INQUIRY INTO PEDIATRIC FORENSIC PATHOLOGY IN ONTARIO

In the matter of the Public Inquiries Act, R.S.O. 1990, 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 Commissioner to the Registrar of the College of Physicians and Surgeons of Ontario on September 17, 2007

FACTUM OF THE COLLEGE OF PHYSICIANS AND SURGEONS OF ONTARIO

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TABLE OF CONTENTS

PART I – OVERVIEW

1. This is a motion by counsel for the Commission to enforce a summons to witness issued by the Honourable Stephen T. Goudge, Commissioner (the "Commissioner") pursuant to section 7 of the *Public Inquiries Act*, requiring the Registrar of the College of Physicians and Surgeons of Ontario (the "CPSO") to attend before the Commissioner on October 4, 2007 to give evidence and bring and produce certain documents to the Commission.

2. The CSPO believes that the Registrar is precluded from complying with the summons by virtue of s. 36(1) of the *Regulated Health Professions Act, 1991* (the "*RHPA*"), which imposes a duty of confidentiality on all College employees, subject to certain exceptions enumerated in the *RPHA*.

3. The CPSO does not believe that any of the exceptions in s. 36(1) of the *RHPA* allow the CPSO Registrar to produce the information sought pursuant to the summons to witness issued by the Commissioner.

PART II – THE FACTS

4. The CPSO agrees that the facts set out in paragraphs 8 to 14 of the Commission's factum are the relevant facts for the determination of the issues set out below.

PART III – ISSUES AND THE LAW

ISSUE #1: Is the CPSO Registrar precluded from complying with the summons given the confidentiality requirements under s. 36(1) of the *RHPA*, or is the disclosure of the information required by an act of the Legislature or an act of Parliament pursuant to s. 36(1)(h)?

RHPA- Confidentiality Requirements

5. Section 36(1) of the *RHPA* imposes a duty of confidentiality on all College employees requiring them to keep confidential all information that comes to their knowledge in the course of their duties and not to communicate any information to any person except in certain specified circumstances.

6. Until recent amendments were made to the *RHPA* in 2007, the exceptions provided in s. 36(1) were as follows:

Confidentiality

36. (1) Every person employed, retained or appointed for the purposes of the administration of this Act, a health profession Act or the Drug and Pharmacies Regulation Act and every member of a Council or committee of a College shall preserve secrecy with respect to all information that comes to his or her knowledge in the course of his or her duties and shall not communicate any information to any other person except,

(a) to the extent that the information is available to the public under this Act, a health profession Act or the *Drug and Pharmacies Regulation Act*;

(b) in connection with the administration of this Act, a health profession Act or the *Drug and Pharmacies Regulation Act*, including, without limiting the generality of this, in connection with anything relating to the registration of members, complaints about members, allegations of members' incapacity, incompetence or acts of professional misconduct or the governing of the profession;

(c) to a body that governs a health profession in a jurisdiction other than Ontario;

(d) as may be required for the administration of the *Drug Interchangeability and Dispensing Fee Act*, the *Healing Arts Radiation Protection Act*, the *Health Insurance Act*, the *Independent Health Facilities Act*, the *Laboratory and Specimen Collection Centre Licensing Act*, the *Ontario Drug Benefit Act*, the *Narcotic Control Act* (Canada) and the *Food and Drugs Act* (Canada);

(d.1) to a police officer to aid an investigation undertaken with a view to a law enforcement proceeding or from which a law enforcement proceeding is likely to result;

(e) to the counsel of the person who is required to preserve secrecy; or

(f) with the written consent of the person to whom the information relates.

7. In June, 2007, s. 36 of the *RHPA* was amended to expand the exceptions to the confidentiality requirements in s. 36(1)[1]:

Confidentiality

36. (1) Every person employed, retained or appointed for the purposes of the administration of this Act, a health profession Act or the Drug and Pharmacies Regulation Act and every member of a Council or committee of a College shall <u>keep confidential</u> all information that comes to his or her knowledge in the course of his or her duties and shall not communicate any information to any other person except,

(a) to the extent that the information is available to the public under this Act, a health profession Act or the *Drug and Pharmacies Regulation Act*;

(b) in connection with the administration of this Act, a health profession Act or the *Drug and Pharmacies Regulation Act*, including, without limiting the generality of this, in connection with anything relating to the registration of members, complaints about members, allegations of members' incapacity, incompetence or acts of professional misconduct or the governing of the profession;

