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 Commission to the Registrar of the College of Physicians and Surgeons of Ontario on September 17, 2007

FACTUM OF COMMISSION COUNSEL
(MOTION FOR DIRECTIONS RETURNABLE OCTOBER 4, 2007)

INQUIRY INTO PEDIATRIC FORENSIC PATHOLOGY IN ONTARIO
180 Dundas Street West, 22nd Floor
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Part I. Overview

1. On April 25, 2007, pursuant to the *Public Inquiries Act*, R.S.O. 1990, c. P.41 the province of Ontario appointed the Honourable Stephen T. Goudge, to conduct a commission of inquiry in order to make recommendations to restore and enhance public confidence in pediatric forensic pathology in Ontario and its future use in investigations and criminal proceedings (the "Commission" and the "Commissioner"). Specifically, the Commissioner is to conduct a systemic review and assessment and report on:

(a) the policies, procedures, 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 to 2001; and

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

2. In 1998, an administrative tribunal held that the College of Physicians and Surgeons of Ontario ("CPSO") was an accountability and oversight mechanism for pediatric forensic pathology in the province. Since 1997, the CPSO has processed at least three complaints about pediatric forensic pathologists in the province of Ontario.

3. The Commission's mandate includes the following:

(a) to evaluate the efficacy and strength of CPSO as an accountability mechanism for pediatric forensic pathology in the province;

(b) to recommend whether or not the CPSO should continue to function as an accountability mechanism; and

(c) to recommend any changes to the systems, policies, procedures, and practices of the CPSO to restore and enhance public confidence in pediatric forensic pathology in Ontario.

4. On September 17, 2007, the Commission delivered a summons to the Registrar of the CPSO requiring him to produce in evidence documents related to these complaints, as well as documents related to the CPSO's role as an accountability and oversight mechanism. The CPSO has informed Commission counsel that their legislative scheme does not permit them to disclose this information pursuant to the summons.

5. Commission counsel submits that the documents listed in the summons are relevant to the Commission's mandate and are not privileged. Moreover, neither the statutory confidentiality provisions of the *Regulated Health Professions Act*, S.O. 1991, c. 18 ("*RHPA*"), nor the *RHPA* provisions rendering such documents inadmissible in a civil proceeding prevent the production of the documents in evidence at the Inquiry.

6. Neither law nor policy compel a result that would insulate the CPSO from scrutiny as the Commission attempts to restore and enhance public confidence in pediatric forensic pathology in Ontario.

Part II. Facts

7. The CPSO and Commission counsel have agreed that the facts set out below are true.

A. The Inquiry, the CPSO, and the CPSO Summons

8. On April 25, 2007, the Lieutenant Governor, by and with the advice and concurrence of the Executive Council, created the Inquiry pursuant to Order-in-Council 826/2007 ("Order-in-Council"), which stated:

> On the recommendation of the undersigned, the Lieutenant Governor, by and with the advice and concurrence of the Executive Council, orders that:
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> WHEREAS on April 19, 2007, the Chief Coroner for Ontario announced the results of a review of certain cases of suspicious child deaths where Dr. Charles Smith performed the autopsy or was consulted ("the Chief Coroner's Review") and found that some of the factual conclusions were not reasonably supported by the materials available;
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> ...
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> AND WHEREAS the Chief Coroner for Ontario has announced that he has made the College of Physicians and Surgeons aware of the concerns identified in the Chief Coroner's Review;
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> ...
>
> AND WHEREAS there are civil and criminal proceedings that have arisen as a result of Dr. Smith's work that are the appropriate forum for the adjudication of those matters;
>
> AND WHEREAS the Lieutenant Governor in Council considers it advisable to appoint a person to identify and make recommendations to address systemic failings that may have occurred in connection with the oversight of pediatric forensic pathology in Ontario;
>
> AND WHEREAS the inquiry is not regulated by any special law;
>
> THEREFORE, pursuant to the *Public Inquiries Act*:
>
> 1. A Commission shall be issued effective April 25, 2007, appointing Honourable Stephen Goudge as a Commissioner.
>
> ...

4. The Commission shall conduct a systemic review and assessment and report on:

a. the policies, procedures, 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 to 2001; and

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

in order to make recommendations to restore and enhance public confidence in pediatric forensic pathology in Ontario and its future use in investigations and criminal proceedings.

...

5. The Commission shall perform its duties without expressing any conclusion or recommendation regarding professional discipline matters involving any person or the civil or criminal liability of any person or organization.

6. The Commission shall review and consider any existing records or reports relevant to its mandate, including the results of the Chief Coroner's Review announced on April 19, 2007, and other medical, professional, and social science reports and records. Further, the Commission shall rely wherever possible on overview reports submitted to the inquiry. The Commission may consider such reports and records in lieu of calling witnesses.

...

10. Part III of the Public Inquiries Act applies to the inquiry and the Commissioner may have recourse to the powers contained in Part III as necessary to achieve the mandate of the inquiry.[1]

9. The College of Physicians and Surgeons of Ontario is a corporate body governed by the *RHPA* and the *Medicine Act*, 1991, S.O. 1991, c. 30. In Ontario, the medical profession is a self regulated profession, and the CPSO has a statutory mandate to act in the public interest.

10. At least three persons have made complaints to the CPSO regarding the conduct of Dr. Charles Smith:

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[1] Order-in-Council 826/2007, Commission Counsel Compendium, Tab 1.

