

*In the matter of the Public Inquiries Act, R.S.O. 1990, c. P. 41*

*And in the matter of the Order-in-Council 826/2007 and the Commission issued effective April 25, 2007, appointing the Honourable Stephen Goudge as Commissioner*

*And in the matter of a Motion by Aboriginal Legal Services of Toronto and Nishnawbe Aski Nation Coalition (ALST-NAN), ALST/NAN Coalition, the Association in Defence of the Wrongly Convicted (AIDWYC), the Criminal Lawyers Association (CLA) and the Mullins-Johnson Group to examine Dr. Young concerning OCCO pathologists testifying on behalf of the prosecution in death penalty cases.*

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**MOTION RECORD**

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DATE: February 7, 2008

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**NOTICE OF MOTION**

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Counsel for ALST/NAN, AIDWYC, , Criminal Lawyers Association and the Mullins-Johnson Group will make a motion on Friday February 8, 2008, at 9:30 a.m. at the Inquiry hearing room, 20<sup>th</sup> Floor, 180 Dundas Street West, Toronto, Ontario.

**PROPOSED METHOD OF HEARING:** In view of the gravity of the matters raised in the herein motion and the time frame in which the issues arose, the Applicants seek to be heard orally.

**THE MOTION IS FOR:**

1. An order permitting a single representative counsel (AIDWYC counsel) to cross-examine Dr. James Young specifically with respect to the role that the OCCO (or other supervisor) played in permitting Dr. Smith to testify for the prosecution in an Ohio death penalty case in September 2000 (and any other similar cases); and, more generally, the oversight and accountability measures that were or ought to have been in place to monitor and supervise the extra-Ontario testimony of pathologists (particularly death penalty cases) working under the auspices of the OCCO.

2. An order permitting counsel to refer to documents (already the subject of notice) provided by counsel for ALSTI/NAN on February 6, 2008 for the purpose of cross-examining Dr. Young with respect to this issue, namely:
  - (a) Letter from Assistant Prosecutor Holcomb to Dr. Smith dated September 22, 2000 thanking him for his testimony in the case of *Ohio v. Fuller* (PFP115000) **Appendix “A”**;
  - (b) Jury verdict in *Ohio v. Fuller* filed September 25, 2000 sentencing the defendant to death **Appendix “B”**;;
  - (c) Entry of jury verdict in *Ohio v. Fuller* filed October 2, 2000 **Appendix “C”**;;
  - (d) Sentencing opinion in *Ohio v. Fuller* of the Honorable Judge Matthew Crehan dated October 18, 2000 **Appendix “D”**;;
  - (e) Final appeal judgment in *Ohio v. Fuller* dated August 12, 2002 **Appendix “E”**;
  - (f) Judgment of the Supreme Court of Canada in *United States v. Burns* [2001] 1 S.C.R. 283 **Appendix “F”**; and
  - (g) List of “Unsigned Out Cases by Pathologist dated September 29, 2000 (redacted) (PFP138108) **Appendix “G”**”.
3. In the event Dr. Young is unable to satisfactorily address the issues set out in paragraph 1, above, an order permitting counsel to recall Dr. Cairns to address these issues or to call such other person as Commission Counsel or counsel for the OCCO can identify with relevant knowledge in respect of these issues.
4. Such further or other order that is just and appropriate in the circumstances.

**THE GROUNDS FOR THE MOTION ARE:****A. The Fuller Case**

5. On Friday February 1, 2008, counsel for ALST/NAN first became aware of the existence of a letter from Assistant Prosecuting Attorney John Holcomb to Dr. Charles Smith ("Holcomb Letter"). The letter is dated September 22, 2000 and states, in part:

I thought you might want to know the outcome of the Fuller case. Christopher Fuller was convicted of the aggravated murder and attempted rape of Randi. Although sentencing is scheduled for October 9, 2000, the jury has recommended that the death penalty be imposed. The court is likely to follow the jury's recommendation.

I, along with my colleagues, found your work in this case to be truly outstanding. I can well imagine that pediatric forensic pathology must rank amongst the most unpleasant fields of medicine in which to practice, but society is indeed fortunate that a man of your caliber has chosen to do so.

[see Appendix A]

6. Prior to the discovery of the Holcomb letter, counsel for applicants were not aware that Dr. Smith (or any other pathologists working under the auspices of the OCCO) had assisted prosecutors by providing expert evidence in death penalty cases.
7. The trial took place between September 11 and 19, 2000 well after serious and credible concerns had emerged concerning his competence including in a nationally televised report on the Fifth Estate more than 10 months earlier, and years after complaints to the College of Physicians and Surgeons of Ontario of which Dr. Young was personally aware.
8. Dr. Smith's list of unsigned out cases dated September 29, 2000 (Appendix "G") at the Hospital for Sick Children includes a reference to "Randi Fuller...Autopsy Anatomic".