[1] amendments underlined

(c) to a body that governs a profession inside or outside of Ontario;

(d) as may be required for the administration of the *Drug Interchangeability and Dispensing Fee Act*, the *Healing Arts Radiation Protection Act*, the *Health Insurance Act*, the *Independent Health Facilities Act*, the *Laboratory and Specimen Collection Centre Licensing Act*, the *Ontario Drug Benefit Act*, the *Coroners Act*, the *Controlled Drugs and Substances Act* (Canada) and the *Food and Drugs Act* (Canada);

(e) to a police officer to aid an investigation undertaken with a view to a law enforcement proceeding or from which a law enforcement proceeding is likely to result;

(f) to the counsel of the person who is required to keep the information confidential under this section;

(g) to confirm whether the College is investigating a member, if there is a compelling public interest in the disclosure of that information;

(h) where disclosure of the information is required by an Act of the Legislature or an Act of Parliament;

(i) if there are reasonable grounds to believe that the disclosure is necessary for the purpose of eliminating or reducing a significant risk of serious bodily harm to a person or group of persons; or

(j) with the written consent of the person to whom the information relates.

8. Unlike the *Coroners Act*, the *Public Inquiries Act* was not added to s.36 (1)(d) when that section was recently amended.

Public Inquiries Act – Power to Summons Evidence

9. Pursuant to s. 7(1) of the *Public Inquiries Act*, the Commissioner may issue a summons to obtain oral and documentary evidence at an inquiry provided that such information is relevant to the subject matter of the inquiry and not inadmissible by reason of any privilege.

10. The governing legislation of various bodies expressly provides those bodies with access to the power to issue a summons under the *Public Inquiries Act*. Legislation incorporating this power includes the *Architects Act*, the *Charities Accounting Act*, the *Education Act*, the *Farm Products Marketing Act*, the *Milk Act*, the *Mortgage Brokers Act*, the *Engineers Act*, the *Social Work and Social Services Work Act*, the *Surveyors Act*, the *Veterinarians Act*. A more exhaustive list including the relevant sections are included in Schedule C.

Coroners Act - Power to Summons Evidence

11. Under the *Coroners Act*, a Coroner enjoys a similar summons power as a commissioner under the *Public Inquiries Act* and may summons oral and documentary evidence relevant to the subject matter of the inquest and admissible.

Coroners Act, R.S.O. 1990, C.C. 37, s. 40

Summons does not override confidentiality provisions in section 36(1) nor does it make the information sought "required by an act of the Legislature or an act of Parliament" under section 36(1)(h)

12. The College submits that the summons issued under the *Public Inquiries Act* does not override the confidentiality provisions in s. 36(1), nor does it make the disclosure of the CPSO information "required by an act of the Legislature or an act of Parliament" or disclosable pursuant to any other exception in s. 36(1). There is nothing in the *Public Inquiries Act* that suggests that a summons issued under that Act overrides the confidentiality requirements in s. 36(1).

13. Further, s. 36(1)(d) of the *RHPA* specifically states that disclosure is permitted if it is required for the administration of various Acts, including the *Coroners Act*, which was added when the legislation was amended in 2007. The *Public Inquiries Act* is not included in this section.

14. Since a Coroner under the *Coroners Act* and a Commission under the *Public Inquiries Act* enjoy virtually the same power of summons, if a summons under the *Public Inquiries Act* or *Coroners Act* negated the confidentiality provision under s. 36(1), it would not have been necessary to amend s. 36(1) of the *RHPA* to specifically include the *Coroners Act*.

15. If the drafters of the *RHPA* intended to relieve College employees of the confidentiality requirements where a summons was issued under the *Public Inquiries Act*, it could have included it in the list of other Acts in s. 36(1)(d) pursuant to which disclosure is permitted. Alternatively, it could have made a specific exception allowing the CPSO to disclose information required pursuant to a summons, which is an exception the Legislature has specified elsewhere, as in the *Mental Health Act*. The Legislature chose to do neither.

16. In paragraphs 48 and 49 of its factum, the Commission counsel relies on the broad definition of "proceeding" in section 83.1(1) of the HPPC in submitting that the Legislature could have expanded the definition of civil proceeding in s. 36(3) if it meant to include a public inquiry. Using Commissioner counsel's reasoning, had the Legislature intended to allow disclosure of CPSO confidential information pursuant to a summons under *the Public Inquiries Act*, it would have expressly stated so in section 36(1) of the *RHPA*.