(a) D.M. filed a complaint on or about November 30, 1997 (the "D.M. Complaint"). D.M.'s daughter was acquitted of a charge of manslaughter arising from the death a 16-month old infant. Dr. Smith conducted a post mortem examination on the infant, and testified for the Crown at the trial of D.M.'s daughter.

(b) Maurice Gagnon filed a complaint on October 5, 1998 (the "Gagnon Complaint").[2] Mr. Gagnon's grandson, Nicholas, died suddenly while in the care of his mother, Lianne, who was Mr. Gagnon's daughter. Dr. Smith conducted a post mortem examination of Nicholas, the results of which prompted both the police to investigate Mr. Gagnon's daughter, and the local Children's Aid Society to commence a proceeding when Lianne subsequently became pregnant. Mr. Gagnon and Lianne have been granted standing at the Inquiry.

(c) Brenda Waudby filed a complaint on or about May 29, 2001 (the "Waudby Complaint", and the three complaints collectively, the "Complaints). Ms. Waudby's daughter, Jenna, died under suspicious circumstances. Dr. Smith conducted the post mortem examination of Jenna. Ms. Waudby was subsequently charged with second degree murder. Dr. Smith testified for the Crown at the preliminary inquiry. On June 5, 1999, the Crown withdrew the charges against Ms. Waudby. Ms. Waudby and her daughter Justine Traynor have been granted standing at the Inquiry.

11. These three cases formed part of the Chief Coroner's Review, as defined in the Order-In-Council.

B. CPSO Summons

12. On September 19, 2007, the Commissioner signed a summons requiring the Registrar of the CPSO (the "Registrar" and the "CPSO Summons") to attend to give evidence under oath touching the matters in question in the Inquiry and to bring with him and produce at such time and place:

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[2] PFP008061

> 1. all documents related to any complaints filed by D.M. regarding Dr. Charles R. Smith (including but not limited to File 27860), and the CPSO's investigation and disposition of that complaint, including but not limited to the Complaints Committee brief;
>
> 2. all documents related to any complaints filed by Maurice Gagnon regarding Dr. Charles R. Smith (including but not limited to File 40735), and the CPSO's investigation and disposition of that complaint, including but not limited to the Complaints Committee brief;
>
> 3. all documents related to complaints filed by Brenda Waudby regarding Dr. Charles R. Smith (including but not limited to File 46947), and the CPSO's investigation and disposition of that complaint, including but not limited to the Complaints Committee brief;
>
> 4. all documents related to any other complaints filed by anyone regarding Dr. Charles R. Smith (paragraphs 1 to 4 inclusive, comprising the "Complaint Files");
>
> 5. all policies, procedures, guidelines or protocols, considered, adopted or used by the CPSO when dealing with complaints made about the conduct of pathologists, forensic pathologists, pediatric forensic pathologists, or coroners; and
>
> 6. all documents relevant to policies, procedures, practices, accountability and oversight mechanisms, or quality control measures for pediatric forensic pathology in Ontario from 1981 to 2001.[3]

13. The CPSO Summons requires two categories of documents (together the "CPSO Documents") to be produced in evidence:

(a) Complaint Files, which relate to complaints filed at the CPSO regarding Dr. Smith; and

(b) Systemic Documents, which relate to policies regarding complaints, and accountability and oversight mechanisms for pediatric forensic pathologists in the Ontario.

14. On September, 20, 2007, counsel for the CPSO wrote to Commission counsel and advised that:

> [S]ection 36(1) of the *Regulated Health Professions Act* imposes confidentiality requirements on all College employees, requiring them to keep confidential all information that comes to their knowledge in the course of their duties and prohibiting them from communicating any such information to any other person, subject to certain

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[3] CPSO Summons, Commission Counsel Compendium, Tab 2.

exceptions enumerated in the Act. In our view, none of the exceptions permit the Registrar to produce the documents you have requested.[4]

C. *CPSO Jurisdiction Over the Work of Forensic Pathologists*

15. In May 1998, the CPSO Complaints Committee considered the D.M. Complaint and concluded that:

(a) Dr. Smith was acting as an agent of the Chief Coroner in the case that triggered the D.M. Complaint;

(b) under the *Coroners Act*, the Chief Coroner had the jurisdiction to deal with such complaints; and

(c) the Complaints Committee had no jurisdiction to act on the D.M. Complaint.

16. On June 16, 1998, D.M. requested that the Health Professions Appeal and Review Board ("HPARB") review the decision of the Complaints Committee to take no action with respect to his complaint.

17. On February 3, 2000, HPARB reviewed the decision of the Complaints Committee that it had no jurisdiction over the D.M. Complaint. On September 1, 2000, HPARB issued written reasons that overturned the decision of the Complaints Committee, and returned the D.M. Complaint to the CPSO Complaints Committee for consideration.[5]

18. On October 15, 2002, the Complaints Committee disposed of the Complaints by requiring Dr. Smith to attend at that CPSO to be cautioned in the three matters On November 18, 2002, the CPSO cautioned Dr. Smith in all three cases, which was reported in the press.

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[4] Letter from CPSO to Commission Counsel, 9/20/2007, Commission Counsel Compendium, Tab 3.

[5] Health Professions Appeal and Review Board decision dated September 1, 2000, Commission Counsel Compendium, Tab 4.

