

INQUIRY INTO PEDIATRIC FORENSIC PATHOLOGY IN ONTARIO

The Honourable Stephen T. Goudge

NOTICE OF APPLICATION FOR STANDING and FOR FUNDING (by the *Criminal Lawyers' Association*)

TAKE NOTICE THAT the Criminal Lawyers' Association (the "CLA") hereby makes an Application to Commissioner Stephen T. Goudge pursuant to Rules 8, 9, 10, 11, 12, 17 and 18 of the *Rules of Standing and Funding* of the Inquiry into Pediatric Forensic Pathology in Ontario (the "Inquiry").

THE APPLICATION IS FOR:

1. An Order, pursuant to Rules 8, 9, 10, 11 and 12 of the *Rules of Standing and Funding* and pursuant to s. 5 of the *Public Inquiries Act*, R.S.O. 1990, c. P-41, granting the CLA standing throughout this Inquiry, with:
 - (i) the right to make submissions on the *Rules of Procedure and Practice*;
 - (ii) the right to review documents relevant to the Inquiry upon counsel signing any undertaking deemed necessary by the Commissioner;
 - (iii) the right to receive Overview Reports prepared for use at the Inquiry;
 - (iv) the right to receive advance notice of witnesses to be examined at the Inquiry and to receive copies of their anticipated evidence and to any documentary evidence to be presented to those witnesses during their examination at the Inquiry;
 - (v) the right to cross-examine witnesses called with respect to the Inquiry;
 - (vi) the right to propose witnesses to be called with respect to the Inquiry; and

- (vii) the right to make written and/or oral closing submissions.
2. An Order, pursuant to Rules 17 and 18 of the *Rules of Standing and Funding* and Paragraph 14 of the *Terms of Reference*, granting funding to the CLA for the purposes of retaining counsel to represent its interest at the Inquiry.

THE GROUNDS FOR THE MOTION ARE:

1. Section 5 of the *Public Inquiries Act*, R.S.O. 1990, c. P-41 allows the Commissioner to grant standing to any person with a “substantial and direct interest in the subject-matter of its inquiry.”
2. According to the *Terms of Reference*, the Commissioner’s mandate is to make recommendations to restore and enhance public confidence in pediatric forensic pathology in Ontario and its future use in investigations and criminal proceedings. In fulfilling this mandate, the Commissioner intends to consider, *inter alia*, the following issues:
 - (a) the evolution, limits and inherent frailties of pediatric forensic pathology, and the developing state of that science, including sudden infant death syndrome and shaken baby syndrome;
 - (b) how key institutions within our justice system work together, and how well they do so;
 - (c) different models of death investigation and reporting including coroner-based systems and medical examiner-based systems, their strengths and weaknesses, and what we can learn from other jurisdictions;
 - (d) how Crown Attorneys and defence counsel obtain and use forensic experts;
 - (e) the role of the legal aid system in ensuring that defence counsel has access to competent expertise in pediatric forensic pathology;
 - (f) the use of scientific experts by courts in other jurisdictions, including how experts are designated by different regulatory bodies, as well as how courts and juries can evaluate an

expert's expertise; and

- (g) how the courts referee forensic disputes both pre-trial and at trial, and how the courts function as gate-keepers by determining who qualifies as an 'expert' and what counts as 'expertise'.
3. The Commissioner's recommendations on each of these topics will have a profound effect on the manner in which criminal trials are conducted in the future. The recommendations will affect on the rights of accused persons in criminal proceedings involving all manner of expert evidence, not just pediatric forensic pathology. The recommendations will also affect criminal defence practice and future interactions between defence and Crown counsel.
4. The CLA will bring a unique perspective to the issues to be addressed by the Inquiry. No other organization has a level of experience and expertise in matters of criminal defence practice and the rights of accused persons comparable to that of the CLA and its members.
5. Paragraph 14 of the *Terms of Reference* allows the Honourable Commissioner to make recommendations to the Attorney General regarding funding for parties granted standing that would not be able to participate without such funding.
6. The CLA is a non-profit organization supported entirely by the contributions of its membership. With its limited budget, the CLA cannot afford to pay for counsel to represent its interest at the Inquiry. A group of three CLA members are willing to divide the enormous amount of work required to meaningfully assist the Commissioner with his mandate. The CLA hopes to be represented by Joseph Di Luca, Mara Greene and Breese Davies at the Inquiry. However, it is not possible for any or all of them to participate at the Inquiry on a *pro bono* basis.
7. Pursuant Rule 18(b) of the *Rules of Standing and Funding*, the contact information for counsel representing the CLA is as follows:

Joseph Di Luca
Di Luca Barristers
15 Bedford Road
Toronto, ON M5R 2J7

Tel: 416-868-1203
Fax: 416-868-0273
e-mail: jdiluca@15bedford.com

Mara Greene
Schreck & Greene
20 Dundas St. W., Suite 1100
Toronto, ON M5G 2G8

Tel: 416-977-6268
Fax: 416-977-8513
e-mail: greene@schreckgreene.com

Breese Davies
Barrister & Solicitor
25 Prince Arthur Ave.
Toronto, ON M5R 1B2

Tel: 416-922-6161, ex. 303
Fax: 416-922-6162
e-mail: davies@25princearthur.ca

8. The CLA seeks the Commissioner's recommendation for funding to allow it to participate in the Inquiry in accordance with such terms and conditions the Commissioner imposes. While the CLA intends to have three lawyers represent its interests at the Inquiry, all efforts will be made to minimize, if not eliminate, duplication of work. Nonetheless, the CLA seeks the Commissioner's recommendation that two lawyers be permitted to attend those days of hearings when representative witnesses are to be cross-examined by CLA counsel and when expert witnesses are called to testify before the Inquiry.
9. The CLA does not seek leave to make oral submissions in relation to this Application for Standing and Funding. However, the CLA is prepared to attend to make submissions should the Commissioner so require.
10. Such further grounds as counsel may advise and this Honourable Commission may permit.

THE FOLLOWING DOCUMENTARY EVIDENCE will be relied upon in support of this Motion:

1. Affidavit of Frank Addario, Vice-President of the Criminal Lawyers Association ("CLA"), sworn on July 12, 2007;
2. Such further and other material as counsel may advise and this Honourable Commission of Inquiry may permit.

THE APPLICANT MAY BE SERVED WITH DOCUMENTS PERTINENT TO THIS APPLICATION:

1. By service upon its solicitor (for the purposes of this Application), Joseph Di Luca, Di Luca Barristers, 15 Bedford Road, Toronto, Ontario, M5R 2J7, Tel: 416-868-1203, Fax: 416-868-0273, e-mail: jdiluca@15bedford.com

Dated at Toronto this 12th day of July, 2007



JOSEPH DI LUCA

Di Luca Barristers
15 Bedford Road
Toronto, Ontario
M5R 2J7

Tel: 416-868-1203
Fax: 416-868-0273

e-mail: jdiluca@15bedford.com

Of Counsel for the Applicant,
Criminal Lawyers' Association

TO: Linda Rothstein
Commission Counsel
Inquiry into Pediatric Forensic Pathology in Ontario
180 Dundas Street West, 22nd floor
Toronto, ON M5G 1Z8

AND TO: Registrar
Inquiry into Pediatric Forensic Pathology in Ontario
180 Dundas Street West, 22nd floor
Toronto, ON M5G 1Z8

**INQUIRY INTO PEDIATRIC FORENSIC
PATHOLOGY IN ONTARIO**

The Honourable Stephen T. Goudge

**NOTICE OF APPLICATION
FOR STANDING and FOR FUNDING
(*Criminal Lawyers' Association*)**

Joseph Di Luca
Di Luca Barristers
15 Bedford Road
Toronto, ON M5R 2J7

Tel: 416-868-1203
Fax: 416-868-0273

e-mail: jdiluca@15bedford.com

Counsel for the Applicant