SickKids®
THE HOSPITAL FOR SICK CHILDREN

Reply Submissions

Prepared for

The Inquiry into Paediatric Forensic Pathology in Ontario

Before the Honourable Stephen T. Goudge, Commissioner

March 27, 2008

1. The Hospital for Sick Children ("SickKids" or the "Hospital") submits that the written argument of the College of Physicians and Surgeons ("CPSO" or the "College") that the Hospital "failed" to report various inadequacies related to the work of Dr. Charles Smith is unpersuasive. While asserting that the Hospital had such a duty[1], the College fails to articulate the legal basis giving rise to any such duty.

2. Moreover, the College's argument seems aimed at creating sympathy for the proposition that physician-reporting to the CPSO should be increased based on the notion that there are some hospitals trying to circumvent their statutory reporting obligations in order to make expedient bargains with sub-standard medical staff members.[2] Whether this is true is completely unsupported by the evidence and, in the case of Dr. Smith, is absolutely untrue.

Mandatory Reporting

3. The applicable legislation (s. 33 of the *Public Hospitals Act*[3], and s. 85.5 of Schedule 2, The Health Professions Procedure Code of the *Regulated Health Professions Act*, 1991[4]) makes clear that the reporting obligations imposed upon institutions arise only in certain limited

[1] Written Submissions of the College of Physicians and Surgeons, undated, at para. 21 and 27.
[2] Written Submissions of the College of Physicians and Surgeons, undated, at para. 19.

[3] Section 33 of the *Public Hospitals Act*, R.S.O. 1990, Chapter P.40, which reads:

Notice to college of disciplinary action against physician.

33. Where,

(a) the application of a physician for appointment or reappointment to a medical staff of a hospital is rejected by reason of his or her incompetence, negligence or misconduct;

(b) the privileges of a member of a medical staff of a hospital are restricted or cancelled by reason of his or her incompetence, negligence or misconduct; or

(c) a physician voluntarily or involuntarily resigns from a medical staff of a hospital during the course of an investigation into his or her competence, negligence or conduct,

the administrator of such hospital shall prepare and forward a detailed report to The College of Physicians and Surgeons of Ontario. R.S.O. 1990, c. P.40, s. 33.

[4] Section. 85.5 of Schedule 2, The Health Professions Procedure Code of the *Regulated Health Professions Act*, 1991, S.O. 1991, C. 18, which reads:

Reporting by employers, etc.

85.5 (1) A person who terminates the employment or revokes, suspends or imposes restrictions on the privileges of a member or who dissolves a partnership, a health profession corporation or association with a member for reasons of professional misconduct, incompetence or incapacity shall file with the Registrar within thirty days after the termination, revocation, suspension, imposition or dissolution a written report setting out the reasons. 1993, c. 37, s. 23; 2000, c. 42, Sched., s. 36.

Same.

(2) If a person intended to terminate the employment of a member or to revoke the member's privileges for reasons of professional misconduct, incompetence or incapacity but the person did not do so because the member resigned or voluntarily relinquished his or her privileges, the person shall file with the Registrar within thirty days after the resignation or relinquishment a written report setting out the reasons upon which the person had intended to act. 1993, c. 37, s. 23.

circumstances, viz, a change in the privileges of a member of the medical staff due to misconduct, incapacity or incompetence, or resignation of a member during an investigation into his or her potential misconduct, incapacity or incompetence.

4. Applying the statutory tests to the factual record regarding Dr. Smith's clinical work at the Hospital, it is clear that:

- There was no change in Dr. Smith's privileges or status on medical staff as a result of any concerns regarding Dr. Smith's competence in clinical pathology;[5] and
- There was no hospital investigation into Dr. Smith's competence, capacity, or any potential misconduct regarding clinical pathology which prompted Dr. Smith's resignation from the Hospital.

5. Moreover, the evidence before the Commission supports the Hospital's position that Dr. Smith was a capable and competent surgical pathologist.[6] Specifically, those with direct knowledge of Dr. Smith's clinical practice, namely Drs. Thorner, Phillips and Taylor (and Dr. Smith himself) support the conclusions that Dr. Smith was a competent and capable paediatric pathologist.[7]

6. During his testimony, Dr. Gerace, the current Registrar of the College, acknowledged that a reduction in a physician's case load with re-assignment within a department could be an effective option for managing issues related to a physician's practice, and that such a case-load reduction would not necessarily fit the definition of a restriction in privileges that would trigger a mandatory reporting requirement to the College.[8]

Voluntary Reporting

7. Apart from the mandatory reporting obligations set out above, there are no guidelines regarding the form, content or triggers of voluntary reporting by individuals or institutions.

[5] Transcript of the evidence of Dr. Paul Thorner, January 11, 2008, p. 132, see also PFP117047, Transcript of the evidence of Dr. Charles Smith, January 28, 2008, p. 62.
[6] See evidence referred to In the Hospital For Sick Children's Written Submissions, dated March 20, 2008, paragraphs 105-126.
[7] Transcript of the evidence of Dr. Ernest Cutz and Dr. Glenn Taylor, December 19, 2007, pp. 8-10, PFP303615, Dr. M.J. Phillips interview summary, pp. 9, 11, and Transcript of the evidence of Dr. Paul Thorner, January 11, 2008, p. 132.
[8] Transcript of the evidence of Dr. Rocco Gerace, January 16, 2008, p. 315.

8. When considering voluntary reporting, it is important to distinguish between professional standards of practice, and institutional standards. The latter are self-determined and applicable only to those practicing within the institution.