Part III. Submissions

19. Pursuant to s. 7 and 11 of the *Public Inquiries Act*, the Commission may require a person to provide evidence that is relevant to the Commission's mandate, provided the evidence would not be inadmissible in a court of law because of a privilege under the law of evidence:

> 7. (1) A commission may require any person by summons,
>
> (a) to give evidence on oath or affirmation at an inquiry; or
>
> (b) to produce in evidence at an inquiry such documents and things as the commission may specify,
>
> relevant to the subject-matter of the inquiry and not inadmissible in evidence at the inquiry under section 11. ...
>
> 11. Nothing is admissible in evidence at an inquiry that would be inadmissible in a court by reason of any privilege under the law of evidence.

20. Commission counsel submits that the CPSO Documents are relevant to the inquiry and are not privileged. Moreover, neither the statutory confidentiality provisions of the *RHPA*, nor the provisions rendering such documents inadmissible in a civil proceeding prevent the production of the documents in evidence at the Inquiry.

A. The CPSO Documents Are Relevant

21. The Court of Appeal for Ontario has held that any evidence that is reasonably relevant to the subject matter of the inquiry is admissible before a commission. Evidence is reasonably relevant if it would assist a commissioner to reach conclusions on the matters referred to her or him:

> In my opinion, **any evidence should be admissible before the Commission which is reasonably relevant to the subject matter of the inquiry, and the only exclusionary rule which should be applicable is that respecting privilege as required by Section 11 of *The Public Inquiries Act, 1971***. The requirement that the evidence be reasonably relevant was applied by this Court in *Regina v. Gaich or Gajic*, [1956] O.W.N. 616 at p. 617 [...]. Having determined that the test of reasonable relevance should be applied, it is necessary to consider the meaning of the words 'reasonably relevant'.

> The definition of 'relevant' which has been commonly cited with approval by the courts is that in *Stephen's Digest of the Law of Evidence*, 12th ed., Art.I. It states that the word means that "any two facts to which it is applied are so related to each other that according to the common course of events one either taken by itself or in connection with other facts proves or renders probable the past, present or future existence or non-existence of the other." In concluding what evidence is admissible as being reasonably relevant to a commission of inquiry, I would adopt the statement in *McCormick on Evidence*, 2nd ed., at p.438:
>
> > "Relevant evidence, then, is evidence that in some degree advances the inquiry, and thus has probative value...".
>
> A similar test was applied by this Court in *Re Huston* (1922), 52 O.L.R. 444. There a Commissioner appointed to hold an inquiry under the *Public Inquiries Act,* R.S.O. 1914, c.18, as amended, decided to admit certain telegrams, and refused to state a case as to their admissibility. After examining and considering the telegrams, the Court was not prepared to say that the Commissioner erred in admitting them as relevant since he considered that they would be of assistance to him in reaching a conclusion as to the matters which were specifically referred to him.[6]

22. To determine whether or not the CPSO Documents are relevant to the Commission, one must look at the subject matter of the inquiry as contained in the Order-in-Council.

> 4. The Commission shall conduct a systemic review and assessment and report on:
>
> > a. the policies, procedures, 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 to 2001; and
> >
> > c. any changes to the items referenced in the above two paragraphs, subsequent to 2001
> >
> > **in order to make recommendations to restore and enhance public confidence in pediatric forensic pathology in Ontario and its future use in investigations and criminal proceedings.**
>
> ...

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[6] *Bortolotti v. Ontario (Ministry of Housing)* (1977), 15 O.R. (2d) 617 at 624-625 (C.A.) [emphasis added] [Bortolotti].

> 6. **The Commission shall review and consider any existing records or reports relevant to its mandate**, including the results of the Chief Coroner's Review announced on April 19, 2007, **and other medical, professional**, and social science **reports and records**. Further, the Commission shall rely wherever possible on overview reports submitted to the inquiry. The Commission may consider such reports and records in lieu of calling witnesses . [Emphasis added.]

23. The D.M. Complaint was filed in November 1997. In October 1998, the Complaints Committee determined that the CPSO did not have jurisdiction over the D.M. Complaint. In September 2000, HPARB overturned the decision of the Complaints Committee and held that doctors acting as forensic pathologists under a coroner's warrant had accountability both to the OCCO and the CPSO:

> Dr. Smith is a pediatric pathologist who performs autopsies ordered by a coroner. The College is his professional governing body. Membership in the College is a prerequisite for his responsibilities with the Coroner's office. As indicated by the aforementioned provisions made under the *Medicine Act. 1991*, and the *Regulated Health Professions Act*, the College has authority over its members with regard to complaints in connection with matters of professional conduct. There is no provision in the *Medicine Act, 1991*, the *Regulated Health Professions Act, 1991*, or the *Coroner's Act*, which ousts the authority of the College when a member is acting as an agent for the Coroner's office. While there may overlap with regard to Dr. Smith's accountability to both the Coroner's office and the College, the involvement of the Coroner's office does not displace the College's responsibility to govern its members. The Committee must in some manner determine if any action is warranted by the College as a result of the conduct and actions of the member complained against.[7]

24. The CPSO did not appeal this decision. Thus, the CPSO was one of the "accountability mechanisms" for pediatric forensic pathology in the province between 1981 and 2001. The Commission is required to conduct a systemic review and assessment and report on such accountability mechanisms.

25. The CPSO Documents will shed significant light on how the CPSO investigated the Complaints, and are the only basis upon which the Commission could:

(a) evaluate the efficacy and strength of CPSO as an accountability mechanism for pediatric forensic pathology in the province;

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[7] Health Professions Appeal and Review Board decision dated September 1, 2000, Commission Counsel Compendium, Tab 4.

