

DATE: 2007-08-17

# INQUIRY INTO PEDIATRIC FORENSIC PATHOLOGY IN ONTARIO

## RULING ON STANDING AND FUNDING

### COMMISSIONER GOUDGE:

I have been appointed by Order in Council 826/2007 to conduct a systemic review of the practice and use of pediatric forensic pathology in the criminal justice system in Ontario, particularly between 1981 and 2001. I am to do so in order to make recommendations to restore and enhance public confidence in pediatric forensic pathology in Ontario and its future use in investigations and criminal proceedings.

Paragraph 4 of the Order in Council reads as follows:

The Commission shall conduct a systemic review and assessment and report on:

- a. 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;
  - b. the legislative and regulatory provisions in existence that related to, or had implications for, the practice of pediatric forensic pathology in Ontario between 1981 to 2001; and
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- c. any changes to the items referenced in the above two paragraphs, subsequent to 2001

in order to make recommendations to restore and enhance public confidence in pediatric forensic pathology in Ontario and its future use in investigations and criminal proceedings.

Pursuant to this mandate, on June 18, 2007, the Commission published Rules of Standing and Funding and invited those interested in seeking standing and funding to apply in writing by July 16, 2007. The Commission received eleven applications by that date. On August 8, 2007, I heard oral submissions in support of nine of these applications. The other two applicants chose not to appear, but simply relied on their written applications. Of the eleven applicants, four requested standing only, and seven requested both standing and funding.

Subsection 5(1) of the *Public Inquiries Act*, R.S.O. 1990 c. P.41 addresses the issue of standing as follows:

A commission shall accord to any person who satisfies it that the person has a substantial and direct interest in the subject-matter of its Inquiry an opportunity during the Inquiry to give evidence and to call and examine or to cross-examine witnesses personally or by counsel on evidence relevant to the person's interest.

The Rules of Standing and Funding issued by the Commission make clear that standing will be granted at the discretion of the Commissioner, in accordance with this statutory provision, the Commission's Terms of Reference as contained in the Order in Council,

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the Commission's systemic nature, and the desirability of a fair and expeditious proceedings.

In addition to these criteria, I have been guided in the exercise of my discretion as to the nature of standing by several additional considerations: first, whether the applicant may be significantly affected by the Commission's recommendations; second, whether the applicant is uniquely situated to offer information to the Commission that will help it with its work; and third, the need to balance the fundamental importance of a thorough inquiry with the need to avoid duplication so far as possible, so that the Commission can properly discharge its mandate and do so in a timely fashion.

With these factors in mind, I turn to the eleven requests for standing that the Commission has received.

#### **A. Institutions Seeking Standing**

Three institutions have sought standing: the Office of the Chief Coroner for Ontario ("OCCO"), Her Majesty the Queen in Right of Ontario ("Ontario") and the Hospital for Sick Children ("HSC"). Because of their involvement in the events that led to the establishment of the Commission, all three have information to offer that will be

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important to the Commission's work and all three may be affected by my

recommendations. All three should be awarded standing. I will elaborate briefly on my reasons for granting standing to all three.

The OCCO is responsible for investigating deaths in Ontario, including pediatric deaths. Where required, it does so with assistance of pediatric forensic pathology. It utilizes both staff pathologists and pathologists working on a fee for service basis. The OCCO has a vital need for, and a long history with, pediatric forensic pathology in Ontario. On April 19, 2007, the OCCO announced the results of its review of certain cases of suspicious child deaths, which found that some of the factual conclusions of Dr. Charles Smith were not reasonably supported by the materials available. This led directly to the establishment of this Commission. The OCCO's central position to the work of the Commission amply justifies my decision to grant it standing.

Ontario, through the Attorney General, the chief law officer of the Crown, is mandated to superintend all matters connected with the administration of justice in Ontario. It therefore has a vital interest in the role of pediatric forensic pathology in criminal prosecutions in the province. Ontario is also responsible for the Ontario Provincial Police and therefore has a clear interest in the interaction between forensic pathologists and police during criminal investigations into pediatric deaths. As well, Ontario is responsible

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for the administration of the legal aid system and for the regulatory regimes of health care

professionals. These various responsibilities exemplify why Ontario should be accorded standing.

