, I do say this, if there is
17 another record filed by another party that finds a
18 concern then I say, with the greatest of respect to the
19 questions you asked Mr. Robichaud, they could point to
20 that record. If there was another record that provided
21 an actual basis for concern, no such record exists, it
22 wasn't filed. Correctional Service is the only party

October 23, 2012

Ruling - 16

(Sealing Motion)

1 seeking this form of sealing order.

2 A court is routinely called upon to do a
3 merit assessment on any kind of "interim-interim" relief.

4 This adjournment motion is colossally meritless.
5 Frankly, it's a pathetic effort to keep from public
6 scrutiny that which every other person and party in this
7 room realizes is public.

8 Now is Correctional Service, because
9 they're playing with house money, entitled to hold us all
10 hostage while we go up and down the court system on a
11 meritless application? I say, with respect, no.

12 So if, if, Dr. Carlisle, you are of the
13 view that their ground for going forward is meritless you
14 are entitled, after hearing submissions from all parties,
15 you are entitled to decline the adjournment request and
16 we move forward.

17 I, with the greatest of respect to Ms.
18 Speyer, do not agree that we should in effect give them
19 their "interim-interim" relief by not referring to the
20 record. The record is before you, the motions are to go
21 ahead. If there had been some wisp, scintilla, a whiff
22 of merit, we'd be in a different position.

October 23, 2012

Ruling - 17

(Sealing Motion)

1 So I say, with respect, it is not every
2 party that can afford a whole troop of lawyers that get
3 to stop a proceeding, there has to be some showing of
4 merit. It isn't here.

5 And as for the irreparable harm, which is
6 another leg of the test, what is the harm exactly? Is
7 the harm that that which is going to be public record is
8 public record tomorrow? There can be no doubt, as an
9 example, that the videos being played are videos that are
10 directly relevant to these proceedings.

11 We have already gone through a judicial
12 review where the Divisional Court has opined on the very
13 issue. The words of the Divisional Court, if I can
14 remind you, Dr. Carlisle, it is difficult to conceive of
15 how these wouldn't be relevant. We were referring to the
16 Joliette tapes and the duct tapes that are being played
17 tomorrow morning. The very tapes that are the subject of
18 a joint submission which Correctional Service at the time
19 took no position.

20 In my submission, whether it's the
21 question of meritless or lack of irreparable harm because
22 they will become part of the proceedings quite clearly,

October 23, 2012

Ruling - 18

(Sealing Motion)

1 in my submission, they haven't made out a case for us to
2 stop our proceedings. Our risk is we get caught in a
3 clinch in any event, which is exactly why I am sitting
4 down. Thank you.

5 **THE CORONER:** Thank you, Mr. Falconer.
6 Are there others who wish to make submissions? Mr.
7 Rubel?

8 **MR. RUBEL:** Yes, please. Thank you, Dr.
9 Carlisle. I'll be briefer than my friend.

10 I first thought your counsel's submission
11 seemed to me to be a practical way of using the time that
12 we have all set aside. However, upon reflection - and I
13 rarely disagree with her on these matters, as you know -
14 I believe that putting off part of the decision on the
15 adjournment until just after one side has argued this
16 motion before you, really isn't going to put us any
17 further ahead.

18 There's been an application brought before
19 you now for an adjournment of the hearing of the balance
20 of the motion that was scheduled for today. In my
21 submission, your ruling made it clear that you were not
22 struggling with the balancing of the second step that you

October 23, 2012

Ruling - 19

(Sealing Motion)

1 may have had to deal with. Your ruling made it quite
2 clear that you found that there really wasn't any
3 evidentiary foundation before you to raise the necessity
4 of the order that was being sought sealing things.

5 In my submission, the adjournment
6 application is discretionary and there's a strong public
7 interest in finally going forward with this matter. To
8 say that well let's start hearing the motion here,
9 Correctional Service's and the doctors' submissions,
10 you're just going to be facing tomorrow morning the same
11 adjournment application that you're facing today. And in
12 my submission, the adjournment application should be
13 dealt with quickly, should be denied quickly and there
14 should be a ruling today that the scope motion proceed so
15 we can use all of our time and anticipate continuing to
16 use it productively tomorrow morning. Thank you, sir.

17 **THE CORONER:** Thank you, Mr. Rubel.
18 Sir?

19 **MR. McNAIR:** Dr. Carlisle, I will not
20 repeat the submissions of either of the last two counsel.
21 I adopt the same position.