(b) recommend whether or not the CPSO should continue to function as an accountability mechanism; and

(c) recommend any changes to the systems, policies, procedures, and practices of the CPSO to restore and enhance public confidence in pediatric forensic pathology in Ontario.

26. Commission counsel anticipates that the Complaint Files will contain information including:

(a) the original Complaints;

(b) notes from the CPSO investigators collecting facts surrounding the Complaints;

(c) responses from Dr. Smith to the Complaints;

(d) responses and supporting information provided by other medical professionals involved in the cases underlying the Complaints; and

(e) the independent assessment of Dr. Smith's work completed by a 'Panel of Assessors' assembled by the CPSO.

27. As noted, paragraph 6 of the Order-in-Council requires the Commission to review and consider any existing records or reports relevant to its mandate, including "medical, and professional reports and records." Commission Counsel submits that the Complaint Files will contain precisely the type of documents that the Order-in-Council directs the Commission to consider.

28. The Systemic Documents requested in paragraphs 5 and 6 of the CPSO Summons, if they exist, relate directly to the systemic recommendations to be made by the Commission. They are clearly relevant and essential to the work of the Commission

29. For the reasons set out above, Commission counsel submits that the CPSO Documents are relevant to the work of the Commission. They have probative value because they will assist the Commissioner in reaching conclusions on matters referred to the Commission and will thereby advance its inquiry.

B. The Documents are Not Privileged Under the Law of Evidence

30. If the documents listed in the CPSO Summons are relevant, they must be produced in evidence unless they are privileged under the law of evidence. The Court of Appeal for Ontario has held that a commission must admit reasonably relevant evidence that is not expressly excluded by the *Public Inquiries Act*:

> If evidence is reasonably relevant to the subject -matter of the inquiry, the Commission is not entitled to reject it as offending one of the exclusionary rules of evidence as applied in the Courts, other than the rule as to privilege which is made expressly applicable by s. 11 of *The Public Inquiries Act, 1971*. If this were not so, it would be possible, as Morden J., points out in *Re Royal Com'n into Metropolitan Toronto Police Practices and Ashton, supra,* at p.121 O.R., p. 485 D.L.R.,, for the Commission to "define its own terms of reference under the guise of evidential rulings on admissibility" and consequently to govern its jurisdiction. If the Commission has refused to admit evidence which is reasonably relevant to the subject -matter of the inquiry, and is not expressly excluded by *tThe Public Inquiries Act, 1971*, or has admitted evidence which is not reasonably relevant to the inquiry, then the Commission is subject to the supervisory role of the Divisional Court on a stated case under s. 6(1) on the ground that the Commission has declined or exceeded its substantive jurisdiction.[8]

31. Commission counsel understands that the CPSO agrees that the CPSO Documents:

(a) are not privileged under the law of evidence; and

(b) would be admissible in evidence at the Inquiry but for the effect of subsections 36(1) to (3) of the *RHPA*.

32. Commission counsel submits that s. 36 of the *RHPA* does not prevent the admission of the Complaint Files into evidence. Commission counsel does not seek to obtain CPSO Documents that are properly privileged.

C. Subsection 36(1) does not affect the admissibility of the CPSO Documents

33. The statutory confidentiality provisions of s. 36(1) of the *RHPA* do not prevent the CPSO Documents from being summonsed and introduced into evidence at the Inquiry.

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[8] *Bortolotti , supra note* at 625.

34. Subsection 36(1) requires persons employed or appointed for the purposes of the *RHPA*, including the CPSO Registrar, to keep confidential all information that comes to their knowledge in the course their duties:

> 36(1) Every person employed, retained or appointed for the purposes of the administration of this Act, a health profession Act ... and every member of a Council or committee of a College shall keep confidential 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, ...
>
> h) where disclosure of the information is required by an Act of the Legislature or an Act of Parliament;

35. Commission counsel agrees that:

(a) the Registrar is a person covered by s. 36(1); and

(b) the CPSO Documents contain information that the Registrar must keep confidential, subject to the statutory exceptions.

36. However, the statutory confidentiality regime created by s. 36(1) is not a bar to the production of information to the Commission under summons. A statutory promise of confidentiality does not constitute an absolute bar to compelling production of the documents and information in the possession and control of the CPSO.

37. In *Transamerica Life Insurance Co. of Canada v. Canada Life Assurance Co.*, the plaintiff served a summons to witness pursuant to rule 39.03(1) on a representative of the Office of the Superintendent of Financial Institutions ("OSFI"), a federal regulatory agency.[9] The summons required production of all correspondence, memoranda, reports, guidelines, instructions, policies, filings and documents of any nature exchanged between OSFI and the defendants in the action. The defendants and OSFI moved to set aside the summons, *inter alia*, on the basis of a statutory confidentiality provision. Sharpe J., as he then was, held at pages 301-302 that the statutory confidentiality provision did not bar production of the documents:

> The defendants and OSFI rely on the *Office of the Superintendent of Financial Institutions Act*, R.S.C. 1985, c. 18 (3rd Supp), s. 22 which provides as follows:

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[9] *Transamerica Life Insurance Co. of Canada v. Canada Life Assurance Co.* (1995), 27 O.R. (3d) 291 (Gen. Div.).

