

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
AND IN THE MATTER OF the removal of Dr. Porter as Coroner

NOTICE OF MOTION

TAKE NOTICE THAT the Moving Parties, the Smith Family (Coralee Smith, Herb Gorber and Dawna Ward) and the Canadian Association of Elizabeth Fry Societies (hereafter “CAEFS”), will make a motion to the Chief Coroner, Dr. Andrew McCallum on September 12, 2011, or on such earlier date as can be obtained.

THE MOTION IS FOR THE FOLLOWING:

1. That the Chief Coroner vacate and/or vary the without notice order dated June 29, 2011, which summarily removed the presiding Coroner, Deputy Chief Coroner Porter, and appointed Dr. Carlisle;
2. That the Chief Coroner provide by way of interim relief, production of the factual basis for removing Dr. Porter and appointing Dr. Carlisle under section 25(3) of the *Coroners Act*; and
3. Such further and other orders as counsel may advise and the Chief Coroner permits.

THE GROUNDS FOR THE MOTION ARE:

1. Thirteen parties (not counting the media parties on the motions) represented by counsel, have standing in these inquest proceedings.
2. The Chief Coroner, mid-hearing, intervened in the inquest and issued an order under section 25(3) of the *Coroners Act* without any notice to the parties and without any opportunity for the parties to be heard on the merits of a substitution order (including whether such an order

should bear terms - for example, that Dr. Porter issue rulings in respect of the matters under reserve).

3. The disclosed circumstances as to the removal of Dr. Porter raise far more questions than answers. On June 21, 2011, the last date upon which the Inquest into the death of Ashley Smith convened, then presiding Coroner Dr. Porter stated on the record that she would issue rulings the following week (i.e. the week of June 27, 2011) in respect of three matters that had been under reserve since May 25, 2011.
4. To date, Deputy Chief Coroner Porter has not issued the above rulings under reserve.
5. On June 29, 2011, eight days after she expressed her intention to deliver rulings by June 30, 2011, Dr. Porter wrote a letter to all of the parties (without any previous notice to counsel, including Coroner's Counsel) that she would be electing to "exercise her retirement option" in five months, being November 2011. Dr. Porter's letter also states:

Dr. McCallum [the Chief Coroner of Ontario] and I [the Deputy Chief Coroner of Ontario] agree that it is in the best interest of the inquest that the change of coroner occur now at this early stage for the jury, having heard just three days of evidence.

I will not be ruling on matters that are before me at this time.

Finally, the letter indicates that Dr. Carlisle had been appointed to preside at the inquest.

6. Coroner's Counsel provided Dr. Porter's letter to the parties with the advice that they had only learned that day of the Chief Coroner's order removing Dr. Porter and appointing Dr. Carlisle. In his email of June 29, 2011, Coroner's Counsel, Fred Duprey, stated:

The attachments may raise a number of questions. Coroner's counsel were made aware of this development today. We have nothing to add until we receive direction from the coroner.
7. In a press release issued by the Chief Coroner on June 29, 2011, the Smith Family and CAEFS learned that Dr. Porter's removal and Dr. Carlisle's appointment would be "effective immediately" and that the new adjudicator would "review and decide on a number of legal and evidentiary issues linked to the inquiry."

Status of the Outstanding Motions

8. As a matter of law, a new adjudicator can only rule on matters argued before him. Put another way, the three outstanding matters, having been argued before Dr. Porter, can only be determined by Dr. Porter. Dr. Carlisle is not legally entitled to rule on the three matters that were argued before another adjudicator.

Jurisdiction to Appoint a Replacement Coroner

9. There is only one statutory provision in the *Coroners Act* that authorizes the Chief Coroner to intervene in an ongoing Inquest and replace a presiding Coroner. It is section 25(3) of the *Coroners Act* which states as follows:

If the Chief Coroner is of the opinion that a coroner is unable to continue presiding over an inquest for any reason, the Chief Coroner may direct another coroner to continue the inquest. [emphasis added]

10. It is only in the rarest of circumstances that any outside agency (ie. an official who is outside the specific court process), including the Chief Coroner, can intervene in a court process and substitute adjudicators. The *Coroners Act* requires a presiding Coroner to be “unable to continue” before the Chief Coroner can appoint a replacement pursuant to section 25(3). As a matter of common sense, “unable” must mean incapable of continuing. In other words, section 25(3) can only be invoked in extreme cases, where the presiding Coroner truly lacks capacity to continue, as a result of, for example, a significant personal or health problem.
11. The Smith Family and CAEFS take the position that a dangerous precedent will be set if section 25(3), intended to allow for the intervention of a Chief Coroner to change a presiding Coroner in the face of incapacity, can be used as a matter of convenience; either institutional convenience for the Chief Coroner, or personal convenience for the presiding Coroner.
12. Neither the parties nor their counsel, nor Coroner’s Counsel, nor the Ontario public have been apprised of what transpired between June 21 and June 29, 2011 to render Dr. Porter “unable to continue” with this inquest.
13. There is nothing in Dr. Porter’s letter of June 29, 2011 that in any way suggests that she is “unable to continue” or has been in any way rendered incapable of issuing the three rulings