17. When a provision specifically mentions one or more items but is silent with respect to other items that are comparable, it is presumed that the silence is deliberate and reflects an intention to exclude the items that are not mentioned. The CPSO submits that the legislature must be presumed to have intended to exclude disclosure under the *Public Inquiries Act* since it was not listed with other comparable exceptions, including the *Coroners Act*, in section 36(1).

> Sullivan, *Sullivan and Driedger on the Construction of Statutes*, Fourth Edition (2002), Butterworths: at p. 187

18. The College respectively submits that "where disclosure of information is required by an act of the Legislature or an act of Parliament" can only refer to circumstances in which another Act expressly requires the disclosure of information that would otherwise be confidential under s. 36 of the *RHPA* and provides that such disclosure is required notwithstanding any confidentiality requirements in another Act. Examples of such legislation include the following:

Family Responsibility and Support Arrears Enforcement Act

Power of Director

> **54.** (2) The Director may, for the purpose of enforcing a support order or support deduction order filed in the Director's office or for the purpose of assisting an office or person in another jurisdiction performing similar functions to those performed by the Director,
>
> (a) demand enforcement-related information or recipient information from any person, public body or other entity from a record in the possession or control of the person, public body or other entity;
>
> (b) subject to subsections (4) and (5), have access to all records that may contain enforcement-related information or recipient information and that are in the possession or control of any ministry, agency, board or commission of the Government of Ontario in order to search for and obtain the information from the records;
>
> (c) subject to subsections (4) and (5), enter into an agreement with any person, public body or other entity, including the Government of Canada, a Crown corporation, the government of another province or territory or any agency, board or commission of such government, to permit the Director to have access to records in the possession or control of the person, public body or other entity that may contain enforcement-related information or recipient information, in order to search for and obtain the information from the records; and

(d) disclose information obtained under clause (a), (b) or (c) to

a person performing similar functions to those of the Director in another jurisdiction.

Court order for access to information

(7) A court may, on motion, make an order requiring any person, public body or other entity to provide the court or the person whom the court names with any enforcement-related information or recipient information that is shown on a record in the possession or control of the person, public body or other entity if it appears that,

(a) the Director has been refused information after making a demand under clause (2) (a);

(b) the Director has been refused access to a record under clause (2) (b); or

(c) a person needs an order under this subsection for the enforcement of a support order that is not filed in the Director's office. 2005, c. 16, s. 32.

Section governs

(11) This section applies despite any other Act or regulation and despite any common law rule of confidentiality.

Child and Family Services Act

Duty to report child in need of protection

72. (1) **Despite the provisions of any other Act,** if a person, including a person who performs professional or official duties with respect to children, has reasonable grounds to suspect one of the following, the person shall forthwith report the suspicion and the information on which it is based to a society:

1. The child has suffered physical harm, inflicted by the person having charge of the child or caused by or resulting from that person's,

   i. failure to adequately care for, provide for, supervise or protect the child, or

   ii. pattern of neglect in caring for, providing for, supervising or protecting the child.

2. There is a risk that the child is likely to suffer physical harm inflicted by the person having charge of the child or caused by or resulting from that person's,

   i. failure to adequately care for, provide for, supervise or protect the child, or

   ii. pattern of neglect in caring for, providing for, supervising or protecting the child.

3. The child has been sexually molested or sexually exploited, by the person having charge of the child or by another person where the person having charge of the child knows or should know of the possibility of sexual molestation or sexual exploitation and fails to protect the child.

4. There is a risk that the child is likely to be sexually molested or sexually exploited as described in paragraph 3.

5. The child requires medical treatment to cure, prevent or alleviate physical harm or suffering and the child's parent or the person having charge of the child does not provide, or refuses or is unavailable or unable to consent to, the treatment.

6. The child has suffered emotional harm, demonstrated by serious,

   i. anxiety,

   ii. depression,

   iii. withdrawal,

   iv. self-destructive or aggressive behaviour, or

   v. delayed development,

and there are reasonable grounds to believe that the emotional harm suffered by the child results from the actions, failure to act or pattern of neglect on the part of the child's parent or the person having charge of the child.