> 22(1) All information
>
> > (a) regarding the business or affairs of a financial institution or persons dealing therewith that is obtained by the Superintendent, or by any person acting under the direction of the Superintendent, as a result of the administration or enforcement of any Act of Parliament, ... is confidential and shall be treated accordingly. ...
>
> In my view, these statutory provisions do not advance the case of the defendants or OSFI for two reasons: ...
>
> Second, and perhaps more fundamental, even if these statutory promises of confidentiality do apply to the information sought here, in my view, **a statutory promise of confidentiality does not constitute an absolute bar to compelling production of the documents and information in the possession and control of OSFI. I see no reason to give statutory confidentiality a higher degree of protection than any other form of confidentiality. There is no reason why Parliament should be taken to have adopted the legal category of confidentiality without intending that category to have in its ordinary legal meaning and effect. It is well established that confidential information may be subpoenaed and introduced in evidence if ordered by a court.** The general rule is that although information is confidential, it must be produced unless the test laid down in *Slavutych v. Baker*, [1976] 1 S.C.R. 254 ... is met. Parliament could have provided that the information and documents at issue here could not be compelled by summons, but in my view, to accomplish this end, specific language to that effect would be required. (For discussion of statutes having this effect, see Bushnell, "Crown Privilege" (1973), 51 C.B.R. 551 at 552 - 555.) I see no reason to impute an intention to accomplish that end where Parliament has adopted a recognized and established legal category which does not have that effect: see Hogg, *Liability of the Crown* (2nd ed. 1989) at p. 76:
>
> > Many statutes contain provisions that expressly make information confidential ... The scope of these provisions is a matter of interpretation in each case. Those provisions that specifically prohibit the introduction of evidence in court will obviously be effective to withhold the protected material from litigation. More commonly, however, such provisions prescribe confidentiality but say nothing specific about the introduction of evidence in court. Such provisions have been interpreted as not barring either the production of documents in court or oral testimony in court. (footnotes omitted)

38. Moreover, the CPSO Summons falls within the s. 36(1)(h) exception to the general confidentiality provision because the disclosure of the information is required by an Act of the Legislature. The CPSO summons is issued pursuant to s. 7 of the *Public Inquiries Act* and mandates the disclosure of the Complaint Files. Absent a valid privilege claim, the *Public Inquiries Act* mandates the disclosure of this relevant information.

D. Subsections 36(2) and (3) do not affect the admissibility of the CPSO Documents

39. Determining whether or not subsections 36(2) and 36(3) of the *RHPA* render the documents inadmissible at the Inquiry despite the provision of section 7 of the *Public Inquiries Act* is an exercise of statutory interpretation. Driedger's modern approach has been repeatedly cited by the Supreme Court of Canada as the preferred approach to statutory interpretation:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament. [10]

40. This approach recognizes the important role that context inevitably plays when a court construes the written words of a statute.

41. Commission counsel submits that, properly interpreted, *RHPA* s. 36(2) and (3) do not make the CPSO Documents inadmissible at the Inquiry because:

(a) *RHPA* subsection 36(3) does not deem the CPSO Documents to be privileged under the law of evidence, which is the only barrier to a commission compelling the production of relevant documents in evidence at a public inquiry;

(b) a public inquiry is not a "civil proceeding" within the meaning of the *RHPA* s. 36(2) and (3), and therefore those provisions are irrelevant to the admissibility of the CPSO Documents at the Inquiry; and

(c) in any event, the Systemic Documents do not fall within the classes of documents to which s. 36(3) applies.

42. Section 7 of the *Public Inquiries Act* provides:

> 7(1) A commission may require any person by summons,
>
> (a) to give evidence on oath or affirmation at an inquiry; or
>
> (b) to produce in evidence at an inquiry such documents and things as the commission may specify,

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[10] *Bell ExpressVu Limited Partnership v. Rex* (2002), 212 D.L.R. (4th) 1 at para. 26 (S.C.C.) [Bell ExpressVu].

> relevant to the subject-matter of the inquiry and not inadmissible in evidence at the inquiry under section 11.

43. Subsection 36(2) of the *RHPA* precludes persons, like the Registrar, from being compelled to testify in a civil proceeding:

> No person or member described in subsection (1) shall be compelled to give testimony in a civil proceeding with regard to matters that come to his or her knowledge in the course of his or her duties.

44. Subsection 36(3) of the *RHPA* deems documents related to proceedings under the RHPA to be inadmissible in civil proceedings:

> 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 or 11.2 of the *Ontario Drug Benefit Act*.

1) Subsection 36(3) does not deem the CPSO Documents to be privileged

45. Subsection 36(3) does not deem documents related to proceedings under the RHPA to be privileged. If the Legislature had intended to declare such records to be privileged, and thus inadmissible at an inquiry pursuant to s. 11 of the *Public Inquiries Act*, it would have done so expressly.

46. For example, s. 266(2) of the *Education Act*, R.S.O. 1990, c. E.2 creates a statutory privilege over pupil records and expressly states that they are not admissible at an inquiry:

> 266(2) A record is **privileged** for the information and use of supervisory officers and the principal and teachers of the school for the improvement of instruction of the pupil, and such record,
>
> (a) subject to subsections (2.1), (3), (5), (5.1), (5.2) and (5.3), is not available to any other person; and
>
> (b) except for the purposes of subsections (5), (5.1), (5.2) and (5.3), **is not admissible in evidence for any purpose in any** trial, inquest, **inquiry**, examination, hearing or other proceeding, except to prove the establishment, maintenance, retention or transfer of the record,

> without the written permission of the parent or guardian of the pupil or, where the pupil is an adult, the written permission of the pupil.[11] [emphasis added]

47. The Legislature could have provided that the CPSO Documents were privileged, but specific language to that effect would be required. There is no reason to impute an intention to accomplish that end where the Legislature chose language that did not have that effect.

