

DATE: 2007-11-20

**INQUIRY INTO PEDIATRIC FORENSIC PATHOLOGY IN
ONTARIO**

**RULING ON THE APPLICATION BY DR. CHARLES SMITH TO BE
EXAMINED IN CHIEF BY HIS OWN COUNSEL**

COMMISSIONER GOUDGE:

On August 17, 2007 Dr. Smith was granted standing at this Commission. On October 11, his counsel advised that he would attend voluntarily to give evidence. On October 22, to ensure fulfillment of her duty to ensure that the Commission has a full and complete factual record, Commission counsel served a summons on Dr. Smith requiring him to appear to give evidence, commencing on January 28, 2008.

Dr. Smith now applies for an order that he be examined in chief by his counsel before being examined by Commission counsel and cross-examined by other parties. He argues that the risk to his reputation makes this fair and appropriate, and will enable the fullest evidentiary contribution to be made by Dr. Smith to the Commission's work.

The Commission's Rules of Procedure provide that, presumptively, all witnesses will be called and questioned first by Commission counsel. The Rules also allow Dr. Smith to apply for the order he now seeks. The relevant Rules are as follows:

32. In the ordinary course, Commission counsel will call and question witnesses who testify at the Inquiry. Except as otherwise directed by the Commissioner, Commission counsel is entitled to adduce evidence by way of both leading and non-leading questions.

...

34. Counsel for a party may apply to the Commissioner to examine a particular witness in chief. If counsel is granted the right to do so, examination will be confined to the normal rules governing the examination of one's own witness.

...

36. Counsel for a witness, regardless of whether or not counsel is also representing a party, will examine after the other parties have concluded their cross-examinations, unless he or she has adduced the evidence of the witness in chief, in which case there will be a right by that counsel to re-examine the witness. In the event, however, that counsel for the witness intends to adduce evidence in chief not adduced by Commission counsel, counsel for the witness will examine the witness immediately following Commission counsel, and then will have a right to re-examine the witness following the cross-examinations by the other parties.

There is no doubt that the task of this Commission is fundamentally systemic in nature. Nonetheless there is also no doubt that there will be considerable evidence about the

work of Dr. Smith, particularly in those cases that were the subject of the Chief Coroner's Review. It is clearly important for the work of the Commission and fair to Dr. Smith that he be able to provide his evidence about that work and the oversight mechanisms to which it was or was not subject.

However, at this stage, I cannot conclude that this requires that his evidence in chief be led by his own counsel.

First, it is important to remember Commission counsel's role. It is to act in the public interest to ensure that all the relevant facts are placed before the Commission in a completely impartial way. The Commission requires this to fulfill its mandate. The objective of impartiality is best served by following the usual procedure. As my colleague, Associate Chief Justice O'Connor, wrote in reflecting on his own experience as Commissioner of the Walkerton Inquiry:

[C]ommission counsel's role is not to advance any particular point of view, but rather to investigate and lead evidence in a thorough, but also completely impartial and balanced, manner. In this way, the Commissioner will have the benefit of hearing all of the relevant facts or evidence unvarnished by the perspective of someone with an interest in a particular outcome.

Second, I do not think that this way of proceeding adds any risk to Dr. Smith's reputation. I know Commission counsel will lead his evidence fairly. Moreover, as Rule 36 provides, Dr. Smith's own counsel then has the right to adduce any evidence in chief not adduced by Commission counsel. This will allow Dr. Smith to give his own full account of events before cross-examination commences.

Third, I am confident that this way of proceeding will provide a complete evidentiary picture of Dr. Smith's work and its oversight. It is Commission counsel's role to be thorough. I am also confident that with the cooperation of Dr. Smith and his counsel beforehand, this can be done most expeditiously.

Dr. Smith's application is therefore dismissed. Should new circumstances relevant to this issue arise between now and the end of January, Dr. Smith is free to renew his request.

RELEASED: November 20, 2007



Stephen Goudge
Commissioner