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Submissions of the Affected Families Group in Response to the Closing Argument of Dr. Charles Smith

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Response to Dr. Smith's Submissions Regarding the Mandate of the Commission

1. With respect to the submissions made by Dr. Smith in paragraphs 21 to 46 of his written submissions, it is simply not correct to suggest that the Commission is precluded from assessing the truth of specific allegations made during the course of the Inquiry regarding Dr. Smith's conduct, simply because those allegations are made in the context of individual cases.

2. Dr. Smith's use of two recent decisions of the Court in connection with the Cornwall Inquiry is mistaken.

3. The Cornwall Public Inquiry's mandate is to "inquire into and report" on the institutional response of the justice system and the public institutions to allegations of historical abuse in young people in the Cornwall area.[1]

4. *MacDonald v. Ontario (Cornwall Public Inquiry)*, relied upon by Dr. Smith in paragraphs 33 and 34 of his submissions, involved a constitutional challenge to the Cornwall Inquiry on the basis that it was an impermissible intrusion into the criminal law sphere. The applicant argued that the Commissioner intended to make findings of fact with respect to specific allegations that he had sexually abused young persons. The Commissioner's response was that he intended to hear evidence regarding the allegations, but only for the purpose of assessing the institutional response to the allegations. The Divisional Court accepted that the Commissioner could assess the reasonableness of the institutional response without having to make findings that the allegations were true.

1 See www.cronwallinquiry.ca/en/legal

5. In the Court of Appeal decision in *Ontario (Provincial Police) v. Cornwall (Public Inquiry)*[2], on the other hand, the issue was whether the Commissioner had exceeded his jurisdiction by proposing to hear evidence of alleged sexual abuse of two complainants outside the time period mandated by the Inquiry.

6. This Commission has a much different mandate from that established in the Cornwall Inquiry.

7. Unlike in the Cornwall Inquiry, where only the institutional response is at issue, this Commission's mandate requires it to conduct a systemic review, assessment and report on "the policies, procedures, practices, accountability and oversight mechanisms, quality control measures and institutional arrangements" of pediatric forensic pathology in Ontario from 1981 to 2001, as they relate to its practice and use in investigations and criminal proceedings.

8. It would be impossible for the Commissioner to make any assessment and report of the "practices" of pediatric forensic pathology in Ontario during the years of the mandate without making findings of fact on Dr. Smith's practices in individual cases.

9. Moreover, the allegations made about Dr. Smith's misconduct in specific cases (for example, allegations of confirmation bias) are directly relevant to issues of accountability, oversight and quality control. The evidence regarding those allegations must therefore be considered by the Commissioner and findings of fact made, if appropriate, based on the evidence.

10. The Commissioner is precluded from reporting on specific cases by the terms of the mandate. That means that he cannot engage in an effort to determine the facts of any particular

2 [2008] O.J. No. 153 (Ont.C.A.)

case as he would have to do in a trial context. Nor can he adjudicate on specific issues of criminal responsibility or civil liability raised by those cases.

11. However, nothing in the mandate prevents the Commissioner from making specific findings of fact based on evidence heard regarding the specific cases examined by this Inquiry, provided that they are relevant to and form a part of his systemic review and assessment of pediatric forensic pathology in the time period covered by the mandate.

Response to Dr. Smith's Submissions Regarding the Sharon and Jenna Cases

12. The central fallacies in Dr. Smith's submissions with respect to the Sharon and Jenna cases are that his conduct was reasonable, and had minimal impact on the course of the criminal proceedings.

(a) Sharon

13. Dr. Smith argues in his submissions that his conduct and opinions in this case were reasonable, primarily on the basis that (i) he had limited experience with dog attacks and penetrating wounds[3]; (ii) the dog attack theory was not seriously raised until 6 months after Sharon's death[4]; and (iii) he was not the only one to reach this opinion[5].

14. For the reasons set out below, it is submitted that these arguments are fallacious.

(i) limited experience

15. As a matter of simple logic, Dr. Smith's lack of experience cannot be used to support the reasonableness of his opinion!

3 Dr. Smith's Closing Submissions, para 654,655

4 Dr. Smith's Closing Submissions, para. 656, 666 and following

5 Dr. Smith's Closing Submission, para. 661-663, 677 and following

16. The most it could demonstrate is that he may have had an honest belief in his own erroneous opinion at the time it was given. That is a matter of debate, given Dr. Smith's own admissions regarding his understanding of his role in the judicial process.[6]

(ii) dog attack theory never seriously raised

17. First, Dr. Milroy's opinion regarding the unreasonableness of Dr. Smith's opinion was not based on what Dr. Smith should have done with information given to him by the police.

