INQUIRY INTO PEDIATRIC FORENSIC PATHOLOGY IN ONTARIO

In the matter of the Public Inquiries Act, R.S.C., c. P. 41

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

And in the matter of a summons to witness issued by the Commission to the Registrar of the College of the Physicians and Surgeons of Ontario on September 17, 2007

FACTUM OF DR. CHARLES SMITH

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PART I—OVERVIEW

1. This motion concerns the enforceability of a summons issued by the Commission on September 9, 2007 requiring the Registrar of the College of Physicians and Surgeons of Ontario (the "College") to produce certain documents to the Inquiry and to attend and give evidence under oath with respect to subject matter contained in those documents.

2. The documents summonsed by the Commission may be classified into four types:

   (a) documents concerning the investigation and disposition of three specific, identified complaints to the College about Dr. Smith, ("Known Complaints") (paragraphs 1-3 of the Summons);

   (b) documents concerning the investigation and disposition of any other, unidentified complaints to the College about Dr. Smith ("Unknown Complaints") (paragraph 4 of the Summons);

   (c) documents concerning actual or contemplated "policies, procedures, guidelines or protocols" used by the College in dealing with complaints about the conduct of pathologists, forensic pathologists, pediatric forensic pathologists, or coroners ("Investigation Protocols") (paragraph 5 of the Summons);

   (d) documents concerning College "policies, procedures, practices, accountability and oversight mechanisms, or quality control measures for pediatric forensic pathology in Ontario from 1981 to 2001" ("Oversight Documents") (paragraph 6 of the Summons).

   Reference: Summons to witness issued by the Commission to the Registrar of the College of Physicians and Surgeons of Ontario on September 17, 2007, Compendium of Commission Counsel, Tab 2.

3. The documents are summonsed pursuant to s. 7 of the *Public Inquiries Act*, R.S.O. 1990, c. P.41, under which a Commission of Inquiry may require the production of documents that are "relevant to the subject matter of the inquiry and not inadmissible in evidence at the inquiry under s. 11."

4. Section 11 provides that "nothing is admissible in evidence at an inquiry that would be inadmissible in a court by reason of any privilege under the law of evidence."

5. By implication, documents that are irrelevant to the terms of reference of the Inquiry, or that are privileged, fall outside the Commission's summonsing powers under s. 7.

6. For the reasons set-out below, Dr. Smith submits that any documents related to Known and/or Unknown Complaints, are irrelevant, inadmissible at law, and privileged.

7. Dr. Smith has no knowledge of the existence or content of any Investigation Protocols or Oversight Documents but in any event takes no position as to their production to the Commission.

PART II—THE COLLEGE DOCUMENTS ARE IRRELEVANT

8. The Order-in-Council establishing the Inquiry requires the Commission to examine and report on the "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."

Reference: Order-in-Council 826/2007 at para. 4(a), Compendium of Commission Counsel, Tab 1.

9. A determination of the relevance of any documents summonsed by the Commission will depend upon whether the documents are useful to and probative of this mandate.

A. THE KNOWN COMPLAINTS

10. Section 25 of the *Health Professions Procedural Code* (the "*Code*"), being Schedule 2 to the *Regulated Health Professions Act*, 1991, S.O. 1991, c. 18 (the "*Act*"), requires designated

regulating bodies[1] to investigate any complaint brought against a regulated health professional[2] who is a member of those bodies. Specifically, s. 25(1) of the *Code* requires the Complaints Committee to investigate any complaint regarding "the conduct or actions of a member".

11. Contrary to the assertion in paragraph 24 of Commission Counsel's Factum, the College did not investigate Dr. Smith because it has or had any oversight responsibilities for pediatric forensic pathology in Ontario. Rather, Dr. Smith was a member of the College at all times material to the Known Complaints and therefore the College was obliged to investigate these complaints.

12. Dr. Smith acknowledges that the Known Complaints relate to three death investigations conducted by the Coroner's Office which were included in the Coroner's Review, the results of which led to the calling of this Inquiry. However, the College investigations were made after the conclusion of the pediatric death investigations undertaken by the Coroner's Office in all three complaints. As such, there is no evidence that the College investigations or decisions had any influence on the conduct of these death investigations or any proceedings arising therefrom.

13. Moreover, there is no evidence that the Coroner's Office relied upon the investigations or decisions rendered by the Complaints Committee of the College. More specifically, there is no evidence that the Coroner's Office looked to the College for any guidance or insight with respect to the conduct of these, or any, pediatric death investigations in Ontario.