22 I do want to point out, sir, that the

October 23, 2012

Ruling - 20

(Sealing Motion)

1 Divisional Court has expressed a view about the
2 desirability of seeking judicial review during an
3 inquest. And if you look - and I won't take you to it,
4 but in the *People First* case, which was an application
5 for judicial review while the evidence was ongoing, I
6 acknowledge, but the Divisional Court said that the
7 public interest requires that the coroner be able to go
8 about his or her job without intermittent interference by
9 the courts, particularly on issues within the expertise
10 of the tribunal. The court in *People First* said that it
11 discouraged an application for judicial review in the
12 midst of inquest proceedings, it is not fair to the
13 public or the jury - in this case we don't have a jury
14 yet, but to the parties or anyone else involved in the
15 difficult business of an inquest as the Divisional Court
16 said to suspend the work in midstream and interfere with
17 the integrity of the process in which it is engaged.

18 This process has been agonizingly slow, it
19 has been expensive and protracted and it ought not to be
20 interrupted by any adjournment request at this stage of
21 this two-day hearing.

22 THE CORONER: Thank you, Mr. McNair.

October 23, 2012

Ruling - 21

(Sealing Motion)

1 Any further submissions? Yes?

2 **MR. SCHABAS:** Dr. Carlisle, I'm mindful
3 that I'm here on behalf of the media and I'm not a party
4 to the motions that are proceeding, but you have made a
5 ruling that documents filed, material filed is not
6 subject to a sealing order. To accede to their request
7 is in effect to accede to an interim sealing order which
8 is a violation of my client's constitutional rights, the
9 public's constitutional right to know what is going on in
10 this room or going on in any of these proceedings.

11 As I said in my submissions, timeliness is
12 critical, the public has a right to know now what you
13 have ruled and to see this matter proceed. And in my
14 submission that there is no basis for a stay. I think I
15 described the motion this morning as utterly untenable
16 and I think Mr. Falconer has driven that point home.

17 **THE CORONER:** Thank you. Any further
18 submission? Sir?

19 **MR. FREIMAN:** Dr. Carlisle, I will not
20 repeat the submissions of the parties before me because I
21 have the misfortune of being unable to agree with those
22 submissions, except to a limited extent I believe your

October 23, 2012

Ruling - 22

(Sealing Motion)

1 counsel is on to the right solution.

2 I start with the proposition that I sense
3 a great deal of frustration and impatience in this room.

4 And I understand the reasons for the frustration, I
5 understand the reasons for the impatience. But
6 impatience is not a synonym for progress and it is not a
7 sound basis upon which to conduct proceedings.

8 It may well be that the request for a stay
9 - and your counsel has proposed a meaningful and
10 minimally disruptive way that could be pursued - it may
11 well be that that motion will not succeed, but surely
12 that is a question that the court has to answer. It is
13 not seemly, in my respectful submission, for a decision
14 maker to say I have decided X and I am confident that X
15 is correct, therefore I also believe that you will fail
16 on appeal and so it is not necessary for me to stop while
17 you exercise your procedural rights to challenge whether
18 it's an appeal or in this case judicial review, to
19 challenge the jurisdictional appropriateness of the
20 order.

21 The only point in which I disagree with
22 your counsel is the idea that it would somehow be

October 23, 2012

Ruling - 23

(Sealing Motion)

1 appropriate for part of the motion to be heard and then
2 the matter adjourned and then we start again. In my
3 respectful submission, that is not congruent with fair
4 process. I shouldn't be put into the position of making
5 submissions and then going away for a while and then the
6 rest of the proceedings will continue in due course.

7 I've already shared with other counsel my
8 predictions that my own submissions will not be lengthy
9 in any event. And so the gain of having them on the
10 record is, in my respectful submission, not worth the
11 loss of at least the appearance of due process. And due
12 process is a question both in substance and of
13 appearance.

14 I therefore urge you to allow the most
15 expeditious means by which those who wish to challenge
16 your decision can know whether they will be allowed to do
17 that and can know from the court.

18 **THE CORONER:** Mr. Freiman, can I just
19 ask, could you elaborate, you say that it would be
20 unseemly or there would be some defect in asking you to
21 proceed? Could you just elaborate a little bit on what
22 would be unseemingly about that?

October 23, 2012

Ruling - 24

(Sealing Motion)

1 **MR. FREIMAN:** It's in no way knowable at
2 the moment how long or how short the delay might be, that
3 would be occasioned by allowing my friends to go off and
4 do what they need to do. If the delay was merely
5 overnight there would be no tangible prejudice, but the
6 idea that submissions should be made based on two sets of
7 rules is, in my respectful submission, not tenable.