The HSC is a quaternary pediatric academic health sciences centre in Toronto serving the provincial, national and international community. For a number of years, it has provided pediatric forensic pathology resources to the OCCO through the Ontario Pediatric Forensic Pathology Unit (“OPFPU”). Many of the post mortem examinations that gave rise to the establishment of the Commission were performed at the OPFPU. In light of this direct involvement of HSC and its personnel in pediatric forensic pathology in Ontario, there is no doubt that it should be accorded standing.

## **B. Individuals Seeking Standing**

The Commission also received applications for standing from Dr. Smith and from two groups of individuals who were involved in the cases reviewed for the OCCO, the results of which led to this Commission. The Commission is required to conduct a systemic review of pediatric forensic pathology in Ontario. It does not have a mandate to report on individual cases. Other processes exist to deal with alleged wrongful convictions, and attempts to recover compensation. The Commission must be careful not to interfere with them.

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Nonetheless, it will be important to learn enough about facts from the individual cases that gave rise to the Commission to assist in determining the systemic issues that should properly be addressed. The involvement of these applicants in those cases gives them each a unique perspective that can assist the Commission in its work. All three applications for standing are therefore granted. Again a brief elaboration will suffice.

Dr. Smith was the Director of the OPFPU at HSC between 1992 and 2001. It was the OCCO review of cases of suspicious child deaths in which Dr. Smith performed the autopsy or was consulted that led directly to this Commission. There can be no doubt that he has a substantial and direct interest that warrants standing.

The first of the two group applications is from seven individuals from four families. Their application refers to them as “the Affected Families Group” (“the AFG”) and I will do so as well.

The seven are Louise Reynolds, Brenda Waudby and her daughter Justine Traynor, Lianne Gagnon (Thibeault) and her father Maurice Gagnon, and Anthony Kporwodu and his wife Angela Venno.<sup>1</sup> All four families suffered the death of a child. Each death was the subject of a pediatric forensic pathology examination or consultation by Dr. Smith. In

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1. While all seven are prepared to have their names disclosed, a number do not want their contact information made public. That will be respected unless I should subsequently determine that disclosure is necessary.

each case, the events that unfolded for the families following the death were traumatic. These applicants have all experienced the effects of the practice of pediatric forensic pathology in Ontario in a unique and personal way. The common features of those experiences may be of much assistance in bringing the relevant systemic issues into focus and these families will undoubtedly be able to assist with suggestions of how those systemic issues can be best dealt with in future. It is appropriate that these individuals be granted standing as a group to help advance the systemic objectives of the Commission. The AFG should be granted standing.

The second group application is made on behalf of nine individuals. William Mullins-Johnson, Sherry Sherret-Robinson and seven others who request not to be identified publicly. I am prepared to honour their request at this stage. I will refer to this group as the Mullins-Johnson group. Like the AFG, the members of this group all suffered the death of a child in their family, each of which was the subject of a pediatric forensic pathology examination or consultation by Dr. Smith. Unlike the AFG, each individual in this group was charged and convicted of a criminal offence or offences following the death of a loved one. These individuals thus share the added perspective of experiencing the effects of the practice of pediatric forensic pathology in the full context of the criminal justice system. Coupled with the reasons I have given for granting standing to the AFG, this dimension adds to the case for giving standing to the Mullins-Johnson group. It is important to note that counsel for the AFG and the Mullins-Johnson group

made clear their willingness to work together to avoid the repetition of facts that may reflect systemic issues but are common to a number of the cases. I would therefore grant standing to this group.