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[1] The Colleges responsible to regulate the professions listed in footnote 2.

[2] A health professional practicing in one of the fields listed in Schedule 1 to the *Act*, specifically: Audiology and Speech-Language Pathology; Chiropody; Dental Hygiene; Dental Technology; Dentistry; Denturism; Dietetics; Massage Therapy; Medical Laboratory Technology; Medical Radiation Technology; Medicine; Midwifery; Nursing; Occupational Therapy; Opticianry; Optometry; Pharmacy; Physiotherapy; Psychology; Respiratory Therapy.

14. In sum, documents pertaining to the Known Complaints can provide no insight into the conduct, oversight and/or regulation of pediatric forensic pathology in Ontario between 1981 and 2001. Nor can they provide any insight into the pediatric death investigations which were the subject of the complaints that is not otherwise available directly (through the Commission's power to compel evidence) from the relevant parties to those investigations, including the police, the Crown, the Coroner's Office, the complainants and all medical professionals involved, including Dr. Smith.

B. THE UNKNOWN COMPLAINTS

15. The preceding submissions as to the irrelevance of the Known Complaints apply with equal force to the Unknown Complaints.

16. Furthermore, the breadth of the Commission's summons is such that it could result in the disclosure of documents that have absolutely no relation to pediatric forensic pathology. Dr. Smith's medical practice between 1981 and 2001 was not limited to forensic pathology. He also practiced as a surgical pathologist. The Commission has no power to require the production of College files concerning Dr. Smith in areas of practice that have no relation to the subject matter of the Inquiry.

17. For these reasons, the documents sought by the Commission concerning any Unknown Complaints against Dr. Smith are irrelevant and thus not producible to the Commission under s. 7 of the *Public Inquiries Act*.

C. INVESTIGATION PROTOCOLS AND OVERSIGHT DOCUMENTS

18. Dr. Smith does not know if the College has any Investigation Protocols or Oversight Documents.

19. As stated above, the College is required to investigate complaints made against individual medical practitioners, including pathologists. However, power over an individual pathologist does not give the College power over the practice of pathology in Ontario. The Office of the Chief Coroner has the broader responsibility to oversee all services provided pursuant to the *Coroners Act*, including Coroner's investigations and pediatric forensic pathology, *inter alia.*

20. Indeed, there is no evidence that the College engaged in the general oversight of pediatric forensic pathology in Ontario. While the February 3, 2000 decision of the Health Professions Appeal and Review Board ("HPARB") held that the College Complaints Committee had jurisdiction to investigate an individual complaint against Dr. Smith, the decision did not hold that the College had either the jurisdiction or the responsibility to oversee the field of pediatric forensic pathology generally. Moreover, a decision of the HPARB on the review of a specific College decision is not determinative of the general regulatory jurisdiction and responsibilities of the College.

21. In any event, to the extent that the College has generic documents of this nature, Dr. Smith does not oppose their production.

PART III—THE KNOWN AND UNKNOWN COMPLAINTS DOCUMENTS ARE INADMISSIBLE

22. Not only are the documents relating to Known and Unknown Complaints irrelevant, they are also inadmissible by operation of the *Act*.

23. Subsection 36(3) of the *Act* provides:

> No record of a proceeding under this Act, a health profession Act or the *Drug and Pharmacies Regulation Act*, no report, document or thing prepared for or statement given at such a proceeding and no order or decision made at such a proceeding is admissible in a civil proceeding other than a proceeding under this Act, a health profession Act or the *Drug and Pharmacies Regulation Act* or a proceeding relating to an order under section 11.1 or 11.2 of the *Ontario Benefit Act* 1991, c. 18, s. 36(3); 1996, c. 1, Sched. G., s. 27(2).

24. The materials summonsed by the Commission pertaining to the Known and Unknown Complaints are reports, documents and things prepared for proceedings under the *Act*, and decisions resulting therefrom. Thus, the materials summonsed by the Commission fall squarely within the ambit of s. 36(3).

A. PURPOSIVE TREATMENT OF S. 36(3) REQUIRES ITS APPLICATION TO THE INQUIRY

25. Subsection 36(3) is intended to facilitate the full, candid participation of all individuals with information necessary for a regulatory body to conduct its investigation in furtherance of its "duty to serve and protect the public interest". These individuals may include complainants, members and other health professionals, as well as institutional actors.