that have been outstanding since May 2011. In fact, all evidence suggests that Dr. Porter is able to continue. Dr. Porter continues to the present day to fulfill her professional duties as Deputy Chief Coroner (in charge of Inquests for the Province of Ontario). The prospective exercise of a retirement option some five months later cannot meet the definition of “unable to continue” as contemplated by law. Indeed, there are countless examples of coroners discharging their duties, including presiding over inquests, beyond their retirement date (e.g. the former Chief Coroner Dr. Ross Bennett).

14. There is thus a factual vacuum as to what, if anything, rendered the Deputy Chief Coroner “unable to continue”. While it is apparent that the Chief Coroner and the Deputy Chief Coroner met to discuss the matter prior, neither Coroner’s Counsel nor counsel for the parties have been apprised of the legal basis for the substitution of adjudicators.
15. It would be precipitous to proceed in the absence of clarification as to what legal basis, if any, exists for the s. 25(3) order in this case. Failure to ensure that the current substitution order is legally valid could ultimately imperil the validity of the entire proceeding. It would be open to any party, unhappy with the jury’s ultimate recommendations, to seek a declaration of invalidity flowing from the thus far unexplained substitution.
16. The Smith Family and CAEFS take the position that in the face of an informational vacuum as to what rendered the Deputy Chief Coroner “unable to continue” (and at minimum issue the three rulings), a reasonable apprehension exists that these proceedings have fallen victim to interference from “on high” on the basis of convenience rather than true incapacity of the adjudicator. There is a reasonable apprehension that some outside agencies intervened to remove one adjudicator and appoint another. In light of the history of these proceedings to date, this development creates a reasonable apprehension of institutional bias.

Appropriate Forum for this Motion

17. Only the Chief Coroner for Ontario can issue an order under section 25(3) of the *Coroners Act* substituting coroners and, therefore, only a Chief Coroner can vacate and/or vary such an order. A section 25 hearing before the Chief Coroner is the appropriate forum for such relief. This is precisely the process adopted by Chief Coroner James Young in respect of the

Inquest into the Death of Marie Ledoux et al that was proceeding before Regional Coroner Bechard in Kingston, Ontario.

Procedural Background

18. On March 1, 2011, the Smith Family, the Provincial Advocate for Children and Youth (“PACY”), and CAEFS all filed a Notice of Motion for production. Together, the parties sought the Joliette videos and any other videos depicting transfers of Ashley Smith between institutions, but particularly the video of April 12, 2007 where duct tape was applied to her person as restraints.
19. On March 25, 2011, Dr. Porter ruled that she would not seize any of the above videos.
20. The Smith Family, PACY and CAEFS applied for judicial review of Dr. Porter’s decision. Upon the release of the Divisional Court’s ruling, all parties to the inquest participated in a joint submission on May 25, 2011 (including Coroner’s Counsel with Correctional Services of Canada (“CSC”) taking no position). This joint submission stated that given the Divisional Court’s ruling, and the fact that no counsel would be offering new submissions on the question of production of the Joliette and duct taping videos, that a seizure order under s. 16(2)(c) issue, and the videos be produced to the parties as relevant and material information.
21. Notwithstanding the joint submission, Dr. Porter reserved her decision. This ruling is yet outstanding.
22. The other two motions outstanding before Dr. Porter are:
 - 1) a without notice motion brought at the outset of the proceedings by CSC requesting that the faces of correctional officers be blurred in video evidence; and
 - 2) a without notice direction made by the Deputy Chief Coroner with respect to counsel’s ability to share filed exhibits.

23. As stated above, arguments on these three motions concluded on May 25, 2011. After nearly a month, Dr. Porter informed the parties on June 21, 2011 that she would release her decisions on these motions in the following week. Instead, that week, the parties received notification of her removal and the appointment of Dr. Carlisle.
24. Such further and other grounds as counsel may advise and the Chief Coroner permits.

THE FOLLOWING DOCUMENTARY EVIDENCE WILL BE USED:

1. The Notice of Motion, herein;
2. The transcript of the Joint Submission on the reconsideration of the Motion for Production;
3. The transcript of proceedings on June 21, 2011;
4. The email of Coroner's Counsel, Fred Duprey dated June 29, 2011;
5. The letter of Deputy Chief Coroner Dr. Bonita Porter dated June 29, 2011;
6. The press release issued by the Office of the Chief Coroner dated June 29, 2011;
7. The letter of direction from the Chief Coroner Dr. Andrew McCallum dated June 29, 2011;
and
8. Such further and other documentary evidence as counsel may advise and the Chief Coroner permits.

DATED this 20th day of July 2011

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