7. The child has suffered emotional harm of the kind described in subparagraph i, ii, iii, iv or v of paragraph 6 and the child's parent or the person having charge of the child does not provide, or refuses or is unavailable or unable to consent to, services or treatment to remedy or alleviate the harm.

8. There is a risk that the child is likely to suffer emotional harm of the kind described in subparagraph i, ii, iii, iv or v of paragraph 6 resulting from the actions, failure to act or pattern of neglect on the part of the child's parent or the person having charge of the child.

9. There is a risk that the child is likely to suffer emotional harm of the kind described in subparagraph i, ii, iii, iv or v of paragraph 6 and that the child's parent or the person having charge of the child does not provide, or refuses or is unavailable or unable to consent to, services or treatment to prevent the harm.

10. The child suffers from a mental, emotional or developmental condition that, if not remedied, could seriously impair the child's development and the child's parent or the person having charge of the child does not provide, or refuses or is unavailable or unable to consent to, treatment to remedy or alleviate the condition.

11. The child has been abandoned, the child's parent has died or is unavailable to exercise his or her custodial rights over the child and has not made adequate provision for the child's care and custody, or the child is in a residential placement and the parent refuses or is unable or unwilling to resume the child's care and custody.

12. The child is less than 12 years old and has killed or seriously injured another person or caused serious damage to another person's property, services or treatment are necessary to prevent a recurrence and the child's parent or the person having charge of the child does not provide, or refuses or is unavailable or unable to consent to, those services or treatment.

13. The child is less than 12 years old and has on more than one occasion injured another person or caused loss or damage to another person's property, with the encouragement of the person having charge of the child or because of that person's failure or inability to supervise the child adequately.

Section overrides privilege

(7) This section applies although the information reported may be confidential or privileged, and no action for making the report shall be instituted against a person who acts in accordance with this section unless the person acts maliciously or without reasonable grounds for the suspicion.

19. The confidentiality requirements in *The Child and Family Services Act* ("*CFSA*") were specifically considered in *Police Complaints Commissioner v. Dunlop*, where the Court confirmed the duty of a police officer, under the *CFSA*, to report his suspicion of child abuse to the Society since he had a duty under the Act to do so, and the Act specifically provided that this duty applied although the information reported may be confidential or privileged.

Police Complaints Commissioner v. Dunlop, [1995] O.J. No. 3818 (Gen. Div.)

20. It is submitted that if a College employee had reasonable grounds to suspect child abuse that came to the employee in the course of his duties, s. 36(1)(h) would apply to allow a College employee to breach confidentiality, since such disclosure under the *CFSA* would be required by

an act of the Legislature given that the *CFSA* mandates reporting "despite the provisions of any other Act."

21. Further, if the Legislature intended that the College be relieved of its duty of confidentiality where a summons was issued, it could have so provided, as it did in other legislation, such as the *Mental Health Act,* R.S.O. 1990, c.M.7 ("*MHA*"), which provided, under s. 35(2) (prior to recent amendments), that clinical records cannot be disclosed, transmitted or examined unless pursuant to a summons or similar requirement in respect of a matter in issue or that may be in issue in a Court of competent jurisdiction or under any Act. (s. 35(5)).

22. In *Ahmed v. Stefaniu*, the Court considered the confidentiality provisions under section 35 of the *MHA*. Section 35(2) of the *MHA* prohibited the disclosure, transmission or examination of a medical record except, under s. 35(5), pursuant to a summons or requirement in respect of matters in issue in a court of competent jurisdiction or under any Act. Under s. 35(9), it also prohibited disclosure, in a proceeding in court or before any body, of information in respect of a patient obtained in the course of assessing or treating the patient, except with consent or where the Court determined that disclosure is essential in the interest of justice.

Ahmed v. Stefaniu, [2004] O.J. No. 3854 (S.C.), at p. 3-5 (QL)

23. In *Ahmed*, the Court emphasized the value of the confidentiality of clinical records, favouring "a clear preference for an interpretation that attributes a greater value and significance to a patient's privacy interest in the confidentiality of his clinical records":

> "I would regard it as surprising, and anomalous, if the effect of s. 35(5) is that the prohibition in s. 35(2) and the policy it reflects, could be displaced by nothing more than a summons to a witness"
>
> *Ahmed v. Stefaniu, supra* at paras. 11 and 39
>
> See also: para. 12 where the Court cites *Everingham v. Ontario* (1992), 88 D.L.R. (4th) 464 at 473-474 (Ont. Div. Ct.). There, the court held that s. 35(5) merely serves to get the clinical records before the court, and s. 35(9) still required the court to sanction introduction of the evidence derived from the clinical records, otherwise the protection in s. 35(2) would be illusory and could be circumscribed merely by serving a summons.