Reference: s. 5.3(2) of the *Code*

26. To achieve this objective, the legislature expressly limits the use to which materials generated during such an investigation can be put, creating an expectation of confidentiality in the investigation process. As stated by the Court of Appeal in *M.F. v. Sutherland*:

> [T]he purpose of s. 36(3) is to prevent not just patients but all participants in College proceedings from using documents generated for those proceedings in civil proceedings, in short to keep the two proceedings separate.

Reference: *M.F. v. Sutherland*, [2000] O.J. No. 2522 at para. 36 (C.A.).

27. That the College proceedings are intended to be confidential is obvious not only because of s. 36(3), but also s. 36(1), which prohibits disclosure by the College of any information obtained in the course of an investigation except in certain defined circumstances.

Reference: *Regulated Health Professions Act*, *ibid.*, s. 36(1).

28. Confidentiality is important not only to permit a comprehensive investigation but also to protection the legitimate privacy interests of all individuals involved.

29. The prohibition of s. 36(3) is absolute. Materials governed by the provision cannot be used, even on consent.

Reference: *Forget v. Sutherland* (1999), 174 D.L.R. (4th) 174 (Ont. Ct. Gen. Div.) at para. 34, aff'd [2000] O.J. No. 2522 (C.A.)

Richard Steinecke, *A Complete Guide to the Regulated Health Professions Act* (Aurora: Canada Law Book, 2006) at para. 2.190.

30. Moreover, subsection 36(3) is a bar to the *use* of the prohibited documents in a civil proceeding, not just their *admission*. Parties in possession of the documents cannot consent to production or disclosure even if assured that the documents will not be admitted in evidence at a civil proceeding. This position is confirmed by the Divisional Court in *Middleton v. Sun Media Corp.*:

> "The words "not admissible" [in s. 36(3)] must mean "not capable of use" in a civil proceeding, as the Court of Appeal stated in *Forget*. If not, the confidentiality which the legislature seeks to protect in College proceedings will be undermined through disclosure of the documents in civil proceedings. Even if there is further protection from disclosure to the public through the deemed undertaking rule, there will still be disclosure of information to those who have not been involved in the College process – an event the Legislature sought to prevent through the provision of s. 36."
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> **Reference:** *Middleton v. Sun Media Corp.*, [2006] O.J. No. 1640 at para. 19.

31. Subsequent disclosure of documents protected by s. 36 is inherently prejudicial, regardless of the forum. Disclosure at the Inquiry of documents arising from College proceedings would be no less a violation of confidentiality and privacy for the individuals concerned than would be disclosure of the documents in a civil trial. It is impossible for the Commission to order production of the summonsed materials without compromising the privacy interest held by individuals involved in those proceedings, thus undermining the intention of s. 36.

32. The enforcement of s. 36(3) by the Commission is thus consistent with the recommendation of the Ontario Law Reform Commission's *Report on Public Inquiries* that "it is a lawful excuse to refuse to produce documents and things over which there is a high expectation of privacy and that are not material to the mandate of the commission."

> **Reference:** Ontario Law Reform Commission, *Report on Public Inquiries* (Toronto: Ontario Law Reform Commission, 1992) at 198 and 215.

B. THE INQUIRY IS A "CIVIL PROCEEDING"

33. The term "civil proceeding" has been held to describe proceedings of a non-judicial nature in several contexts where such an interpretation is consistent with a purposive treatment of

the statute in which the term arises. As stated by Jacket C.J. for Federal Court of Appeal in *Reference re Public Staff Relations Act*:

> I am ... of the opinion that a matter before the Public Service Arbitration Tribunal is a "Civil...proceeding" within the meaning of those words in section 107 of the *Public Service Staff Relations Act*. I recognize that the word "proceeding", in this context, had its origin in connection with matters in the ordinary courts of the land but, in current use, it refers, in my understanding of the use of language, to matters before any person or persons having authority to make decisions or give advice after hearing evidence or otherwise giving persons concerned an opportunity of putting forward their point of view. Furthermore, it is, in my view, inconceivable that Parliament would have provided the protection of section 107 against being compelled to give evidence in the traditional tribunals but have withheld it from persons who might otherwise be compelled to give evidence before one of the numerous other authorities who are armed with powers to compel the giving of evidence.

Reference: *Reference re Public Staff Relations Act*, [1973] F.C. 604 (F.C.A.) at para. 8;

Gonzales-Davi v. British Columbia (Legal Services Society) (1991), 81 D.L.R. (4th) 12 (B.C.C.A.).

