

Coroner in Ashley Smith inquest faces barrage of criticism

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Dr. Bonita Porter is presiding over the high-profile inquest into the death of Ashley Smith.

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It has been a rough go for the Ontario coroner's office and Bonita Porter, the doctor presiding over the high-profile inquest into the prison death of mentally-ill teenager Ashley Smith.

Two weeks in and a panel of judges has slapped down Porter's decision to exclude video evidence. Newspaper editorials and columnists have critiqued her decisions, including rulings on access to exhibits in what is a public hearing.

Porter, facing a barrage this past week from media and lawyers, is aware of the fuss. She playfully quipped this week: “It’s caused a little bit of a kerfuffle, hasn’t it?”

But, after expensive legal wrangling and missteps — on such a high-profile case — it has some asking questions.

Among them: Should doctors be playing lawyer?

The inquest, expected to last until the end of the year, was to enter its third week Monday but was unexpectedly adjourned late Thursday. In a brief email, the coroner’s office said Porter required time to deliberate on access rulings. Only certain parties were notified and the move left many parties mystified — and some clearly frustrated.

At one point during the inquest’s first week, Porter, who began her career as a family doctor and researcher, suggested reporters who ask counsel for exhibits may be held in contempt.

This, she later explained, was mentioned out of concern that video of the moments leading to Smith’s death would end up on YouTube. Fair enough, the parties — 14 groups have standing — seemed to agree. (The inquiry has yet to figure out a way to deal with that issue.)

Porter, who like other presiding coroners has some in-house legal training, has since clarified that it would be lawyers who would be held in contempt if they shared exhibits — not reporters.

And then came the court decision on one of her earlier rulings.

In a pre-inquest decision, Porter, deputy chief coroner in charge of all inquests in Ontario, ruled the hearing need not examine all of the video and other evidence of the teen’s years in various institutions.

This includes a videotape of Smith being injected with tranquilizers and left strapped to a gurney in a Quebec facility for nearly half a day, without water and food, as well as footage of her taped to a plane seat during a transfer between jails.

Porter found no “nexus” between these earlier happenings and Smith’s 2007 death in Grand Valley Institution in Kitchener, a federal facility where Smith tied a ligature around her neck and choked while under direct watch of staff.

Smith’s family, the Provincial Advocate for Children and Youth and the Canadian Association for Elizabeth Fry Societies, went to court to challenge the coroner, arguing

video of Smith's behaviour and treatment in out-of-province prisons speaks to her state of mind when she died.

The [Divisional Court determined](#) Porter had “unreasonably restricted the examination of potentially relevant evidence in finding that there is no demonstrated nexus between the death of Ashley Smith and the incidents shown on video.”

Porter's own definition of the scope of the inquiry was to include factors that may have impacted Smith's state of mind on the day of her death.

“It is difficult to understand why the coroner would conclude that the videos are irrelevant to the subject matter of the inquest given the scope of the inquest as she herself has defined it,” read the decision.

“It is a denial of natural justice,” is how one judge put it in the unanimous decision.

Last week, a dozen lawyers, including Porter's own counsel, argued against her decision to hold in contempt any counsel found to have shared exhibits with reporters or the public. They also challenged a requirement that reporters fill out a form and explain why they want access to exhibits.

It's unclear when Porter may rule on the challenges.

Since Porter is in the midst of the Smith inquest, it would be “inappropriate” for her to agree to an interview, a spokesperson for the Office of the Chief Coroner said in an email.

Ontario's chief coroner, Dr. Andrew McCallum, was not available for an interview, said the spokesperson.

Porter, in her late 50s, is considered one of the most experienced presiding coroners in Ontario. She has served in that role since 1991, when she was regional coroner in Niagara.

In an interview with the *Globe and Mail* in 2008, for a story naming her as one of the top 100 women in Canada, Porter said she'd long been “attracted to the medical-legal aspect of death investigation.”

Porter, who got her medical degree at McMaster University and has worked as a pharmaceutical researcher, lauded Ontario's system as one focused on public safety.

She said the coroners “take every case as a problem and what we can learn from it, and bring whatever we learned to the attention of those who might be in a position to act on it.”

Those who know the mother of three and grandmother say she is a stickler for details, is cognizant of the role of the coroner and protective of the scope of inquests, which can become a circus of competing and like-minded parties.

