CORONERS COURT

IN THE MATTER OF the *Coroners Act*, R.S.O. 1990, c. 37
AND IN THE MATTER OF the Inquest into the death of Ashley Smith

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WRITTEN SUBMISSIONS

"It [a videotape] may indeed be a silent, trustworthy, unemotional, unbiased and accurate witness who has complete and instant recall of events."
R. v. Nikolovski [1996] 3 S.C.R. 1197

I. INTRODUCTION

1. **Public Submission**: These Smith Family submissions make no reference to confidential matters that could reasonably result in their being withheld from the public. On the contrary, the Smith Family respectfully submits that to withhold these submissions from public access would violate their right to free expression protected by s. 2(b) of the *Canadian Charter of Rights and Freedoms*.

2. The Smith Family brings this motion in order to persuade Deputy Chief Coroner Bonita Porter to obtain and view the Joliette videos that chronicle the abuse of Ashley Smith over several days in late July 2007. As part of its motion, the Smith Family seeks to argue these issues in open court rather than simply through written submissions. Therefore these submissions address both the right of parties to make argument in an open, public and fair proceeding as well as the main argument as to why the Coroner ought not to remain disinterested in the Joliette videos.

Overview – Abuse by Joliette Health Care Professionals

3. The Smith Family sought to expand the scope of the Inquest to include, among other things, the incidents of abuse of Ashley Smith at Joliette Institute in late July 2007. The motion to expand the scope resulted in a ruling by the Coroner dated November 12, 2010 in which the Honourable Coroner broadened the scope of the Inquest such that neither geographic boundaries nor timelines would hinder an inquiry into relevant circumstances of death. Relevant circumstances include, but are not limited to, matters that would have had an impact on Ashley's state of mind at the time of her death in October 2007.

4. When the Smith Family counsel alluded to the Beaudry Report (on Joliette) in argument, no party or Coroners Counsel disputed the Smith Family's position that the following may have detrimentally affected Ashley's faith in so called health care professionals:

   i) abuse suffered at the hands of a psychiatrist (the "tele-Doctor") who apparently never examined Ashley (prescriptions by telephone of repeated forced injections of anti-psychotic medications over Ashley's objections despite Ashley having the legal capacity and right to refuse);

   ii) abuse suffered at the hands of a Registered Nurse who used the forced injections as compliance security measures (including threatening more injections and misleading the tele-Doctor); and

   iii) abuse suffered by Ashley as a result of endless hours of restraints where I.V. protocols were not followed for her nutrition and hygienic needs.

5. No party or Coroners Counsel disputed the Smith Family's contention that the above may have impeded Ashley's ability to form therapeutic relationships with those whose jobs were to help Ashley.

6. No party or Coroners Counsel disputed the Smith Family's position because to do so would fly in the face of common sense.

7. If indeed Ashley suffered such abuse (over several days in the months before her death), the proof would be painfully apparent in the Joliette videos of Ashley's restraint over those three days in July 2007 which are in the possession of CSC officials. While these matters were argued before the Coroners Court on November 1, 2010, the parties did not learn until three months later (on February 9, 2011) that the Coroners Office had not taken any steps to obtain the videos despite the statutory power (s. 16 of the Coroners Act) to obtain this evidence. In a public statement, Mr. Siebenmorgen, senior Coroners Counsel, explained the decision not to obtain the videos in terms of the Coroner's lack of "interest":

   At this point, (Porter) is not interested in getting this material," Eric Siebenmorgen, a lawyer with the Office of the Chief Coroner, said Tuesday.

   "(But) she said, 'I'm open to be persuaded, but you're going to have to convince me (to get the material.)'"

   [see Canadian Press article, March 2, 2011, http://www.ctv.ca/CTVNews/Canada/20110302/coroner-ashley-smith-inquest-110302/]

8. **Interested Parties:** The Correctional Investigator, Howard Sapers, looking into Ashley's death viewed the videos and was interested enough to pursue the matter further. Mr. Sapers hired Dr. Beaudry to provide a professional opinion on what he saw on the videos. Dr. Beaudry, an independent duly qualified psychiatrist, was consulted and his interest in the videos resulted in a lengthy report setting out the extensive and illegal conduct on the part of the Joliette health care professionals whom we entrusted to form therapeutic relationships with Ashley. Kim Pate, the Executive Director of the Canadian Association of Elizabeth Fry Societies, was interested enough to view the videos well before the convening of this Inquest

because it was recognized that the abuse portrayed on the videos struck at the heart of the safety of all mentally ill inmates.