34. A broad treatment of the term "civil proceeding" is supported by the reasons of the Supreme Court in *Winters v. B.C. (Legal Services Society)*. Interpreting the term as used in s. 3(2)(*b*) of the British Columbia *Legal Services Act*, Cory J. holds: "I believe it is clear that the use of the word 'civil' in s. 3(2)(*b*) must have a meaning beyond the adjudication between two persons."

Reference: *Winters v. B.C. (Legal Services Society)*, [1999] 3 S.C.R. 160 at para. 61.

35. While the Supreme Court in *Winters* adopts a definition of civil proceeding centered on the disposition of "private rights", it holds that "private rights" include a prison inmate's "residual liberty interest" in continuing to possess the "liberty enjoyed by the general penitentiary population." It is thus clear that the Court considers private rights to be more than simply material rights, but to concern matters of personal sanctity and autonomy.

Reference: *Winters, supra* at para. 62.

36. Although the Inquiry is not empowered to reach individual findings of civil or criminal culpability, its outcome will nevertheless be highly consequential to the private rights of individuals involved. The Supreme Court in *Canada (A.G.) v. Canada (Commissioner of the Inquiry on the Blood System)* noted the potential impact of a public inquiry on an individual's reputation, a matter closely connected to personal sanctity and associated private rights, in affirming the need for procedural fairness at an inquiry:

> The findings of fact and the conclusion of the commissioner may well have an adverse impact upon a witness or a party to the inquiry. Yet they must be made in order to define the nature of and responsibility for the tragedy under investigation and to make the helpful suggestions needed to rectify the problem. It is true that the findings of a commissioner cannot result in either civil of penal consequences for a witness. Further, every witness enjoys the protection of the *Canada Evidence Act* and the *Charter*, which ensures that the evidence given cannot be used in other proceedings against the witness. Nonetheless, procedural fairness is essential for the findings of commissions may damage the reputation of a witness. For most, a good reputation is their most highly prized attribute. It follows that it is essential that procedural fairness be demonstrated in the hearings of the commission. [emphasis added]

Reference: *Canada (A.G.) v. Canada (Commissioner of the Inquiry on the Blood System)*, [1997] 3 S.C.R. 440 at para. 55.

37. The decisions and findings of the Commission may impact on the private rights of parties concerned by adversely affecting their reputation. This fact, combined with a purposive treatment of s. 36(3), leads to the conclusion that the Inquiry should be considered a "civil proceeding" within the meaning of that section. Accordingly, no one is entitled to produce the documents.

PART IV—THE KNOWN AND UNKNOWN COMPLAINTS DOCUMENTS ARE PRIVILEGED

38. The Known and Unknown Complaints documents are privileged under the common law "Wigmore" criteria. These criteria, adopted by the Supreme Court of Canada, are as follows:

> The applicable principles are derived from those set forth in *Wigmore on Evidence*, vol. 8 (McNaughton rev., 1961), sec. 2285. First, the communication must originate in confidence. Second, the confidence must be essential to the relationship in which the communication arises. Third, the relationship must be one which should be "sedulously fostered" in the public good. Finally, if all these requirements are met, the court must consider whether the interests served by protecting the communications from disclosure outweigh the interest in getting at the truth and disposing correctly of the litigation.
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> **Reference:** *A.M. v. Ryan*, [1997] 1 S.C.R. 157 at para. 20.

39. Documents governed by s. 36 of the *Act* satisfy the first three criteria:

(a) s. 36 creates an expectation of confidentiality among participants in College proceedings;

(b) this expectation of confidentiality is essential to the effective operation of the proceedings, as it permits full and candid participation of the individuals involved, while protecting their privacy interest; and

(c) the confidence relationship between the College and participants in its proceedings should be sedulously fostered as it enables the College to investigate complaints and regulate its professionals in fulfillment of its mandate to serve and protect the public interest.

40. The absence of the term "privilege" in s. 36(3) does not exclude the application of the Wigmore criteria. In *Steep (Litigation Guardian of) v. Scott*, the Court found documents relating to a hospital's quality assurance reports and peer review evaluations to be privileged under Wigmore despite the absence of a statutory declaration to that effect. In fact, the statute in *Steep* did not even classify the documents concerned as "confidential":

> The *Public Hospitals Act* and the hospital's by-law are silent with respect to the issue of confidentiality of the reviews. They do not require or prevent confidentiality.

Reference: *Steep (Litigation Guardian of) v. Scott*, [2002] O.J. No. 4546 (Ont. Sup. Ct. J.) at para. 18.