24. The CPSO submits that if a summons issued under the *Public Inquiries Act* required the CPSO to disclose its documents absent any exception, it would render the confidentiality provisions of s. 36(1) illusory.

25. Where information is expressly made confidential by legislation and disclosure is permitted only in prescribed circumstances, the Legislature must be taken to have intended that disclosure is not otherwise permitted. In reviewing the *Access to Information Act*, the Federal Court of Appeal in *Hunter v. Canada (Minister of Consumer and Corporate Affairs)* reviewed the appropriate approach to be taken in interpreting legislated confidentiality:

> Apart from the practice developed by the Courts, Parliament has suggested or imposed various techniques to protect confidential information. The techniques extend to judicial as well as to non-judicial proceedings. The more sensitive the issue is, the more stringent the requirements are. Here is a non-exhaustive list of techniques developed so far, some of whom are occasionally combined.
>
> ...
>
> It is obvious when going through these statutes, that Parliament has sought to balance the need of the state and of private parties to protect the integrity of confidential information with the possibility for the public and the opposing parties to challenge the alleged confidentiality. When Parliament felt that the need of the state was such as to exclude any form of challenge or as to restrict severely any access to the confidential information at issue, it did not hesitate to do so. When Parliament decided to impose a particular "technique", it did so. When Parliament decided that courts could choose the most appropriate "technique," it did so. When Parliament, in a single statute, has imposed various "techniques" to deal with different situations, it presumably wanted a particular technique to be applied to a particular situation.
>
> *Hunter v. Canada (Minister of Consumer and Corporate Affairs)*, [1991] F.C.J. No. 245 (C.A.) per: Décary J. at p. 9-10 (QL)

26. It appears that the "technique" chosen by the legislature to protect confidential CPSO information was to prescribe the circumstance in which it could be disclosed, outside of which disclosure was not intended to be permitted.

27. In *Biscotti v. Ontario Securities Commission*, the Ontario Court of Appeal confirmed that the confidentiality requirements in section 14 of the *Securities Act* should be strictly adhered to since there was no indication in the legislation that confidentiality could be breached absent consent:

> The fact that a statement made in the course of s. 11 investigation is relevant does not make it compellable. Section 14 of the Act requires that it be and remain confidential and that the prohibition against disclosure continues unless the Commission consents to its disclosure. The requirement for consent does not end after the investigation ends or after a hearing has commenced. Further, the need for confidentiality does not diminish once the investigation is complete. There is no reason why the legislation should be construed in that way. If that had been the legislature's intention, the section would have expressly so provided. Perhaps the possibility of collusion was one of the reasons for requiring confidentiality but, in my opinion, it was not the primary reason.
>
> *Biscotti v. Ontario Securities Commission*, [1991] O.J. No. 35 (C.A.) at p. 5 (QL); lev. ref'd [1991] 1 S.C.R. vi

28. The CPSO submits that if the Legislature wished to allow the CPSO to disclose confidential information pursuant to a summons issued under the *Public Inquires Act*, it could easily have included this exception.

29. In *Transamerica Life Insurance Co.*, while the Court held that a generally statutory confidentiality provision was not an absolute bar to the production of information sought by summons, it found that the scope of confidentiality must be determined by the wording of the statute. The decision of the Court and the passage it relied on from Professor Hogg, *Liability of the Crown*, makes it clear that the scope of confidentiality provisions must be interpreted in each case, and that where specific exceptions to confidentiality are set out, as in s. 36(1) of the *RHPA*, the Legislature intended that they be adhered to.

> *Transamerica Life Insurance Co. v. Canada Life Assurance Co.* (1995), 27 O.R. (3d) 291 (Ont. Gen. Div.) at p. 302 [Commission Counsel's Authorities, Tab 2]

30. To allow disclosure by the CPSO of confidential information simply by virtue of a summons having been issued under the *Public Inquiries Act* would render the exceptions set out in s. 36(1) meaningless. It would allow for disclosure of the CPSO's confidential information to a variety of parties who enjoy the summons power under the *Public Inquiries Act*, some of which are listed in Schedule C. This type of wide disclosure does not appear to have been intended by s. 36(1), and would defeat the purpose of the limited exceptions carved out in the legislation.