### **C. Organizations Seeking Standing**

Finally, there are five applications from organizations involved one way or another in the criminal justice system. These are the Ontario Crown Attorneys' Association ("OCAA"), the Criminal Lawyers' Association ("CLA"), the Association in Defence of the Wrongly Convicted ("AIDWYC"), the Aboriginal Legal Services of Toronto and Nishnawbe-Aski Nation ("ALST-NAN Coalition") and Defence for Children International-Canada ("DCI-Canada").

Based on their applications, none of these organizations appear to have any unique information to offer about any of the individual cases that were the subject of the OCCO review. However, given their mandates and histories, all have their own well developed perspectives on the workings of pediatric forensic pathology within the criminal justice system. I am confident that their expertise will be useful to me in crafting my recommendations. I therefore grant standing to each organization because of its particular area of expertise and its unique interest at this Inquiry. I expect each organization to focus its participation on its area of expertise. Again, it is appropriate to give brief elaboration respecting each organization.

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The OCCA is made up of non-managerial Crown Attorneys who represent the provincial Crown in the criminal justice system of Ontario. It therefore has significant expertise concerning the duties and responsibilities of Crown counsel in the conduct of criminal matters, including their involvement with pediatric forensic pathology in the criminal process. For example, this may assist in shedding light on the interaction of Crown counsel with forensic pathologists. For this reason, the OCCA should have standing.

The CLA comprises approximately 1000 criminal defence lawyers most of whom practise in Ontario. Its expertise, namely, the interaction between defence counsel and pediatric forensic pathology in the context of the criminal justice system, is the counterpoint to the OCCA. This perspective also warrants standing.

AIDWYC is a national public interest organization dedicated to preventing and rectifying wrongful convictions. It is well recognized for the continuing interest and involvement in criminal justice issues relating to the wrongful conviction of innocent persons. One of the Commission's tasks is to seek to ensure that the use of pediatric forensic pathology in the criminal justice system does not contribute to creating or sustaining wrongful convictions. AIDWYC's expertise will, I think, be helpful to this aspect of my work and it should have standing.

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ALST-NAN Coalition is a partnership of ALST, a multi-service legal agency providing services to the Aboriginal community in Ontario, and NAN, a political territorial organization representing 49 First Nation communities in the Treaty 9 and Treaty 5 areas of Ontario. Each of these partners has longstanding expertise in Aboriginal issues, including those involving the interaction between Aboriginal people and the criminal justice system in Ontario. The ALST-NAN Coalition is well placed to assist the Commission with issues raised by the use of and access to pediatric forensic pathology in investigations and criminal proceedings that may be unique to Aboriginal people. This warrants standing.

DCI-Canada is the Canadian section of Defence for Children International, an independent grassroots human rights organization with a mission to promote and protect the rights of the child through concerted international actions. DCI-Canada has experience and expertise in the prevention of violence against children and the prevention of institutional child abuse in particular. This may very well help the Commission to address the issue of how pediatric forensic pathology can best assist child death investigation, and even more, the issue of how surviving children are best dealt with in those circumstances. It should also have standing.

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Finally, as the Rules of Standing and Funding provide, it is vital that Commission counsel have standing throughout. Commission counsel have the primary responsibility of

representing the public interest, including ensuring that all matters that bear upon the public interest are brought to the Commissioner's attention.

### **The Funding Applications**

The Commission has received applications for funding from seven of the parties who have been granted standing.

Paragraph 14 of the Order in Council establishing the Commission reads as follows:

The Commission may make recommendations to the Attorney General regarding funding for proceedings before the Commission for parties who have been granted standing because they have information relevant to the systemic issues that would otherwise be unavailable and where in the Commission's view the party would not otherwise be able to participate in the inquiry without such funding. Any such funding recommendations shall be in accordance with Management Board of Cabinet Directives and Guidelines.

This and the Commission's Rules of Standing and Funding provide that in making recommendations to the Attorney General regarding funding, I am to be guided by whether those seeking it can provide assistance to me that would not otherwise be available, and by whether, in my view, they would not be able to do so without funding.