9. During his evidence, Dr. Gerace acknowledged that it is not axiomatic that every breach of a professional standard of practice by a physician requires reporting to the College. The requirement to report to the College exists on a spectrum and there is room for the management of transient practice issues by those responsible for monitoring the physician's conduct at the institution where he or she has privileges:

> MR. WILLIAM CARTER: … You agree with me that it's important to manage the medical staff in a way that encouraged their best performance and identified deficiencies and give (sic) them an opportunity to improve through education and other forms of instruction?
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> DR. ROCCO GERACE: Yes.
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> MR. WILLIAM CARTER: Okay. And in doing that, that process, that's a natural process of learning and personnel management?
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> DR. ROCCO GERACE: Yes.
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> MR. WILLIAM CARTER: Okay. And that -- that -- when those things occur they don't necessarily give rise to reporting obligations?
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> DR. ROCCO GERACE: That's correct.
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> MR. WILLIAM CARTER: At the College?
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> DR. ROCCO GERACE: That's correct.[9]

10. There are no published professional standards in Ontario regarding the practice of paediatric forensic pathology, and it is not clear what professional standards exist with regard to paediatric pathology more generally.[10]

11. Dr. Smith's departure from applicable standards for surgical pathology work was short-lived[11]. There were no surgical deficiencies after 1997. He was never removed from the surgical

[9] Transcript of the evidence of Dr. Rocco Gerace, January 16, 2008, p. 314.
[10] Transcript of the evidence of Dr. David Chiasson, December 11, 2007, pp. 215-217.
[11] In fact, Dr. Smith successfully completed his American Board of Medical Specialities exam in paediatric pathology in 1999, see transcript of the evidence of Dr. Charles Smith, January 28, 2008, p. 24.

pathology rotation or docked any salary[12], and his deficiencies related to an area of considerable medical complexity where other competent pathologists may encounter the same types of difficulties.[13] Neither Dr. Thorner, the former Associate Head of the Division of Pathology nor Dr. Taylor, the current Head of the Division of Pathology, two pathologists with special expertise in surgical pathology, had any concerns with Dr. Smith's competence as a surgical pathologist.[14]

12. The CPSO also suggests that issues relating to Dr. Smith's reporting timeliness may have triggered a duty for the Hospital to report.[15] Turnaround times for reports were set by the Hospital and the OCCO. They were not set by any universal standard of practice within the purview of the CPSO. In any event, any requirement to report these issues then would not be on a legal or mandatory basis, but instead on a voluntary basis. Although the Hospital agrees that voluntary physician reporting may be appropriate in some circumstances, this is at the discretion of the member and/or institution making the report, based on their judgment of the value in taking this step.

Conclusions

13. Notwithstanding the fact that there was no statutory duty for the Hospital to report any of the so-called "issues" relating to Dr. Smith to the College, it is the Hospital's submission that it is speculative for the College to state that they would have instituted a section 75 investigation under Schedule 2 of the *Regulated Health Professions Act*[16] had they been advised of these issues relating to Dr. Smith.[17]

14. The College had received complaints from members of the public who felt seriously aggrieved by the alleged misconduct of Dr. Smith, but its initial response was to let the OCCO conduct the investigation into the complaints. If the complaints were not sufficient to merit an investigation under section 75 of the *Regulated Health Professions Act*[18], it is not credible to submit that, with the benefit of hindsight, complaints about timeliness and sporadic concerns

[12] Transcript of the evidence of Dr. Paul Thorner, January 11, 2008, p. 132, see also PFP117047.
[13] Transcript of the evidence of Dr. Ernest Cutz and Dr. Glenn Taylor, December 18, 2007, p. 231.
[14] Transcript of the evidence of Dr. Paul Thorner, January 11, 2008, p. 132, Transcript of the evidence of Dr. Ernest Cutz and Dr. Glenn Taylor, December 18, 2007, pp. 231-232.
[15] Written Submissions of the College of Physicians and Surgeons, undated, at para. 27-30.
[16] Schedule 2, The Health Professions Procedure Code of the *Regulated Health Professions Act*, 1991, S.O. 1991, C. 18.
[17] Written Submissions of the College of Physicians and Surgeons, undated, at para. 18.
[18] Schedule 2, The Health Professions Procedure Code of the *Regulated Health Professions Act*, 1991, S.O. 1991, C. 18.

about a physician's diagnostic abilities in a highly complex area would have triggered such an investigation.

15. The Hospital and the College both play significant roles in the delivery of health care. SickKids respects the role of the CPSO as the licensing body to monitor the bedrock competency criteria of its physicians. This function is discharged in the public interest. The Hospital's duty is to ensure that those who deliver care in its institutional setting are competent to do so. This involves a consideration of many factors in addition to the licensure of the physician; for example, recognition of short-comings and the ability to embrace improvement. Both institutions have important public responsibilities which are congruent but not coextensive.

16. In conclusion, SickKids wishes to stress the importance of the Commission staying within its mandate. The subject of medical staff management in a public hospital as its relates to the disciplinary role of the CPSO, while worthy of a robust dialogue, is not before this Commission. The Commission has heard no evidence in respect of the full panoply of mechanisms available to manage quality improvement in the delivery of health care. Often, the conduct of an individual physician is only one factor in analysing a poor outcome. The decision to report a physician to the College is not to be taken lightly. The voluntary choice to do so is multi-factorial and, any recommendation aimed at increasing the frequency of physician-reporting should only be considered after a much more comprehensive review of the issue, in order to ensure that existing and complementary quality assurance mechanisms are not compromised by an isolated review of physician reporting.

ALL OF WHICH IS RESPECTFULLY SUBMITTED,

Dated this 27th day of March, 2008

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Party with Standing
Inquiry into Paediatric Forensic Pathology in Ontario