31. Such an interpretation would appear to run contrary to the plain meaning of s. 36(1), the objectives of the *RHPA* and the intention of the Legislature.

> *Bell Expressvu Limited Partnership v. Rex* (2002), 212 D.L.R. (4th) 1 (S.C.C) [Commission Counsel's Authorities, Tab 3]

ISSUE #2: Are the documents relevant to this inquiry?

32. The College does not dispute that the documents sought are potentially relevant to the subject matter of the inquiry.

ISSUE #3: Are the documents privileged under the law of evidence?

33. Unlike Dr. Smith, the College is not claiming any general privilege over the documents sought pursuant to the summons. There may, however, be specific documents among those sought which are properly privileged (for example, documents subject to solicitor-client privilege).

ISSUE #4: Are the documents sought admissible under section 36(3) of the *RHPA:* Is this inquiry a "civil proceeding" under section 36(3) of the *RHPA*?

34. The CPSO submits that production under s. 36(1) is a separate and discreet issue from admissibility under s. 36(3). That is, whether or not this inquiry is a civil proceeding pursuant to sections 36(2) and (3) of the *RHPA* does not determine whether the information sought can be disclosed under s. 36(1). It must first be determined whether the information sought pursuant to the summons must be produced notwithstanding the confidentiality provisions of section 36(1) of the *RHPA*.

35. While CPSO documents available to the parties may ultimately be admissible in this inquiry despite s. 36(3) (if it is determined that this inquiry is not a civil proceeding, there is no privilege and the documents are relevant), documents in the possession of the CPSO may still not be producible by the CPSO given the confidentiality provisions in s. 36(1). The reverse may be true as well. For example, the CPSO could be relieved of its duty of confidentiality pursuant to an exception found in s. 36(1), such as if documents are produced under s. 36(1)(j) with the written consent of the person to whom the information relates, but those documents would still be inadmissible if it is determined that the inquiry is a civil proceeding pursuant to s. 36(3).

Ahmed v. Stefaniu, supra

36. The CPSO submits that in any event, the legislation and the case law suggests that this inquiry could be considered a "civil proceeding" under sections 36(2) and (3) of the *RHPA*.

Legislation suggests inquiry is a civil proceeding

37. A review of the *RHPA* and the *Health Professions Procedural Code*, which is Schedule 2 thereof ("*HPPC*") suggests that the Legislature intended that the term civil proceeding under s. 36(3) should be given a broad meaning.

38. Section 36(3) itself makes it clear that a civil proceeding includes various proceedings other than civil actions, including a proceeding under the *RHPA,* the *Health Professions Act* or the *Drug and Pharmacies Regulation Act* or a proceeding related to an order under certain sections of the *Ontario Drug Benefit Act*:

> **36.** (3) 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 in 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 of 11.2 of the *Ontario Drug Benefit Act.*
>
> *RHPA,* s. 36(3)

39. If a proceeding under the *RHPA* was not a civil proceeding under the legislation, s. 36(3) would have read: "...in a civil proceeding **or** a proceeding under this Act, a health profession Act, etc." By specifically stating that documents were inadmissible in a civil proceeding other than a proceeding under this Act, the Legislature appears to have intended to include other administrative proceedings, such as those under the *RHPA*, as civil proceedings. The CPSO submits that this could include proceedings under the *Pubic Inquiries Act.*

40. Section 7 of the *HPPC* also suggest that "civil proceeding" in the *RHPA* is to be given a broad meaning to include proceedings such as inquiries:

> **s.7** (2) Despite subsection (1), the Council may exclude the public from any meeting or part of a meeting if it is satisfied,
>
> (c) a person is involved in a criminal proceeding or civil suit or proceeding may be prejudiced;

41. Under s. 7(2), "civil" appears to modify both suit and proceeding. In distinguishing between a civil suit and civil proceeding, the legislation seemed to intend the latter to include more than just civil actions or applications, but rather also to include other proceedings, including administrative ones such as inquests and inquiries.