9. Respectfully, it is difficult to understand how this Inquest would not be "interested" in the events at Joliette Institute and the related question of how the abuses of Ashley may have impeded Ashley's ability to form therapeutic relationships with those whose jobs were to help Ashley. The best evidence is the videos. The truest evidence is the videos.

10. With respect, disinterest is not an option.

Overview – Right to Make Argument in Open Court

11. Ashley Smith died because she was in a place that was hidden from public scrutiny.

12. Nothing about the inquest into her death ought to be hidden. As a result of a direction by the Honourable Coroner, a critical motion on the production of video evidence depicting Ashley's mistreatment at the hands of health care professionals and correctional staff is to be conducted behind closed doors

13. The Honourable Coroner has prohibited the Smith Family, the Child Advocate for Children and Youth and the Canadian Association of Elizabeth Fry Societies from making their case for the production of these videos in open court and in full view of the public. Respectfully, the Honourable Coroner's order that these proceedings be conducted in the absence of the media violates the most fundamental notions of openness and transparency that underpin our justice system.

14. The evidence at issue in this motion consists of videos that have been described as "shocking and disturbing" by one witness who viewed them. The shocking and disturbing nature of these videos demands that any motion concerning their production be conducted under the glare of full public scrutiny. Nothing less will do justice to Ashley.

15. Five weeks ago, the Supreme Court of Canada had this to say about the critical role of openness in preserving the integrity of the justice system:

> In *Attorney General of Nova Scotia v. MacIntyre*, [1982] 1 S.C.R. 175, at p. 183, Dickson J. (as he then was) quoted the following passage from Bentham: **"In the darkness of secrecy, sinister interest and evil in every shape have full swing. Only in proportion as publicity has place can any of the checks applicable to judicial injustice operate. Where there is no publicity there is no justice." "Publicity is the very soul of justice. It is the keenest spur to exertion and the surest of all guards against improbity." Thus, openness fosters the fair administration of justice and, like a watchdog, protects citizens from arbitrary state action** (*Toronto Star Newspapers Ltd. v. Canada*, 2010 SCC 21, [2010] 1 S.C.R. 721, at para. 1; *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480, at para. 22). It therefore helps to maintain and to enhance public confidence in, and serves in a way as a guarantee of, the integrity of the court system. To be able to provide adequate support for this multifaceted role of openness, journalists must have access to information relating to the courts and must be able to broadcast it as freely as possible.
>
> Openness not only guarantees the integrity of the judicial system, but also makes it possible for the public to obtain information, and to express opinions and criticisms, regarding the administration of justice. In *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326, at p. 1340, Cory J. pointed out that "[i]t is only through the press that most individuals can really learn of what is transpiring in the courts" (see also *New Brunswick*, at para. 23). In saying this, he was echoing Fauteux C.J.'s comment that [TRANSLATION] "[o]penness would be a myth if the media were not given legitimate access to the courts in order to witness all stages of proceedings, and the freedom to make accurate and honest reports of those proceedings" (G. Fauteux, *Le livre du magistrat* (1980), at p. 70, quoted in *R. c. Southam Inc.*, [1988] R.J.Q. 307 (C.A.), at p. 312). [emphasis added][1]

[1] *Canadian Broadcasting Corp. v. Canada (Attorney General)*, 2011 SCC 2

16. By depriving the parties of the opportunity to make argument in open court on a central issue in this inquest, in the absence of a protocol that would permit the media and the general public access to these proceedings, the Honourable Coroner has removed "the surest of all guards against improbity".

17. The Smith Family respectfully requests that any and all argument on significant issues in this matter be heard in open court to permit the media "legitimate access to the courts in order to witness all stages of proceedings, and the freedom to make accurate and honest reports of those proceedings".

II. FACTS

18. The Smith Family relies on the Affidavit of Dottie Goriah, sworn March 3, 2011. The Smith Family also relies on the factual submissions of the Provincial Advocate for Children and Youth and the Canadian Association of Elizabeth Fry Societies.

III. ISSUES

19. Should the parties be permitted to make argument in open court on this motion?

20. Should the video recordings of Ashley's mistreatment at Joliette Institution be obtained and produced by the Honourable Coroner?

