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Barristers

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HAND DELIVERED

The Inquiry into Pediatric Forensic Pathology in Ontario  
180 Dundas Street West  
22<sup>nd</sup> floor  
Toronto ON M5G 1Z8

Attention Linda Rothstein

Dear Ms. Rothstein:

**RE: Marco Trotta**

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I am counsel for Mr. Trotta and have been since shortly after he commenced his appeal for his conviction for second degree murder to the Court of Appeal for Ontario over eight years ago. The Inquiry has invited interested parties to bring a motion should they choose to seek standing. I am aware that there was a deadline that passed some time ago. However, I would like the Commissioner to consider this request for standing.

A brief history of the matter as it relates to Mr. Trotta will explain the reasons why I am writing belatedly for standing. At the time that the Attorney General announced the establishment of this commission Mr. Trotta was in a federal institution serving a life sentence for the murder of his eighth month old child. Shortly after the announcement of the creation of this Inquiry in April of 2007, Mr. Trotta was released on bail pending appeal. By that time his appeal to the Court of Appeal had been dismissed in October of 2004, but leave to the Supreme Court of Canada had been granted and the appeal was scheduled to be argued on October 12, 2007. It was in fact argued on that date and judgement has been reserved. Although leave had been granted to the Supreme Court at large, the issue that could be identified as one of national importance related to post conviction disclosure. The disclosure in question related to the steadily unfolding problems with respect to the work of Dr. Smith as a forensic pathologist. Dr. Smith's evidence as to the cause of death of my client's son was critical to the trial and to my client's conviction for murder.

The post conviction disclosure issue was overtaken by fresh evidence that the cause of death was not as Dr. Smith had opined at my client's trial. The fresh evidence came from Dr. Pollanen, Chief Forensic Pathologist for Ontario and Dr. Avis Chief Medical Examiner for Newfoundland and Labrador. That evidence was accepted by the crown as credible and trustworthy and could have affected the verdict, but only to the extent of reducing the murder conviction to a conviction for manslaughter. The fresh evidence that was put before the Supreme Court started with a simple review by Dr. Pollanen to confirm that certain fractures that were attested to by Dr. Smith in the Trotta trial actually existed.

Ordinarily, based on earlier Supreme Court of Canada cases, if the fresh evidence is found by an appellate court to be admissible, then a new trial must be ordered. Suffice it to say that if the crown were successful on this novel argument there would be no new trial and my client's need for standing would be moot. The crown's argument, as outlined in its factum, was received at about the same time as the deadline for standing. I decided to hold off on the standing issue before the Inquiry until it became clearer to me as to what was likely to happen with respect to Mr. Trotta's case.

The case is now under reserve and Mr. Trotta has been readmitted to bail pending the decision of the Supreme Court. I think that it would be fair to say that in one form or another the Trotta case is likely to be coming back to the trial court. But the Inquiry is about to commence and I have a very real concern about protecting Mr. Trotta's right to a fair trial should one be ordered.

I am comforted somewhat by the terms of reference and the emphasis on systemic issues. I am also aware that in order to expose the systemic issues the Inquiry will to some extent have to uncover the facts. Uncovering facts in one context could look like the investigation of an outstanding allegation of murder merely by changing the focus or emphasis. In those circumstances my client needs to be represented in order for the Commissioner to balance the fair trial rights of my client with the societal interest in the investigation of the systemic issues in this Inquiry. I also recognize that it would not be possible for Commission counsel to be tasked with trying to protect future fair trial rights of one individual given the scope of this Inquiry.

Lastly with respect to funding Mr. Trotta does not have the means to fund counsel. He is recently released after more than 8 years in custody and has a relatively modest paying job. The focus of my concern is with the pathology evidence as will be given by the various experts. At this point I do not anticipate making submissions with respect to any aspect of the systemic issues. It would be my intention to either be there myself or have a junior lawyer in attendance to participate during the testimony of particular witnesses.

Yours truly,  
  
Michael Lomer

ML/ad