“There’s the saying, ‘The devil’s in the details of anything,’ and this type of work is suited to me personally,” she told the *Globe*. “I am detail-oriented, which means that in proceedings and things like that, I have to dot all the I’s and cross the T’s.”

Lawyer Barry Swadron, who has been a counsel at inquests going back decades and has acted for both families and government, says coroners have an “extremely broad discretion” in what is heard at inquests.

He has noticed a narrowing of the scope of inquests over the years and so have other medical health professionals and lawyers who were interviewed but asked not to be named.

Anecdotally, this appears to be true, but is likely driven by a desire to avoid inquests that last more than a year and can drain resources. There have been no official directives to shorten inquests, said the coroner’s office. In fact, in one recent case involving ambulance services, a coroner sought to expand the scope of an inquest and saw his decision reversed at Divisional Court.

Yet, said Swadron, “I have sensed an increasing feeling of frustration of lawyers who are genuinely trying to assist the inquest process.

“The purpose of an inquest is to shed light on what led to the death so that the death of a similar nature can be avoided in the future. Unless the process is revisited and revamped to permit a broader scope and greater transparency, the public will be cheated.”

Toronto lawyer Peter Rosenthal believes some of the narrowing of scope is due to a desire by coroners to limit exposure to government institutions and individuals. But with no blame assessed, Rosenthal says there is even more reason to be open.

“Unfortunately many coroners presiding at inquests artificially limit the scope of the inquiry and in my view this interferes with the inquest performing its important function.”

A coroner’s inquest is tasked with answering five key questions: Who was the deceased? Where did they die? When? What was the medical cause of death? And was that death natural, accidental, a suicide or a homicide?

Blame, once a part of inquests, is no longer part of the equation.

In Quebec, doctors investigate the circumstances of death and lawyers or judges preside at the inquest.

Not so in Ontario.

Coroners who wish to preside over inquests take a specialized course that lasts three-and-a-half days and they receive two days of continuing education training every two years.

No one disputes that medical professionals must be tasked with investigating the medical causes of death, but over the years an ongoing debate has questioned whether doctors have the legal tool kit necessary to deal with complex inquests.

While other provinces have adopted a medical examiner's model, Ontario is one of the few still using the coroner's model, where doctors preside over the inquests.

Julian Falconer, who is representing the Smith family and led the successful judicial review to quash Porter's decision on the video evidence, has been counsel at dozens of inquests, has lectured on the subject and published an annotated Coroner's Act book.

Falconer would not speak on specific inquests, but says coroners struggle with complex legal principles.

"It's arguably unfair to expect a medical professional to navigate complex legal proceedings the way a judge or lawyer adjudicating a commission of inquiry would," Falconer said in an interview.

"But there is a compelling argument that we may well have reached the stage with these complex systemic death inquests that we should be taking a hard look at the alternatives other provinces are pursuing."

What that would involve? Breaking up the process into two branches — investigative and adjudicative — and leaving the latter to lawyers and judges. The benefits might include fewer legal hiccups and perhaps fewer costly court challenges.

"Frankly, very few compelling arguments exist for confining this to the role of doctors," said Falconer.

There is no definitive count of court challenges of coroners' rulings, although this is the second on the Smith case alone. The chief coroner's office said there have been less than 10 in the past five years.

It's important to note, said one former public safety official who asked not to be named, that even the best judges have decisions overruled by higher courts. Porter, as a more experienced coroner, would also be expected to work the most complex and high-profile cases, which increases the chances of challenges.

The coroner's office, in an email to the *Star*, noted that other quasi-judicial processes, such as the labour relations board and housing tribunal, use non-lawyers to preside over tribunals, and that the "value of having a presiding coroner with medical training has been recognized by the courts."

But to be sure, the role of coroner's court — to determine cause of death and prevent similar deaths through recommendations — puts it in a different realm than other quasi-judicial bodies.

If Porter is feeling the heat, she hasn't shown it in coroner's court. Born in Regina, she credits her upbringing for her positive attitude, according to the 2008 *Globe* article.

She also mentioned a fight with breast cancer and that, as of 2008, she had been cancer-free for five years.

Porter also has a sense of humour.

She mused in that profile piece that when she served a stint as chief coroner during the tumultuous inquiry into discredited pathologist Charles Smith, she bought a lot of jewelry.

"That's how I deal with stress," she said.