IV. LAW AND ANALYSIS

A. The parties should be permitted to make argument in open court on this motion

21. The courts have long recognized the role of coroners inquests in informing and educating the public with respect to matters of compelling public interest. The Supreme Court of Canada in *Faber v The Queen* identified three purposes of a coroners inquest as follows:

> (a) identification of the exact circumstances surrounding a death serves to check public imagination, and prevents it from becoming irresponsible;
>
> (b) examination of the specific circumstances of a death and regular analysis of a number of cases enables the community to be aware of the factors which put human life at risk in given circumstances;
>
> (c) the care taken by the authorities to inquire into the circumstances, every time a death is not clearly natural or accidental, reassures the public and makes it aware that the government is acting to ensure that the guarantees relating to human life are duly respected.[2]

22. The public interest imperative of an inquest is acute in a penitentiary setting. In *Stanford v. Harris,* the Divisional Court recognized that an inquest into a penitentiary death serves to facilitate public scrutiny in respect of an institution that is not normally open to public view:

> One of the functions of an inquest into a death in a prison or other institution not ordinarily open to the public view is to provide the degree of public scrutiny necessary to ensure that it cannot be said, once the inquest is over, that there has been a whitewash or a cover-up. There is no better antidote to ill-founded or mischievous allegations and suspicions than full and open scrutiny.[3]

23. As submitted at paragraph 1 above, the Supreme Court has recognized that the media plays a pre-eminent role as a means facilitating public access to and public debate around issues within the justice system. In a penitentiary inquest, it is essential that full access to all stages

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[2] *Faber v The Queen*, [1976] 2 S.C.R. 9 at 30
[3] *Stanford v Harris* (1989), 38 Admin. L.R. 141 (Ont. Div. Ct.) at p.166

of the proceedings by the media be strictly maintained. Where discretionary infringements of media access are imposed, they must be justified on a "very high degree of probability"[4].

24. The Smith Family submits that the "open court principle" strictly limits a coroner's discretion to control her own process, where such exercise of discretion operates to frustrate access to the proceedings by the media.

25. There is no explicit statutory authority in the *Coroners Act* for the hearing of significant and contested matters in writing. The sole statutory provision applicable to the form of proceedings is section 32:

> 32. INQUEST PUBLIC – An inquest shall be open to the public except where the coroner is of the opinion that national security might be endangered or where a person is charged with an indictable offence under the *Criminal Code* (Canada) in which cases he coroner may hold the hearing concerning any such matters in the absence of the public.

Section 32 implies a strong legislative intention that proceedings in a Coroners inquest be conducted in public.

26. The Smith Family has requested that Coroner's counsel advise of any judicial authority relied on to empower the Coroner to direct that hearings be limited to written submissions on matters of significance. Counsel to the Family has not been directed to any such authorities.

27. The Honourable Coroner has not provided any criteria governing the exercise of her purported discretion to direct that hearings be restricted to written submissions, nor did she provide reasons for her decision to order a hearing in writing.

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[4] *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835; *R. v. Mentuck*, 2001 SCC 76

28. Coroner's counsel has advised interested media parties that there is no protocol for informing the media of written hearings, or for providing access to the parties' written submissions. The media has expressed frustration and concern as to the degree of access that has been afforded in these proceedings.

29. In the absence of any protocol for ensuring that hearings in writing are accessible to the media and the public, these proceedings are *de facto* non-public proceedings. The infringement of access by the media to this motion has not been justified on any standard, much less a "high degree of probability standard".

30. The Smith Family respectfully submits that to proceed with the hearing of the motion without argument in court would constitute a jurisdictional error.

B. The video recordings of Ashley's mistreatment at Joliette Institution should be obtained and produced by the Honourable Coroner

31. The Smith Family repeats and relies on the submissions of the Provincial Advocate for Children and Youth and the Canadian Association of Elizabeth Fry Societies with respect to the production of the video recordings of Ashley's mistreatment at Joliette Institution.

32. The Smith Family further submits that the potential for a suicide verdict elevates its entitlements in natural justice to production of this evidence. In *Re Beckon*, the gravity of a suicide verdict militated in favour of an elevated burden of proof:

> Before leaving this issue, I wish to make it clear that, while I do not think that a finding of suicide amounts to a finding of legal responsibility or an expression of a conclusion of law, I recognize that it is a very serious finding. In this respect, the Divisional Court quoted appropriately from R. v. H.M. Coroner for Dyfed, ex p. Evans, Q.B.D., May 24, 1984: "[A] wrong finding of suicide oppresses the living and demeans the dead". This

> emphasizes the care that must be taken before a finding of suicide is made -- an issue which I shall deal with in the next part of these reasons, which are concerned with the correct standard of proof.