41. The Court upheld the privilege in *Steep* based on a purposive treatment of the statute, highlighting policy considerations that are analogous to the present case:

> It would be understandable for any individual whose decisions were the subject of critical analysis by his or her peers, in the absence of confidentiality, to be self-protective, guarded and concerned about the consequences of any admissions despite his or her professional obligations and responsibilities. If participants in such reviews were not as frank as they might be in a confidential setting, the person conducting the review is hampered from gathering the information needed to make an evaluation. The result could well be a report that does not assist in improving quality of care or that only does so to a limited extent.
>
> "In my view, the free exchange of information, promoted by confidentiality, goes to the very core of successful quality assurance reviews leading to the improvement of quality care. It is in the public interest that hospital care and services are effectively assessed and improved to ensure a continuous improving quality of health care."

Reference: *Steep*, *ibid.* at paras. 25-26.

42. While the policy considerations in the present case are analogous to those in *Steep*, the individuals involved in College proceedings have an even higher expectation of confidentiality because of the language in s.36.

43. Not only does the expectation of confidentiality created by s. 36 reflect important underlying policy considerations, it also advances the *Charter* value of safeguarding individual dignity in the face of compulsory and highly consequential regulatory proceedings.

44. The College has the ability to limit or prevent its members from practicing their chosen vocation. Its proceedings can impact profoundly on a member's dignity and self-worth. The result of a College proceeding may destroy a person's professional life entirely, affecting in grave and sometimes irretrievable ways not only the member but also colleagues and family.

45. The gravity and significance of a professional regulator's control over its membership, and its potential to affect individual rights, has been recognized repeatedly by the courts. As stated in the *Royal Commission Inquiry into Civil Rights* headed by Mr. Justice McRuer:

> "The most obvious feature of the power of a self-governing body to discipline its members is that it is clearly a judicial power within the meaning we have given to that term[.] ... It is a power whose exercise may have the most far reaching effects upon the individual who is disciplined. The sanction imposed upon one who has been found guilty of misconduct may be anything from a reprimand to expulsion from the profession. Where conviction may result in what has aptly and justifiably been termed "economic death", it is vital that procedural safeguards to ensure fairness be clearly established."

Reference: *Royal Commission Inquiry into Civil Rights*, Hon. James C. McRuer, Commissioner, Report No.1, Vol. 3, 1968 at p. 1181

Cameron v. Law Society of British Columbia (1991), 81 D.L.R. (4th) 484 (B.C.C.A) at 7 (QL).

46. The confidentiality provided by section 36 thus plays an important role in safeguarding individual dignity and self-worth, a recognized *Charter* value. The Supreme Court has made clear that the common law, including the common law of privilege, is to be developed and applied in a manner consistent with *Charter* values. That the expectation of confidentiality created by s. 36 reflects a *Charter* value reinforces the view that the documents summonsed are privileged according to the Wigmore criteria.

Reference: *A.M. v. Ryan*, *supra* at para. 23

Hill v. Church of Scientology of Toronto, [1995] 2 S.C.R. 1130.

47. The final stage of the Wigmore criteria requires determination of whether there is any countervailing interest favouring the disclosure of communications that have otherwise satisfied the elements of the test. Specifically, it asks whether the interests in "getting at the truth" and

"disposing correctly" of a matter outweigh the interest in protecting confidentiality. McLachlin C.J.C. offered the following guidance to applying the final stage in *A.M. v. Ryan*:

> Once the first three requirements are met and a compelling *prima facie* case for protection is established, the focus will be on the balancing under the fourth head. A document relevant to a defence or claim may be required to be disclosed, notwithstanding the high interest of the plaintiff in keeping it confidential. On the other hand, documents of questionable relevance which contain information from other sources may be declared privileged. [emphasis added]

Reference: *A.M. v. Ryan*, *supra* at para. 37.

48. As articulated above, the documents relating to the Known and Unknown Complaints summonsed by the Commission have no relevance to the terms of reference of the Inquiry. As there is no persuasive countervailing interest favouring disclosure of the documents, the documents are privileged under the Wigmore criteria and therefore, by the combined operation of s. 7 and s. 11 of the *Public Inquiries Act*, are outside the Commission's summonsing power.

PART V—CONCLUSION

49. Dr. Smith respectfully submits that the documents described in paragraphs 1-4 of the Commission's Summons to the College are not compellable by the Commission because:

(a) they are irrelevant;

(b) they are inadmissible; and

(c) they are privileged.

ALL OF WHICH IS RESPECTFULLY SUBMITTED,

October 2, 2007

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LIST OF AUTHORITIES