8
9 I was very careful in my written
10 submissions not to refer to any of the material that is
11 in controversy here today, but if I'm to make my own
12 submissions now I'm also precluded from making any
13 reference to them and I shouldn't have to wait until the
14 end of the proceedings by way of reply to make those
15 submissions.

16 **THE CORONER:** Thank you. I understand
17 that better. Are there any other submissions to be
18 heard? Anyone else? The reply? None? Oh, I'm sorry.
19 Please.

20 **MS. THORNTON:** Just very briefly, Dr.
21 Carlisle. Our submissions are in accordance with those
22 that were made by Mr. Falconer, Mr. Rubel, Mr. McNair.

October 23, 2012

Ruling - 25

(Sealing Motion)

1 We do believe that this motion should proceed today.

2 And my submissions on CSC's motion, I said
3 that this was all about context and the context of this
4 motion was the applications that were brought by the
5 doctors and by the CSC to which we all responded.

6 And furthermore, if I can direct you to
7 one further authority, it's in many parties' materials,
8 it's also in ours, at Tab 9 of the CCLA brief, and I
9 would be referring to page 12 of that decision. This is
10 the *Stanford and Harris* decision. On page 12, two
11 paragraphs down from Scope of Judicial Review,

12 "The coroner is faced with a very
13 difficult task and must be afforded a sufficient degree
14 of insulation from review. He must have the power to
15 keep the inquest from turning into a circus and the power
16 to prevent every busybody from using the inquest as a
17 platform for their particular views. Applications for
18 judicial review should be discouraged as they detract
19 from the coroner's ability to control the proceedings and
20 they produce delay."

21 This motion that was brought by CSC this
22 morning is an example of that kind of danger. This,

October 23, 2012

Ruling - 26

(Sealing Motion)

1 although it was a blanket order that was sought by CSC,
2 is no different in kind from any ruling that you may have
3 to make in the course of this inquest about the
4 admissible of evidence and we cannot stop this process
5 every time one of the parties does not agree with your
6 ruling.

7 Mr. Falconer is correct, to stop today
8 they must show on a merit's basis, on the RGR test, that
9 there is a reason to do so. And not to do so, as Mr.
10 Schabas has already pointed out, would be
11 unconstitutional and unfair to the public who are
12 expecting that we proceed.

13 **THE CORONER:** Thank you. Anything
14 further?

15 **MS. BIRDSELL:** Mr. Coroner, if I could
16 just echo that I would, on behalf of the Empowerment
17 Council, adopt the submissions of Mr. Falconer, Mr.
18 Rubel, Mr. McNair and Ms. Thornton, and support the
19 notion that it is merit based test to go forward and that
20 nothing should be adjourned at this point.

21 **THE CORONER:** Any further submissions?
22 Your reply?

October 23, 2012

Ruling - 27

(Sealing Motion)

1 MR. ROBICHAUD: No reply.

2 THE CORONER: No reply. Ms. Speyer,
3 where shall we go now?

4 MS. SPEYER: Well, sir, having had an
5 opportunity to hear the submissions of various counsel, I
6 would suggest, sir, that the submissions that have been
7 made to you with respect to the test to be applied on
8 this discretionary decision you are to make seem sound to
9 me.

10 And that if you are of the view that the
11 application was not only without merit, but without an
12 evidentiary foundation, such that there was no air of
13 reality to its prospects of success, then you would be
14 entitled in the exercise of your discretion to decline
15 the application for an adjournment.

16 And I just wish to thank my friends who
17 made submissions on that issue for pointing out that area
18 of the law.

19 THE CORONER: Thank you for that advice.

20 I'll retire and consider the matter.

21 --- Recess at 2:45 p.m.

22 --- Resuming at 4:55 p.m.

October 23, 2012

Ruling - 28

(Sealing Motion)

1 **THE CORONER:** Thank you, ladies and
2 gentlemen for your patience. It has been more than could
3 be reasonably be expected, but I'm a chicken scratcher
4 and if I want to say something to you that has any
5 meaning it's necessary for me to write it out and
6 transcribe it so that I can give it. And I apologize if
7 I stumble over it a bit, my eyes are beginning to get a
8 little bleary, as I'm sure are others in the room.
9 However, I have a decision.

10 Correctional Service of Canada submits
11 that it intends to seek judicial review of my decision of
12 this afternoon on the Sealing Order Motion and moves that
13 further hearing of the motions returnable today be
14 adjourned until the result of that judicial review is
15 known.