2) RHPA expressly declares Quality Assurance Documents to be Inadmissible at a Commission

48. The Legislature specifically drafted the *RHPA* to ensure that information prepared for the Quality Assurance Committee could not be disclosed to a commission of inquiry. The Legislature did so in s. 83.1 by expressly extending the definition of "proceeding" to include a commission, by making quality assurance information not admissible in a proceeding, and by stating that in the event of a conflict between s. 83.1 and any other Act, including the *Public Inquiries Act*, the *RHPA* prevails. The Legislature did not take any of these steps with respect to the CPSO Documents. Section 83.1 provides, in part, as follows:

> 83.1(1) In this section,
>
> > "proceeding" includes a proceeding that is within the jurisdiction of the Legislature and that is held in, before or under the rules of a court, a tribunal, a **commission**, a justice of the peace, a coroner, a committee of a College under the *Regulated Health Professions Act, 1991*, a committee of the Board under the Drugless Practitioners Act, a committee of the College under the Social Work and Social Service Work Act, 1998, an arbitrator or a mediator, but does not include any activities carried on by the Quality Assurance Committee; ("instance")
>
> (2) In the event of a conflict between this section and a provision under any other Act, this section prevails unless it specifically provides otherwise.
>
> (4) Despite the *Personal Health Information Protection Act*, 2004, no person shall disclose quality assurance information except as permitted by the *Regulated Health Professions Act, 1991*, including this Code or an Act named in Schedule 1 to that Act or regulations or by-laws made under the *Regulated Health Professions Act, 1991* or under an Act named in Schedule 1 to that Act.

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[11] See also, for example, s. 26(3) of the *Registered Insurance Brokers Act*, R.S.O. 1990, c. R.19, deems documents submitted concerning an applicant for membership to be privileged and inadmissible in civil proceedings, "Any information, document, record, statement or thing made or disclosed to the Manager, the Council or a committee of Council concerning a member or a person applying for registration under this Act is privileged and shall not be used as evidence in any civil action or proceeding in any court brought by or on behalf of such member or person."

> (5) No person shall ask a witness and no court or other body conducting a proceeding shall permit or require a witness in the proceeding to disclose quality assurance information except as permitted or required by the provisions relating to the quality assurance program. 2004, c. 3, Sched. B, s. 11 (2).
>
> (6) Quality assurance information is not admissible in evidence in a proceeding. [Emphasis added.]

49. Had the Legislature also wanted to make the CPSO documents inadmissible at a commission, it could have used the language from the *Education Act* to accomplish that end. There is no reason to impute an intention to accomplish that end where, as set out below, the Legislature chose language that did not have that effect.

3) There is no conflict between RHPA s. 36 and the *Public Inquiries Act*: an inquiry is not a civil proceeding

50. In the modern regulatory state, statutes do not operate in a vacuum. Frequently, the same level of government will enact more than one piece of legislation affecting the rights and obligations of persons operating in a certain sphere. In such circumstances, courts presume a harmony, coherence and consistency among statutes dealing with the same subject matter. As the Supreme Court of Canada held in *Bell ExpressVu*:

> The preferred approach recognizes the important role that context must inevitably play when a court construes the written words of a statute: as Professor John Willis incisively noted in his seminal article "Statute Interpretation in a Nutshell" (1938), 16 Can. Bar Rev. 1, at p. 6, "words, like people, take their colour from their surroundings". This being the case, where the provision under consideration is found in an Act that is itself a component of a larger statutory scheme, the surroundings that colour the words and the scheme of the Act are more expansive. In such an instance, the application of Driedger's principle gives rise to what was described in R. *v. Ulybel Enterprises Ltd.*, [2001] 2 S.C.R. 867, ... 2001 SCC 56, at para. 52, as 'the principle of interpretation that presumes a harmony, coherence, and consistency between statutes dealing with the same subject matter.'[12]

51. Statutes are not inconsistent simply because they overlap, occupy the same field or deal with the same subject matter. It is entirely possible that such statutes were designed to complement each other. The test for finding an inconsistency between two pieces of legislation is a stringent one: provisions are not inconsistent unless they cannot stand together. As the Court of Appeal for Ontario has held:

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[12] *Bell ExpressVu supra* note 12 at para. 27.

> There is a presumption that the legislature did not intend to make contradictory enactments and thus the test for finding an inconsistency between two pieces of legislation is a stringent one. As was said by Anglin J. in *Toronto Railway v. Paget* (1909), 42 S.C.R. 488 at p. 499, "It is not enough to exclude the application of the general Act that it deals somewhat differently with the same subject-matter. It is not 'inconsistent' unless the two provisions cannot stand together." [13]

4) An inquiry is not a civil proceeding within the meaning of RHPA s. 36

52. The provisions of section 7 of the *Public Inquiries Act* and s. 36 of the *RHPA* should be read as part of a consistent harmonious scheme to protect the public interest. The presumption of coherence between related statutes means that provisions should only be deemed inconsistent or in conflict where they cannot stand together. This was the approach taken by the Supreme Court when interpreting s. 47 of the *Ontario Limitations Act* and the limitation period prescribed in s. 180 of the *Ontario Highway Traffic Act*:

> In determining the legislator's intention there is a presumption of coherence between related statutes. Provisions are only deemed inconsistent where they cannot stand together. [14]

53. There is no express conflict between the provisions of s. 7 of the *Public Inquiries Act* and s. 36(2) and (3) of the *RHPA*. When the acts are interpreted in a coherent manner and in accordance with their scheme and purpose, they do not conflict. This interpretation best promotes the purposes of the acts and is faithful to the schemes of the acts.