18. Rather, it was based on the pathology of the wounds on Sharon's body, such as:

a. the distribution of the injuries;

b. the irregular nature of the puncture wounds coupled with extensive bruising and abrasion;

c. the photograph of markings highly suspicious of a dog's arch;

d. the scalp wound, which he described as being "torn or ripped away"; and

e. the fact that the wounds did not look like stab wounds made by a knife or scissors, given their irregular edges.[7]

19. Whether the dog theory was seriously raised by the police or not, it was Dr. Smith's job to determine the cause of death, or if he could not do so to consult with someone more experienced who could.

6 See AF6 Closing Submission, para. 120

7 Evidence of Dr. Milroy, November 19, 2007, page 54, line 8-24

20. Second, the argument that the dog attack theory was not seriously raised until some six months after Sharon's death conveniently overlooks Dr. Smith's *own role* in that theory not being taken seriously earlier.

21. Dr. Smith significantly undermined the possibility of a dog attack when he opined at the conclusion of the autopsy that the penetrating injuries were stab wounds.[8]

22. When concerns were brought to Dr. Smith's attention by the police two days later about the marks on Sharon's upper back, he effectively shut down the prospect of the dog attack being taken seriously by unequivocally opining that they were "not domestic or wild animal in any way".[9]

23. For Dr. Smith to now suggest that his failure to properly assess the wounds was because the prospect of a dog attack was never seriously raised by the police is, frankly, ridiculous.

24. In any event, Dr. Smith's conduct at the preliminary inquiry, by which time the "new" dog attack theory was being raised "seriously" – was anything and everything but reasonable. As set out in our original submissions, Dr. Smith misled the court and opposing counsel about his qualifications to assess the wounds, his examination of the scalp, and the certainty of his own opinion, all in order to assist the Crown demolish the dog attack theory.[10]

25. The suggestion by Dr. Smith that his testimony was "in good faith"[11] is equally ridiculous, unless "good faith" was meant in the context of his acknowledged role in assisting the Crown. Recall that Dr. Smith has clearly admitted that he advocated for the Crown's position at the preliminary inquiry and knowingly overstated his confidence in his evidence at the

8 Sharon Overview Report, PFP144453, paragraph 57

9 Sharon Overview Report, PFP144453, paragraph 74

10 AFG Closing Submissions, paragraphs 275 to 280

11 Dr. Smith's Closing Submissions, paragraph 700

preliminary, notwithstanding that he knew by that time that his role was to be neutral and objective.[12]

(iii) others reached a similar opinion

26. Dr. Smith relies on the fact that Mr. Blenkinsop, Dr. Bechard, Dr. Wood and Dr. Chiasson all either supported or did not express any concerns about Dr. Smith's opinion that Sharon's injuries were stab wounds, not dog bites.[13]

27. However, for the reasons which follow, the involvement of these individuals does not in any way support the notion that Dr. Smith's opinion was reasonable:

a. Mr. Blenkinsop was not a pathologist, and since he is deceased we don't know what he thought of Dr. Smith's opinion.

b. Dr. Bechard is not a pathologist, and he did not view the body.

c. Dr. Wood also did not view the body, which he testified would have been "very important" in analyzing the wounds.[14] In any event, Dr. Wood now accepts that his opinion was wrong.

d. Dr. Chiasson did not view the body. He also testified that he had little experience with dog bites and did not have a high level of comfort in this area.[15] Further, we adopt the submissions of OCCO (see para. 234 of OCCO's Closing Submissions) that the meeting at which Dr. Chiasson participated was in 1999, ***after*** the preliminary inquiry, and that he had no involvement in the case before then.

12 AFG Closing Submissions, paragraphs 275, 277

13 Dr. Smith's Closing Submissions, paragraph 662, 678

14 Evidence of Dr. Wood, January 23, 2008, pages 50-52

15 Evidence of Dr. Chiasson, December 11, 2007, pages 106, lines 16-18, page 112, lines 5-18

28. Dr. Smith also attempts to downplay his role in the charging and continuing prosecution of Louise Reynolds by referring to the circumstantial evidence suggesting she was guilty of a murder.[16]

29. Had Dr. Smith acknowledged from the outset (rather than 20 years later) his lack of experience in penetrating wounds and ensured that the autopsy was performed by a forensically trained pathologist, the criminal investigation would have ended at that point, ***since it would have been clear that there was no homicide.***

Jenna

30. In the Jenna case, Dr. Smith argues that his opinion as to timing of the injuries was reasonable, and he takes issue with Dr. Pollanen's view that his faulty diagnosis delayed the prosecution and conviction of the true perpetrator of the crime.[17] He also points to the evidence of Brenda's "clear and unequivocal" admission that she assaulted Jenna on the evening of January 20, 1997.

31. In particular, Dr. Smith points to his evidence at the preliminary inquiry, which he says provides a time window of between 4 and 32 hours for the injuries. He also says that he did not testify that the injuries all occurred at once.