9. The Fuller case arose out of the death of the accused's three-year-old daughter. Dr. Smith was one of the pathologists called by the prosecution concerning the cause of death. The cause of death in the Fuller case was determined to be "asphyxia" caused by a neck and chest compression. The case involved forensic evidence identifying petechial hemorrhages as evidence of "asphyxia", and a "dilated anus" as possible evidence of sexual assault.
10. A number of issues of concern in some of the cases being examined by this Commission were also present in the Fuller case:
  - (a) The cause of death was identified as "asphyxia", terminology that the Commission has heard is not appropriately used to identify a cause of death;
  - (b) "Petechial hemorrhages" were identified as evidence of "asphyxia", a finding that the Commission has heard is not accurate given the non-specific nature of petechial hemorrhages;
  - (c) The pathology evidence examined the issue of the child's dilated anus, and the possible link between this feature and sexual assault.
11. The Commission has heard evidence from forensic pathologists that Dr. Smith erred in his findings in each of the above-identified areas.
12. At the conclusion of the trial, Mr. Fuller was convicted of aggravated murder and the jury recommended the death penalty. The trial judge declined to accept this recommendation, and instead imposed a life sentence. Mr. Fuller appealed his conviction, but was unsuccessful. It is unknown whether either the prosecution or defense were aware of these facts.

13. Thus, the *Fuller* case raises concerns about the extent to which the OCCO was complicit in the tendering of potentially flawed forensic pathology in a matter which could have led to the execution of an accused person.
14. In addition, one of the issues raised in this inquiry is the need to track the evidence of forensic pathologists so that it is known to the OCCO, crown attorney's and defence counsel when pathologists have been found to be problematic, wrong in their opinions and not credible. This is necessary for proper quality assurance of pathologists working for the OCCO. Cross-examination on the extent of Dr. Smith's testimony in cases outside of Ontario is necessary to learn how to properly track this evidence and ensure that the OCCO and the Crown attorneys are made aware of problems in experts testimony in other jurisdictions so that they can fulfill their supervisory function.

**B. Dr. Young's Evidence**

15. When Dr. Young testified between November 29 and December 4, 2004, the Holcomb letter (one of more than 30,000 documents in the Commission database) had not been discovered. He was not asked any questions concerning the issue of OCCO pathologists using the resources and the reputation of the OCCO to provide expert opinions in cases in which accused persons faced potential execution.
16. Dr. Young is returning to testify at the Inquiry on Friday February 8, 2008. Dr. Young is returning to testify – at his own request – to address particular evidence relating to him that was not available at the time that he first appeared. Thus Dr. Young is returning for the specific purpose of responding to evidence not available at the time of his first appearance.
17. Despite best efforts to familiarize themselves with the database documents, counsel for the applicants were unaware of the existence of the Holcomb letter prior to February 1, 2008. Nor were counsel aware that Dr. Smith had testified in the United States generally, or in death penalty cases, more specifically.



Commission Counsel was not aware of the Holcomb letter prior to February 1, 2008.

18. When the Holcomb letter came to light on February 1, 2008, counsel for ALST/NAN brought the letter to the attention of Commission Counsel while Dr. Smith was still under cross-examination. Subsequently, by correspondence of February 4, 2008, counsel for ALST/NAN raised the issues that are the subject of this motion with Commission Counsel. By correspondence of February 6, 2008, counsel for AIDWYC also raised the issues that are the subject of this motion with Commission Counsel. [see Appendices “H” and “I”]
19. The applicants propose to cross-examine Dr. Young with respect to which the OCCO approved or permitted pathologists working under its auspices to providing expert evidence in support of the prosecutions seeking execution of accused persons and the oversight and accountability issues that arise therefrom.
20. The above issue is central to the Commission’s primary mandate; that is the Commission’s primary task: to make recommendations to restore and enhance public confidence in pediatric forensic pathology in Ontario and its future use in investigations and criminal proceedings, as well as to prevent wrongful convictions based on flawed pediatric pathology evidence. The Applicants respectfully submit that public confidence in pathology in Ontario cannot be fully restored if there is uncertainty about oversight and accountability of OCCO pathologists in respect of their roles in providing expert testimony in support of death penalty prosecutions. To the extent possible, this uncertainty should be alleviated and clarity should be achieved around the existence of clear policies governing pathologists who testify as experts outside the Province of Ontario.