16 Counsel for the Family, having consulted
17 with counsel for the Provincial Advocate and Elizabeth
18 Fry Societies, submits that in such circumstances the
19 granting of an adjournment or stay is not automatic and
20 refers me to *R.J.R. MacDonald versus Canada* in the
21 Supreme Court of Canada, wherein the three-part test to
22 be applied is found. I had asked court staff to be

October 23, 2012

Ruling - 29

(Sealing Motion)

1 provided with a copy of that and have briefly read it.

2 The first arm of the test is whether the
3 interlocutory process proposed presents a serious issue
4 to be determined or has an air of reality. In the motion
5 of today regarding the sealing order, Correctional
6 Service of Canada argued very generally that two harms
7 could happen if documents relied upon in these motions
8 were not the subject of a sealing order or precluded from
9 use by the undertakings given by counsel. Those were a
10 possible tainting of the jury pool and possible
11 harassment of witnesses. In neither case was there any
12 evidentiary basis for such assertions or speculations nor
13 was there any specificity or particularity as to those
14 putative harms or as to their nature, extent or
15 probability. The cases require such an evidentiary basis
16 and require particularity. On the sealing order motion
17 there were neither.

18 Great reliance was placed on the ruling of
19 the previous coroner in a previous inquest into this
20 death granting such a sealing order. Other submissions
21 were, however, that the circumstances and the law have
22 changed since that order was given by virtue of a

October 23, 2012

Ruling - 30

(Sealing Motion)

1 decision of the Ontario Court of Appeal on facts arising
2 in this very case given after the coroner's order was
3 given.

4 I had no difficulty in finding that the
5 submissions of Correctional Service of Canada did not
6 meet even the first arm of the applicable test for the
7 granting of a sealing order, nor that the use of the
8 materials in question on the motions returnable was in
9 compliance with the undertakings given by counsel in the
10 inquest.

11 On the basis of the submissions and
12 materials before me, there does not appear to me to be
13 significant merit in the arguments advanced in favour of
14 the sealing application which is why I found that it did
15 not meet even the first test in *Dagenais* and *Mentuck*.

16 The second arm of the test requires that I
17 consider whether there will be irreparable harm to
18 Correction Service of Canada if I do not grant the motion
19 for adjournment and consequently the hearing of these
20 motions goes forward today.

21 I must observe that of all the inquests
22 where I have presided this is one where by far the

October 23, 2012

Ruling - 31

(Sealing Motion)

1 greatest amount of information about the circumstances of
2 the death is already public.

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

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

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

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

October 23, 2012

Ruling - 32

(Sealing Motion)

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

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

9 I incorporate by reference the list of
10 materials in issue on the motions set out in the
11 submissions of my counsel, Part 1, paragraph 2 on pages
12 1, 2 and 3. This shows that there are ten items already
13 on the public domain and seven not yet public. The harm
14 to be suffered by Correctional Service of Canada is that
15 these items may become public, along with some videos.
16 And that putatively may taint the jury pool or cause
17 witnesses to be intimidated, these being mere assertions
18 of possibility.

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

October 23, 2012

Ruling - 33

(Sealing Motion)

1 indeterminant period.

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

13 In the result I dismiss the application
14 for adjournment and direct that the argument of these
15 motions proceed. And I'll provide that in writing in due
16 course.

17 Now then, Ms. Speyer, we're ready to
18 proceed.

19 **MS. SPEYER:** Well it's four minutes
20 after 5:00. We're I think ready to proceed. The
21 question is whether you'd like to continue today or
22 whether we return tomorrow.

October 23, 2012

Ruling - 34

(Sealing Motion)

1 **THE CORONER:** Well I am of the view, as
2 you all know, that we need to move this matter forward.
3 On the other hand, it's been a long day. My sense is
4 that it would be better not to split these submissions
5 apart into pieces as several counsel have suggested. And
6 so I'm of the view that we ought to commence afresh in
7 the morning start and move ahead. And at that time we'll
8 move ahead with the motions respecting the scope and
9 focus of the inquest. Is this satisfactory to all? I'm
10 seeing a lot of nods in the affirmative.

11 **MR. FALCONER:** And then are we going to
12 do the witness motion after, if there's time?

13 **THE CORONER:** Yes, sir. We will move
14 ahead as quickly and with as much resolution as we can.
15 And I again thank all counsel for the submissions they to
16 make on the spur of the moment today, they were able and
17 very helpful. And I also thank counsel here on behalf of
18 the media for their helpful submissions and I seek
19 everybody's cooperation in moving forward, I know I'll
20 have it. Thank you very much.

21 **MS. SPEYER:** Shall we, in the interest
22 of getting as much done tomorrow as possible, have a nine

October 23, 2012

Ruling - 35

(Sealing Motion)

1 o'clock start again, sir?