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The only institution to seek funding is HSC. It does so on the basis that its involvement in the Commission has come about only because it has cooperated with the OCCO over the years to serve the public interest and the needs of Ontario by providing pediatric forensic pathology services to the OCCO. The OCCO has provided it with an annual grant for this purpose, so that HSC has not had to expense significant health care dollars to assist the OCCO. HSC says that without funding from the Attorney General, it will now have to do so, only because of its past support of the mission of the OCCO and that it is, therefore, only fair that it be able to recoup this through funding from the province.

On the record before me, HSC has not established that it cannot participate in the Inquiry without funding. As a condition of funding required by the Order in Council is not met, this application is dismissed. That being said, it seems to me that HSC may well have a moral claim on the province, both because of the genesis of its need to participate in the Commission and because it would be unfortunate if its delivery of health care suffered as a result.

Both groups of individuals, the AFG and the Mullins-Johnson group, seek funding. So do four of the organizations: CLA, AIDWYC, ALST-NAN Coalition and DCI-Canada. As I have indicated, in granting them all standing, each has unique assistance to offer the Commission in the discharge of its mandate. I am also satisfied that without funding, none would be able to participate. Therefore, I would grant all six applications for

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funding and recommend to the Attorney General that it be provided, in accordance with Management Board of Cabinet Directives and Guidelines.

It remains to provide such guidance as I can concerning the extent of the funding that I have recommended.

The AFG proposes to have three counsel working on the matter, one senior and two junior counsel. It seeks counsel fees (which I take to mean attendance fees at the hearing itself) for one senior counsel and one junior counsel. It also requests up to 500 hours of time for a law clerk. In my view, it is reasonable that three counsel in total might work on preparation concerning the file. However, subject to the exception noted immediately below, it is reasonable that the total hours per day be limited to 10. Where two counsel are required to attend hearings, fees for attendances should be allowed for one senior counsel and one junior counsel and the total hours per day extended to a maximum of 20. That being said, there will be a number of hearing days at which one counsel will suffice. It is also understood that for various parties (including the AFG) it will be necessary that the roles of senior and/or junior counsel be filled at times by alternates to those with primary responsibility for the file. That is simply the reality of life for those with busy practices. This will necessarily entail some overlap in work so that rather more time may be involved in total than if the same lawyer filled the role throughout. Provided that the

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substitutions are necessary and the amount of overlap is reasonable, that seems acceptable to me. Finally I would accede to the law clerk request made by the AFG.

The Mullins-Johnson group's request for funding was not framed in precisely the same way as the request made by the AFG. However, it is similarly situated to the AFG. Accordingly, I recommend funding in identical terms to those recommended for the AFG, including the use of substitute counsel where necessary. The hours allocated to a law clerk may also be performed by an articling student.

The CLA seeks funding on the basis that it will require three lawyers to represent its interest but expects only one counsel present at most if not all hearing days. Because of the exigencies of busy practices, it is reasonable that three counsel in total might work on the file, as long as the total hours claimed per day does not exceed ten. The counsel attendance fee should be limited to one counsel (senior, intermediate or junior at the discretion of the CLA). The total allowed hours per day can be used to fund counsel, an articling student or law clerk at the discretion of the CLA. As with all those granted funding, the use of alternate counsel must be necessary, and the overlap in work must be reasonable.

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AIDWYC seeks funding for one senior counsel throughout. I took from this submission that it was addressing funding for attending the hearing rather than the total number of

lawyers who might work on the file. I recommend funding on the same basis as recommended for the CLA.

The ALST-NAN Coalition also seeks funding for one counsel. Again, I interpreted this request as addressing the attendance at the hearing itself, rather than the total number of lawyers who might work on the file. I recommend funding on the same basis as recommended for the CLA.

Finally, DCI-Canada seeks funding for one counsel. Again, I interpreted this request in similar fashion as the earlier requests. I recommend funding on the same basis as recommended for the CLA.

These reasons do not preclude any of these six parties from applying for additional funding to deal with exceptional circumstances.

**RELEASED:** August 17, 2007



Stephen Goudge  
Commissioner

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