54. The purpose of s. 36(3) of the *RHPA* was explained by Laskin J.A. in *F.(M.) v. S.(N.)*:

> The purpose of s. 36(3) is to encourage the reporting of complaints of professional misconduct against members of a health profession, and to ensure that those complaints are fully investigated and fairly decided without any participant in the proceedings -- a health professional, a patient, a complainant, a witness or a College employee -- fearing that a document prepared for College proceedings can be used in a civil action.[15]

55. In describing the purpose of s. 36(3), Justice Laskin used the words "civil action" in place of "civil proceeding," which are the words found in s. 36(2) and (3).

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[13] *Urban Outdoor Trans Ad v. Scarborough (City)* (2001), 52 O.R. (3d) 593 at 600 (C.A.). See also *Brantford (City) Public Utilities Commission v. Brantford (City)* (1998), 36 O.R. (3d) 419 at 432-433 (C.A.).

[14] *Murphy v. Welsh* (1993), 106 D.L.R. (4th) 404 at para 10 (S.C.C.).

[15] *F. (M.) v. S. (N.)* (2000), 49 O.R. (3d) 414 at para. 29 (C.A.).

56. Commission counsel accepts that "civil proceeding" is a broader term than "civil action." The phrase "civil proceeding" is not defined in the *RHPA*, and its meaning changes with the context in which it is used.

57. Halsbury's Laws of England has described the essential aspects of a civil proceeding as follows:

> Civil proceedings have for their object the recovery of money or other property, or the enforcement of a right or advantage on behalf of the claimant.[16]

58. The Supreme Court of Canada has also held that a civil proceeding refers to the enforcement, redress, or protection of private rights:

> In Black's Law Dictionary (6th ed. 1990), "civil" is defined as follows: "Of or relating to the state or its citizenry. Relating to private rights and remedies sought by civil actions as contrasted with criminal proceedings." The definition of a "civil action" is an "[a]ction brought to enforce, redress, or protect private rights. In general, all types of actions other than criminal proceedings". This definition essentially accords with that offered by the Legal Services Society: "civil proceedings", as defined in s. 3(2)(b), refers to the enforcement, redress or protection of private rights.
>
> However, the Legal Services Society is incorrect in its submission that no private right is in issue in prison disciplinary hearings. ...
>
> The outcome of a prison disciplinary hearing could result in the imposition of a term in solitary confinement - that is, a period of incarceration separate from the general penitentiary population. From this result it follows that a prisoner's private rights can be and are affected by a prison disciplinary hearing. ... Thus, in my view a prison disciplinary hearing is a civil proceeding within the definition of ss. 3(2)(b) of the *Legal Services Society Act*.[17]

59. The purpose of the *Public Inquiries Act* is to allow inquiries to be undertaken in the public interest. Inquiries are not about enforcing or vindicating private rights. Most importantly, there are no legal consequences attached to the determinations of a commissioner. It is the absence of any legal consequences that distinguishes an inquiry from a civil proceeding:

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[16] Halisbury's Laws of England, 4th ed., vol. 11(1) (London, Butterworths, 2006) at 21, para. 2.

[17] *Winters v. Legal Services Society (British Columbia)* (1999), 137 C.C.C. (3d) 371 at paras. 62-64 (S.C.C.) per Cory J. Justice Cory dissented in the result, but this part of his reasoning was expressly adopted by the majority.

> A commission of inquiry is neither a criminal trial nor a civil action for the determination of liability. It cannot establish either criminal culpability or civil responsibility for damages. Rather, an inquiry is an investigation into an issue, event or series of events. The findings of a commissioner relating to that investigation are simply findings of fact and statements of opinion reached by the commissioner at the end of the inquiry. They are unconnected to normal legal criteria. They are based upon and flow from a procedure which is not bound by the evidentiary or procedural rules of a courtroom. **There are no legal consequences attached to the determinations of a commissioner. They are not enforceable and do not bind courts considering the same subject matter**. The nature of an inquiry and its limited consequences were correctly set out in *Beno v. Canada (Somalia Inquiry Commission)* (1997), 146D.L.R. (4th) 708 (Fed. C.A.), at pp. 716-17:
>
> > A public inquiry is not equivalent to a civil or criminal trial. ... In a trial, the judge sits as an adjudicator, and it is the responsibility of the parties alone to present the evidence. In an inquiry, the commissioners are endowed with wide-ranging investigative powers to fulfil their investigative mandate. ... The rules of evidence and procedure are therefore considerably less strict for an inquiry than for a court. Judges determine rights as between parties; the Commission can only" inquire" and "report". ... Judges may impose monetary or penal sanctions; the only potential consequence of an adverse finding ... is that reputations could be tarnished.
>
> Thus, although the findings of a commissioner may affect public opinion, they cannot have either penal or civil consequences. To put it another way, even if a commissioner's findings could possibly be seen as determinations of responsibility by members of the public, they are not and cannot be findings of civil or criminal responsibility.[18]

60. Similarly, the Court of Appeal for Ontario has emphasized that an inquiry is not for the purpose of trying a case and that information that could not be admitted in a court is properly, and necessarily admissible at an inquiry:

> [T]he nature of the inquiry in question...is... to bring to light evidence or information touching matters referred to the Commissioner. It is not a question between one person and another. There is no issue referred to the Commissioner to determine, and the rules of evidence have no application to such an inquiry. The Commissioner should avail himself of all reasonable sources of information, giving a wide scope to the inquiry. If, for example, some person were to inform the Commissioner where useful documents or other evidence could be obtained, it would seem reasonable that he avail himself of such a source of information. The inquiry is one on behalf of the general public, and should be conducted in public. There are no parties or sides to the proceedings. It is for the Commissioner, from all available sources, to bring to light such evidence as may have a bearing on the matters referred to him. ...
>
> A Royal Commission is not for the purpose of trying a case or a charge against any one, any person or any institution -- but for the purpose of informing the people concerning the

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[18] *Canada (Attorney General) v. Canada (Commissioner of the Inquiry on the Blood System)* (1997), 151 D.L.R. (4th) 1 at para. 34 (S.C.C.) [emphasis added].

> facts of the matter to be inquired into. Information should be sought in every quarter available. ...
>
> Nor are the strict rules of evidence to be enforced; much that could not be admitted on a trial in Court may be of the utmost assistance to the Commission.[19]

61. In *Bortolotti*, Howland J.A. emphasized that a public inquiry does not deal with rights between parties and performs a very different function from that of a court, administrative tribunal, or arbitrator:

> The Commission of Inquiry is charged with the duty to consider, recommend and report. It has a very different function to perform from that of a Court of law, or an administrative tribunal, or an arbitrator, all of which deal with rights between parties: *Re Ontario Crime Co'n*, [1963] 1 O.R. 391... It is quite clear that a commission appointed under *tThe Public Inquiries Act, 1971* is not bound by the rules of evidence as applied traditionally in the Courts, with the exception of the exclusionary rule as to privilege (s. 11): *Re Royal Com'n into Metropolitan Toronto Police Practices and Ashton* at p.124 O.R.,...; *Re Children's Aid Society of the County of York*, [1934] O.W.N. 418 at p.420. It may admit evidence which is not given under oath or affirmation (s. 10).
>
> The approach of the Commission should not be a technical or unduly legalistic one. A full and fair inquiry in the public interest is what is sought in order to elicit all relevant information pertaining to the subject -matter of the inquiry.[20]

62. In considering a similar issue, Commissioner Linden concluded that a public inquiry is not a "civil proceedings" under the *Police Services Act* and that the *Police Services Act* did not provide a statutory bar to that commission's receipt of summonsed discipline files.[21]

63. Moreover, the *Public Inquiries Act* itself distinguishes between an inquiry and a civil proceeding:

> 9(1) **A witness at an inquiry** shall be deemed to have objected to answer any question asked him or her upon the ground that his or her answer may tend to criminate the witness or may tend to establish his or her liability to **civil proceedings** at the instance of the Crown or of any person, and no answer given **by a witness at an inquiry** shall be used or be receivable in evidence against him or her **in any trial or other proceedings** against him or her thereafter taking place, other than a prosecution for perjury in giving such evidence. [Emphasis added.]

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[19] *Re the Children's Aid Society of the County of York,* [1934] O.W.N. 418 at 419-420 per Mulock, C.J.O. and Ridell, J.A. (C.A.).

[20] *Bortolotti , supra* note 8 at 623-624.

[21] Ipperwash Public Inquiry, *Commissioner's Ruling Re: Motion by the Ontario Provincial Police and the Ontario Provincial Police Association*, August 15, 2005, Report of the Ipperwash Inquiry – Volume 3, Appendix 13C, page 162.

64. Commission counsel submits that this is evidence that the Legislature did not consider an inquiry to be a civil proceeding.

65. Similarly, the Order-In-Council establishing the Commission recognized that civil proceedings had already arisen as a result of Dr. Smith's work. The Order-in-Council distinguishes between civil proceedings and the inquiry, and mandates the Commission to perform its duties without encroaching on those civil proceedings:

> AND WHEREAS there are civil and criminal proceedings that have arisen as a result of Dr. Smith's work that are the appropriate forum for the adjudication of those matters;
>
> AND WHEREAS the Lieutenant Governor in Council considers it advisable to appoint a person to identify and make recommendations to address systemic failings that may have occurred in connection with the oversight of pediatric forensic pathology in Ontario;
>
> AND WHEREAS the inquiry is not regulated by any special law;
>
> THEREFORE, pursuant to the *Public Inquiries Act*:
>
> 1. A Commission shall be issued effective April 25, 2007, appointing Honourable Stephen Goudge as a Commissioner ...
>
> 5. The Commission shall perform its duties without expressing any conclusion or recommendation regarding professional discipline matters involving any person or the civil or criminal liability of any person or organization.

Part IV. ORDER SOUGHT

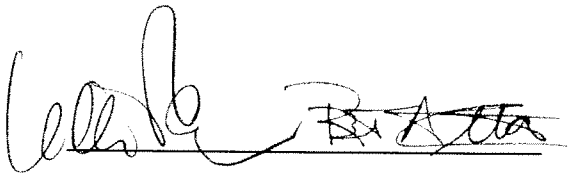
66. Commission counsel requests that the Commissioner:

(a) decline to quash the CPSO Summons;

(b) order the Registrar of the CPSO shall comply with the CPSO Summons delivered on September 19, 2007, by no later than October 10, 2007; and

(c) order the Registrar identify any documents covered by the CPSO Summons but over which the CPSO wishes to assert privilege by no later than October 10, 2007.

All of which is respectfully submitted, September 27, 2007



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