2 **THE CORONER:** I believe so.

3 **MS. SPEYER:** And I took the liberty of
4 canvassing with the court reporter, in the event that we
5 were to be close to being finished at 5 o'clock tomorrow,
6 the court reporter is available to sit late tomorrow, Ms.
7 Creal and I are, so I'm wondering whether you'd be
8 prepared to consider that if it appears to be a way to
9 conclude the arguments on the scope and the out of
10 province witness summons applications. And I just alert
11 people so they can arrange their affairs because that may
12 be a request I'll be making.

13 **THE CORONER:** Indeed I would be very
14 interested in pursuing that and I hope everyone will be
15 able to arrange their affairs accordingly. I would like
16 to move ahead and I would like to do as much as we can
17 do. I think in an inquest of this kind, where there are
18 so many parties and where it is therefore so difficult to
19 accommodate as we need to do seriously everybody's
20 schedule, we need to take maximum advantage of whatever
21 time we do have together. And so I would ask everyone to
22 please take account of what Ms. Speyer says and work with

October 23, 2012

Ruling - 36

(Sealing Motion)

1 us as best you can on that.

2 **MR. FALCONER:** Dr. Carlisle, I'm in an
3 awkward position, but I just -- I often tell younger
4 counsel if you're not sure just tell the truth and deal
5 with it. So I need one minute of your and I mean no
6 disrespect.

7 **THE CORONER:** One minute for truth, okay.

8 **MR. FALCONER:** There you go.

9 Dr. Carlisle, I made argument on the
10 applicability of the *R.J. MacDonald* case and I - because
11 we were doing things on the fly, I didn't give you the
12 courtesy of having the case in front of you. And I
13 suspect that, knowing you as I do, you obtained that case
14 anyway.

15 I did not make a submission that one of
16 the arms of the test was that significant merit had to be
17 shown. I made an argument that the test is actually a
18 serious issue to be tried. I'm seeking, respectfully, a
19 clarification from you on your ruling. And I'm asking,
20 with respect, whether your ruling was meant to suggest
21 that it was upon CSC to prove that there was significant
22 merit or whether it was upon - and it's a clarification

October 23, 2012

Ruling - 37

(Sealing Motion)

1 I'm seeking, respectfully - or whether it was a
2 requirement that CSC establish that there was a serious
3 issue to be tried. And I'm respectfully asking for
4 clarification because you used the words "significant
5 merit" in your ruling, which I didn't submit before. And
6 I mean no disrespect when I draw it to your attention.

7 **THE CORONER:** So could you just do that
8 again, please, say that again.

9 **MR. FALCONER:** Certainly. So *R.J.*
10 *MacDonald* referred to the issue of a serious issue to be
11 tried out of the *R.J. MacDonald*, so that's the merit
12 piece of the test on the motion to stay. And in the
13 speed of the matter - and this is why I'm seeking a
14 clarification from you, Dr. Carlisle, with the greatest
15 of respect - in your effort to issue the reasons to
16 assist Mr. Robichaud, you used the words "significant
17 merit" at one point. And since I didn't advance that I
18 wanted to seek some clarification from you as to whether
19 you were making a finding that they hadn't met the
20 standard of serious issue to be tried as stated in *R.J.*
21 *MacDonald* or you were in fact using a different test
22 requiring them to prove significant merit?

October 23, 2012

Ruling - 38

(Sealing Motion)

1 **THE CORONER:** I was trying to copy it
2 from *R.J.R. MacDonald* and in the haste of the issue I may
3 well have got it wrong, but my intention was to set out
4 what it says in the case, which is serious issue.

5 **MR. FALCONER:** Thank you and I
6 appreciate it.

7 **THE CORONER:** Thank you. I'll correct
8 that in the written version when I issue it.

9 Nothing further, then we'll adjourn until
10 9:00 a.m. tomorrow morning.

11 --- WHEREUPON THE INQUEST WAS ADJOURNED AT 5:05 P.M.

12 UNTIL WEDNESDAY, OCTOBER 24th, 2012 AT 9:00 A.M.

13
14
15 I hereby certify that the foregoing is a true and
16 accurate transcription of my tape(s) to
17 the best of my skill and ability.

18
19 

20 _____
 Ala Kleinberg, Verbatim Court Reporter

October 23, 2012

Ruling - 39

(Sealing Motion)

1 Reproduction of this transcript are in direct
2 violation of O.R. 587/91 Administration of Justice Act
3 January 1, 1990 and are not certified without the
4 original signature of the Court Reporter