32. Dr. Smith argues that because the liver injury could not be excluded as contributing to Jenna's death, and because it "could be as much as 48 hours old, sitting adjacent to other

16 Dr. Smith's Closing Submissions, paragraph 673

17 Dr. Smith's Closing Submissions, paragraph 831

abdominal injuries that were likely quite recent", it was reasonable for him not to "narrow down the window of time the injuries could have been inflicted".[18]

33. This reasoning, however, is superficial.

34. The opinion which needs to be evaluated is that which Dr. Smith gave the police during their initial investigation, and which the police relied upon in charging Ms. Waudby, not what he later testified to at the preliminary inquiry.

35. As outlined in our initial submissions, that opinion appears to have been that the injuries occurred "prior to 1700 on January 21, 1997" and "within a twenty-four hour period."[19]

36. As Drs. Milroy and Pollanen have opined, the analysis in this case is straightforward – the injury to the pancreas and duodenum was fatal and must have occurred within 6 hours of death because there was no evidence of healing.[20]

37. Indeed, as Dr. Milroy put it:

> "the evidence was there from the start to indicate that this child did not survive very long from the infliction of the injuries. … the key in this case was the fatal injury was available. You can look at the fatal injury, which was the rupture of the pancreas and the duodenum, and that could not have occurred longer than six hours. The other thing is that the clinical state of a child who has had the injury inflicted will not be normal. So if the child was described as being normal when it was handed over to the babysitter, that was an instant clue that the child had not been struck in the abdomen at that stage."[21]

18 Dr. Smith's Closing Submissions, paragraph 825

19 AFG Closing Submissions, para. 231 and see Evidence of Detective Charmley, Jan 15 2008 at p. 152, l. 8 to 153, l. 25.

20 Evidence of Dr. Milroy, November 19, 2007, page 124 line 17 to page 125 line 13, page 134, lines 15-23, page 135, lines 9-13; Jenna Overview Report, PFP144684, paragraph 172

21 Evidence of Dr. Milroy, November 19, 2007, page 134, line 24 to page 135, line 19

38. The uncertain timing of the liver injury, its possible contribution to Jenna's death, and whether it could have occurred at the "start of the process"[22] have no bearing on this analysis. Dr. Smith's suggestion to the contrary is illogical and unreasonable.

39. The suggestion by Dr. Smith that he did not play a central role in Brenda Waudby being charged and prosecuted for murder, because there was circumstantial evidence of her guilt, is equally unreasonable.[23] Had Dr. Smith told the police that the fatal injuries must have been inflicted within 6 hours of death, they would have had to turn their attention away from Brenda Waudby and to the babysitter:

> MR. PETER WARDLE: And if Dr. Smith had said that the injuries had occurred within a few hours of death, that would have led the police in a very different direction, correct?
>
> MR. LARRY CHARMLEY: Absolutely. I mean, we wouldn't have ruled out everybody initially, but generally, the investigation would have pursued that avenue.
>
> MR. PETER WARDLE: So the questions My Friend asked you about reasonable and probable grounds; reasonable and probable grounds, of course, is based on the information known to the police at the time, correct?
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> MR. LARRY CHARMLEY: Yes.
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> MR. PETER WARDLE: And at the time, your opinion is that you had reasonable and probable grounds to charge Brenda Waudby based on the pathology information that was coming from Dr. Smith, correct?
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> MR. LARRY CHARMLEY: It -- it fit in with all of the other information we investigated and found to make it reasonable given that the information of an assault occurring the night before and the information from Dr. Smith that the injuries that caused death could have occurred up to twenty-four (24) hours prior to death.
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> MR. PETER WARDLE: And had Dr. Smith told you, as we heard recently in this Inquiry from Dr. Milroy, that the child died

22 Evidence of Dr. Milroy, Nov. 19, 2007, page 135, line 8-9

23 Dr. Smith's Closing Submissions, paragraphs 834, 835

> within a few hours, under six(6) hours, from the infliction of the fatal injury, you would agree with me that the police would not have had reasonable and probable grounds to charge Brenda Waudby, correct?
>
> MR. LARRY CHARMLEY: That's correct. Had I been that definite, we would not have reasonable grounds.[24]

40. Finally, with respect to the cautioned statement, described by Dr. Smith as a "clear and unequivocal" admission, we simply note that the circumstances surrounding the taking of that statement and the subsequent plea are controversial and disputed by Ms. Waudby, who has not had an opportunity to testify at this inquiry. This issue was briefly canvassed with Mr. Gilkinson in cross-examination and is referred to in our Closing Submissions at paragraphs 256-359.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

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24 Evidence of Officer Charmley, Jan 15, 2008, p. 154, l. 12 to p. 155, l. 20