**C. The Interests of the Applicants**

**i. ALST/NAN**

21. There can be no greater miscarriage of justice than a wrongful execution. ALST-NAN is a party with unique knowledge concerning the interface between Aboriginal peoples and the criminal justice system and therefore has a unique interest in pursuing the issue of the role of Ontario pathologists in providing expert evidence in death penalty cases. In its ruling granting standing to ALST/NAN, this Honourable Commission recognized that this coalition 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.” [Commissioner’s Ruling on Standing, August 17, 2007 at p. 10].
  
22. In Canada, Aboriginal people are over-represented in the criminal justice system, over-represented as persons accused of committing homicide, and over-represented as victims of crime. Tragically, Aboriginal people are similarly over-represented both as victims and defendants in the criminal justice system in the United States. “American Indian” or “Alaskan Natives”, who were approximately 0.9 percent of the population in 2000 account for 1.3 percent of all arrests. “American Indians” are incarcerated at a rate 2.4 times the rate for white prisoners. The number of “American Indians” imprisoned in state and federal prisons is about 38 percent about the national average. The rate of “American Indian” confinement in local jails is estimated to be nearly four times the national average. The American Sociological Association has found that there is strong evidence that racial discrimination exists in the capital sentencing process of many states. As a group that is over-represented within the US criminal justice

system, Aboriginal peoples have a significant interest in ensuring that systemic contributions to miscarriages of justice are identified and addressed.

[National Criminal Justice Association, "Policy: Native Americans and the Criminal Justice System" (July 22, 2003); American Sociological Association, "Race, Ethnicity, and the Criminal Justice System" (September 2007) at p. 4; American Sociological Association, "Race, Ethnicity, and the Criminal Justice System" (September 2007) at p. 20]

**ii. AIDWYC**

23. AIDWYC is a national public interest organization dedicated to preventing and rectifying wrongful convictions. AIDWYC has two broad objectives: first, eradicating the conditions that give rise to miscarriages of justice; and second, participating in the review and, where warranted, correction of wrongful convictions. AIDWYC seeks to achieve these objectives both by advocating on behalf of individuals and by becoming involved in broader law reform activities.
24. AIDWYC's interest and involvement in attempting to correct and prevent miscarriages of justice is not confined to Ontario, or even Canada. AIDWYC regularly advocates on behalf of persons in other countries including the United States.
25. AIDWYC has consistently been opposed to the death penalty and has advocated on behalf of persons who are facing the death penalty. In addition to the well-known moral and ethical objections to the penalty that many persons and organizations hold against the death penalty, AIDWYC is particularly concerned that the death penalty represents the ultimate miscarriage of justice to those persons who are wrongfully convicted.

**iii. CLA**

26. The Criminal Lawyer's Association has a strong interest in this motion. The Criminal Lawyer's Association sought standing in this matter to ensure that all issues relevant to a defendant's ability to make full answer and defence be addressed in a fair and thorough fashion. A full understanding of the extent of Dr. Smith's contribution to the convictions of persons in other jurisdictions is a key component of the Criminal Lawyer's Association standing in this inquiry. The Criminal Lawyer's Association also has an interest in the role of the OCCO in monitoring the testimony of their pathologists in Ontario and other jurisdictions. Experts frequently refer to their testimony in other jurisdictions to bolster their credibility and the view that they are world renowned experts. In order to make full answer and defence, defendant's must have access to information to either confirm or challenge these assertions. The fact that it is now known that Dr. Smith testified in a death penalty case makes this matter of even greater concern to the Criminal Lawyer's Association given its intervention in other death penalty cases.

**iii. Mullins-Johnson Group**

27. The Mullins-Johnson Group are individuals who are victims of Dr. Smith's the flawed evidence and have suffered miscarriages of justice as a result. It is a core purpose of their standing at the Commission to attempt to assist in uncovering miscarriages of justice that have already occurred and in preventing similar miscarriages of justice to other persons. The Mullins-Johnson Group's concerns, in this regard, do not stop at the Ontario border.

**IN SUPPORT OF THIS APPLICATION, THE APPLICANT RELIES UPON THE FOLLOWING:**

1. This Notice of Application;
2. Letter from Assistant Prosecutor Holcomb to Dr. Smith dated September 22, 2000 thanking him for his testimony in the case of *Ohio v Fuller* (PFP115000);
3. Jury verdict in *Ohio v Fuller* filed September 25, 2000 sentencing the defendant to death;
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9. Letter from Julian Falconer to Commission Counsel dated February 4, 2008;
10. Letter from Louis Sokolov to Commission Counsel dated February 5, 2008; and
11. Such further and other material as Counsel may advise and this Honourable Court may permit.

**DATED at Toronto, this 7<sup>th</sup> day of February 2008.**

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