33. What Ashley intended on October 19, 2007 is anticipated to be a central issue in this inquest. The "care that must be taken before a finding of suicide is made" demands that the Family have access to any and all productions that may reflect her state of mind leading up to her death. In recognition of the Family's natural justice entitlements, the Honourable Coroner has already ruled that the scope of this inquest encompasses matters that could have impacted Ashley's state of mind at the time of her death, without regard to temporal or provincial boundaries.

34. The materials sought represent the best evidence of Ashley's treatment by CSC officials, as well as her behaviour and demeanor. Without the video recordings, the only remaining evidence of the events at Joliette consists of the evidence of CSC officials, whose interests are potentially adverse to that of the Smith Family. The videos represent independent and objective evidence of these events.

35. The value of video evidence has been recognized by the Supreme Court, especially in cases in which the events depicted result in death:

> 21 The video camera on the other hand is never subject to stress Through tumultuous events it continues to record accurately and dispassionately all that comes before it. Although silent, it remains a constant, unbiased witness with instant and total recall of all that it observed The trier of fact may review the evidence of this silent witness as often as desired. The tape may be stopped and studied at a critical juncture

> 22 So long as the videotape is of good quality and gives a clear picture of events and the perpetrator, it may provide the best evidence of the identity of the perpetrator. It is relevant and admissible evidence that can by itself be cogent and convincing evidence on

the issue of identity. Indeed, it may be the only evidence available. For example, in the course of a robbery, every eyewitness may be killed yet the video camera will steadfastly continue to impassively record the robbery and the actions of the robbers. Should a trier of fact be denied the use of the videotape because there is no intermediary in the form of a human witness to make some identification of the accused? Such a conclusion would be contrary to common sense and a totally unacceptable result It would deny the trier of fact the use of clear, accurate and convincing evidence readily available by modern technology. The powerful and probative record provided by the videotape should not be excluded when it can provide such valuable assistance in the search for truth. In the course of their deliberations, triers of fact will make their assessment of the weight that should be accorded the evidence of the videotape just as they assess the weight of the evidence given by *viva voce* testimony.

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28 Once it is established that a videotape has not been altered or changed, and that it depicts the scene of a crime, then it becomes admissible and relevant evidence. Not only is the tape (or photograph) real evidence in the sense that that term has been used in earlier cases, but it is to a certain extent, testimonial evidence as well. It can and should be used by a trier of fact in determining whether a crime has been committed and whether the accused before the court committed the crime. It may indeed be a silent, trustworthy, unemotional, unbiased and accurate witness who has complete and instant recall of events. It may provide such strong and convincing evidence that of itself it will demonstrate clearly either the innocence or guilt of the accused.[5]

36. To deprive the Smith Family of "a silent, trustworthy, unemotional, unbiased and accurate witness" as to Ashley's state of mind mere weeks from her death would unfairly deprive it of its ability to challenge a suicide verdict, and risk a finding that would "oppres[s] the living and demea[n] the dead".

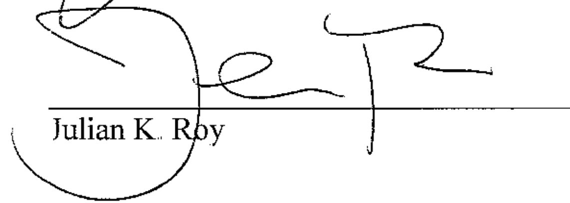
V. **ORDER SOUGHT**

37. The Smith Family seeks the relief set out in its Notice of Motion as well as that described in the submissions of the Provincial Advocate for Children and Youth and C.A.E.F.S. In addition, the Family seeks an Order that the motion herein be heard in open court, with oral argument, on a date well in advance of the commencement of the inquest.

[5] *R. v Nikolovski*, [1996] 3 S.C.R. 1197

ALL OF WHICH IS RESPECTFULLY SUBMITTED, THIS 3RD DAY OF MARCH, 2011.

Julian N. Falconer



Julian K. Roy