

INQUIRY INTO PEDIATRIC FORENSIC PATHOLOGY IN ONTARIO

The Honourable Stephen T. Goudge

**AFFIDAVIT OF FRANK ADDARIO
(Sworn July 12, 2007 in support of the
Criminal Lawyers' Association's application for standing and funding)**

I, FRANK ADDARIO, Barrister and Solicitor, of the City of Toronto, in the Province of Ontario, affirm and say as follows:

1. I am a Barrister and Solicitor and a member in good standing of the Law Society of Upper Canada. I am a Vice President of the Criminal Lawyers' Association (Ontario) ("CLA") and the Chair of its Interventions Committee. Accordingly, I have knowledge of the matters to which I depose.
2. The CLA is requesting standing before this Honourable Inquiry. According to the Order in Council establishing the Inquiry, the Commissioner has been asked to conduct a systemic review of:
 - (a) the policies, procedure, 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 and 2001; and

- (c) any changes to the items referenced in the above two paragraphs, subsequent to 2001.

The Commissioner has been asked to make recommendations to restore and enhance public confidence in pediatric forensic pathology in Ontario and its future use in investigations and criminal proceedings. These are all issues of particular concern to the CLA and, more importantly, are issues upon which the CLA can offer a unique perspective. None of the other parties or public interest groups has a level of expertise or experience in matters of criminal defence practice which is comparable to that of the CLA's membership.

(a) *The Criminal Lawyers' CLA (Ontario)*

3. The CLA is a non-profit organization which was founded on the first day of November 1971.

The CLA is comprised of approximately 1000 criminal defence lawyers, most of whom practice in the Province of Ontario, but a number of whom practice in other Canadian jurisdictions. The objects of the CLA are to educate, promote and represent the membership on issues relating to criminal and constitutional law.

4. To that end, the CLA presents educational workshops and seminars throughout the year, culminating in its annual Fall Convention and Education Program. This Program often includes guest speakers or participants from the United States, and, on occasion, the United Kingdom. In addition, the CLA publishes and circulates a nationally circulated newsletter five times per year. The Newsletter and the case commentaries, are directed to highlighting current developments in criminal and constitutional law.

5. The CLA is routinely consulted and invited by both Houses of Parliament and its Committees to offer submissions on proposed legislation pertaining to issues in criminal and constitutional law. This year alone, the CLA has been asked to make submissions before Parliamentary Committees on legislative amendments relating to conditional sentences, mandatory minimum sentences for firearms offences and impaired driving. Similarly, the CLA is often consulted by the Government of Ontario, and in particular the Attorney General of Ontario, on matters concerning provincial legislation, court management, the Ontario Legal Aid Plan and various other concerns that involve the administration of criminal justice in the Province of Ontario.

6. Over the years, the CLA has been granted standing to participate in a number of public inquiries. For example, the CLA was granted standing (and funding) to address systemic issues during the Commission on Proceedings Involving Guy Paul Morin (the “Kaufman Inquiry”) which released its Report in April, 1998. The CLA made submissions during the Kaufman Inquiry on the appropriate role of expert evidence in criminal trials generally as well as the need for training to ensure that expert witnesses testify in a manner that is fair and consistent with the limitations of the science involved and the need for internal and external review mechanisms for forensic science testing. The CLA was also instrumental in convening a “panel” of expert witnesses to testify before the Commissioner on some of the systemic causes of wrongful convictions.

7. More recently, the CLA was granted intervenor status at the Air India Inquiry to make written submissions on systemic issues relating to (a) the relationship between security intelligence and

evidence that would be admissible at a criminal trial; (b) the appropriate framework for controlling terrorist financing and (c) the creation of adequate safeguards to protect witnesses at criminal trials from intimidation.

8. For over two decades, the CLA has been granted intervenor status in appeals before the Court of Appeal for Ontario and the Supreme Court of Canada which have raised criminal law issues of public importance, including the following:

R. v. Clayton et al., [2007] S.C.C. 32

Re Charkaoui [2007] S.C.C. 9

R. v. Robertson [2007] ONCA 463

R. v. Khelawon [2006] S.C.C. 57

R. v. Pires, [2005] 3 S.C.R. 343

R. v. Chapman, [2005] O.J. No. 4446 (Ont.C.A.)

R. v. Orbanski; R. v. Elias, [2005] 2 S.C.R. 3

R. v. Mann, [2004] S.C.J. No. 49

R. v. Felderhof (2003), 180 C.C.C. (3d) 498 (Ont. C.A.)

R. v. J.P. (2003), 177 C.C.C. (3d) 522 (Ont. C.A.)

R. v. Leduc (2003), 176 C.C.C. (3d) 321 (Ont. C.A.)

R. v. Ling, [2002] 3 S.C.R. 813

R. v. Jarvis, [2002] 3 S.C.R. 757

R. v. Hall, [2002] 3 S.C.R. 309

R. v. Shearing, [2002] 3 S.C.R. 33

- R. v. Brown*, [2002] 2 S.C.R. 185
- R. v. 974649 Ontario Inc.*, [2001] 3 S.C.R. 575
- R. v. Find*, [2001] 1 S.C.R. 863
- R. v. McClure*, [2001] 1 S.C.R. 145
- R. v. Pan*, [2001] 2 S.C.R.344
- R. v. Sharpe*, [2000] 1 S.C.R. 45
- R. v. Biniaris*, [2000] 1 S.C.R. 381
- R. v. Oickle*, [2000] 2 S.C.R. 3
- R. v. Williams*, [1998] 1 S.C.R. 1128
- R. v. Mills*, [1999] 3 S.C.R. 668
- R. v. Stillman*, [1997] 1 S.C.R. 607
- R. v. Burns and Rafay*, [2001] 1 S.C.R. 283
- L.L.A. v. A.B.*, [1995] 4 S.C.R. 536
- R. v. Morales*, [1992] 3 S.C.R. 711
- R. v. Pearson*, [1992] 3 S.C.R. 665