Case law suggests that an inquiry is a civil proceeding under the *RHPA*

42. The Supreme Court of Canada has found, in *R. v. Faber*, that a coroner's inquest is civil, rather than criminal, in nature. Wood J., of the British Columbia Supreme Court, referring to that case, stated:

> ... In the Supreme Court of Canada five judges, led by Grandpre J. concluded that a coroner's inquest is a civil proceeding ...
>
> *R. v. Faber*, [1976] 2 S.C.R. 9 at p. 8, 15 and 17 (QL)
>
> *British Columbia Securities Commission v. Branch* (1990), 68 D.L.R. (4th) 347 (B.C.S.C.) at p. 366; aff'd (1992), 88 D.L.R. (4th) 381 (B.C.C.A.); aff'd (1995), 123 D.L.R. (4th) 462 (S.C.C.)

43. The College submits that a corner's inquest and a public inquiry are similar in nature. As such, if a coroner's inquest is civil in nature, it could be considered a civil proceeding under the *RHPA*. A public inquiry must logically be afforded the same status.

44. Commission Counsel contends that a civil proceeding refers to the enforcement, redress, or protection of private rights. However, *Winters v. Legal Services Society (British Columbia)*, Cory J. states that the interpretation of the term "civil proceeding" must be done in the context of the legislation in which it is found:

> ¶61 I believe it is clear that the use of the word "civil" in s. 3(2)(b) must have a meaning beyond the adjudication of rights between two persons. To interpret "civil" in such a way is in effect to render s. 3(2)(b) meaningless because imprisonment or confinement would rarely result from an adjudication of rights between individuals. To reach such a conclusion would run counter to the principles of statutory interpretation ... since the term must be given a meaning that accords with the statute as a whole.
>
> *Winters v. Legal Services Society*, [1999] 3 S.C.R. 160 at para. 61 [Commission Counsel's Brief of Authorities, Tab 8]

45. In the context of the *RHPA*, where confidentiality of CPSO information may be breached only in limited prescribed circumstances, it is submitted that civil proceeding may be given a broad meaning to encompass all proceedings that are not criminal in nature.

46. This reading of the *RHPA* to include public inquiries as civil proceedings would be consistent with the approach taken by the courts in strictly construing the confidentiality requirement under s. 36(2) and (3) in confirming the inadmissibility of College documents in civil proceedings.

> *M.F. v. Sutherland*, [2000] O.J. No. 2522 (Ont. C.A.) at para. 29-39
>
> *Armitage v. Brantford General Hospital*, [2004] O.J. No. 2012 (S.C.) at para. 29
>
> *Middleton v. Sun Media Corp.*, [2006] O.J. No. 1640 (Div. Ct.) at p. 12-20 (QL)

47. While commission counsel appears to put some weight on Laskin J.A.'s use of the words "civil action" in *M.F. v. Sutherland* as an interpretation of the term "civil proceeding", with respect, it is not possible to read into Laskin J.A.'s use of the word "civil action" as precluding a proceeding such as an inquiry. In fact, Laskin J.A., was not required to, and did not, turn his mind to the definition of "civil proceeding" in that case. His use of three different terms undoubtedly occurred because the matter with which he was concerned could indeed be accurately described as a "civil action," "civil case," or "civil proceeding." Given that the three are not simply interchangeable, as Commission Counsel has acknowledged, the use of these terms by Laskin J.A. cannot be used to interpret the legislative intent.

M.F. v. Sutherland, supra at para. 36

48. Moreover, in *Middleton v. Sun Media Corp*, the Divisional Court used the term "civil proceeding", rather than "civil action", in its recent decision confirming that s. 36(3) precluded not only the admission of documents in a civil proceeding, but the requirement to even disclose such documents in an affidavit of documents. In strictly construing the confidentiality requirement to preclude disclosure of such information in the discovery process, the Court held as follows:

> In construing a statute, the words are to be considered in their entire context and in light of the purpose of the legislation. In this case, the words "not admissible" 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 protection from further 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 that the Legislature sought to prevent through the provisions of s. 36.

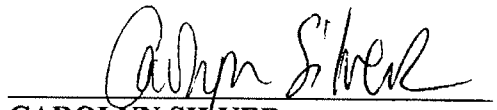
Middleton v. Sun Media Corp., supra at para. 19

49. It is respectfully submitted that there is certainly authority to support a finding that a public inquiry is a civil proceeding under s. 36(3) of the *RHPA*.

PART IV – ORDER SOUGHT

50. The College requests direction from the Commissioner regarding whether it is permitted to comply with the summons.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.



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