All of these cases raised important issues which related to the proper limits on criminal liability, the rules of evidence, criminal practice and the rights of individuals accused with criminal offences. In some cases, the CLA has been invited to appear before the Court to present the “defence” perspective on important criminal law issues. For example, in *Horsefield v. Ontario (Registrar of Motor Vehicles)* (1999) 44 O.R. (3d) 73, the issue had become largely moot for the individual appellant and, thus, the CLA became the primary “respondent” to the Crown’s appeal on the issue of the

constitutionality of the administrative driving suspensions. The Court of Appeal for Ontario singled out the CLA's submissions as being particularly helpful to its decision in that case.

(b) Reasons for Seeking Standing

9. As noted above in Paragraph 2 of my Affidavit, the Commissioner's Terms of Reference will require consideration of issues fundamental to the investigation and prosecution of criminal offences. In particular, the Commissioner will likely consider whether existing rules and practices with respect to death investigations, disclosure, trial preparation and expert testimony are adequate to identify and protect against faulty expert evidence being admitted at a criminal trial. Simply put, there is no other organization which has the expertise and experience in understanding how potential changes to the rules of evidence and procedure will affect an accused's ability to make full answer and defence to a serious criminal charge. These are the issues that our members address on a daily basis in their practices. The CLA is the only organization in Ontario dedicated to criminal defence practice and, thus, is well situated to assist the Commissioner in understanding systemic failings in the system and analyzing the effect of any recommendations that would change the use of pediatric forensic pathology evidence in criminal cases.

10. As the only organization specializing in the defence of criminal cases, the CLA could assist the Commissioner by ensuring, through cross-examination, that the evidence presented at the inquiry accurately portrays the deficits, if any exist, in the present system. Similarly, the CLA could assist the Commissioner by helping to identify potential witnesses who can provide evidence on the likely effects of any potential evidentiary or procedural change on the rights of accused persons and

the ability of counsel to fully defend their client's interests. The CLA can also provide broad insight, based on the collective experience of its members, into the current use of expert evidence in criminal trials and make submissions on recommendations that would enhance protections against faulty or flawed expert opinion evidence.

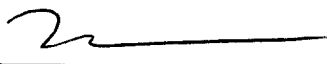
(c) Request for Funding

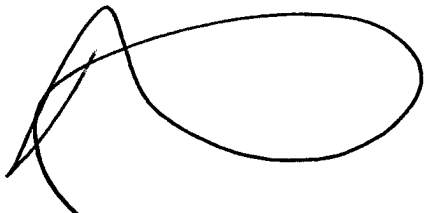
11. As noted above, the CLA is non-profit organization. Its only ongoing source of funds comes from the contributions of its membership. The CLA's ability to assume the costs of participating in public interest litigation is very limited. Counsel who have appeared on behalf of the CLA in all of the above-noted appeals were members of the CLA who contributed their time on a *pro bono* basis (albeit their disbursements were paid by the CLA). Similarly, counsel who have appeared on behalf of the CLA before legislative committees have also contributed their time (and have had their disbursements paid). In all of those prior cases, despite the substantial amount of time which counsel had devoted to the preparation of the written briefs submitted to the decision-makers, the appearances have almost always been limited to a single day.

12. By contrast, in order to fulfill the role afforded to it by Commissioner Kaufman, the CLA retained a team of senior criminal defence counsel to represent its interest in that inquiry. The group of lawyers who represented the CLA's interest before Commissioner Kaufman divided both the work and the time required to attend at the hearing. The CLA's counsel were granted funding by Commissioner Kaufman.

13. If standing is granted, it is the intention of the CLA to have three counsel, Joseph Di Luca, Mara Greene and Breese Davies, represent its interests at this Inquiry. In order to contribute meaningfully as a party before this Honourable Commissioner, the CLA would need to have counsel in attendance on most, if not all, of the days upon which evidence is presented. It will also be necessary for counsel to familiarize themselves with any Overview Reports prepared and the supporting documentation. I am confident that every effort will be made to ensure that there is little or no duplication of work among counsel. Nonetheless, in order for counsel to devote themselves to a brief of this magnitude, they would need to be compensated for their time. Without funding, the CLA would not otherwise be able to meaningfully participate in any capacity at the Inquiry.

14 This affidavit is made in support of the CLA's Application before this Honourable Commission and for no other or improper purpose.

SWORN BEFORE ME at the)
City of Toronto, in the Province of)
Ontario, this 1st day of July)
2007.)
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_____)
Commissioner for Taking Affidavits)



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