DATE: 2007-11-01

INQUIRY INTO PEDIATRIC FORENSIC PATHOLOGY IN ONTARIO

RULING ON THE REQUESTS FOR NON-PUBLICATION ORDERS

COMMISSIONER GOUDGE:

Public hearings, by their very nature, must be conducted in public, so far as possible. That is their raison d'être.

Commission Counsel and Mr. Lockyer have each brought applications asking that I impose certain limited constraints on this principle of openness, by way of non-publication orders. Notice of these applications was provided to all parties granted standing, and to the media. On October 18, the applications were argued by Commission Counsel and Mr. Lockyer in the presence of counsel for the province of Ontario, Dr. Smith, the Affected Families Group and AIDWYC, none of whom opposed the orders being sought. Neither the media, nor the other parties with standing attended.

At the commencement of the hearing of these applications, Commission Counsel requested an order to ensure that names of persons identified during the submissions not

be published or made public. In order to permit full submissions, I granted the order sought.

Both applications propose a ban on identifying certain persons who may be the subject of inquiry by the Commission. Both propose that pseudonyms be used for them so that the Commission can carry out its work as it relates to these individuals, while protecting their identities.

Before turning to the specifics of these applications, several fundamental principles must be emphasized.

First, this Commission, like all public inquiries, must be held in public so far as possible, if it is to fully discharge the mandate expected of it. In *Canada (Attorney General) Canada (Commission of Inquiry on the Blood System in Canada-Krever Commission)*, [1997] 3 S.C.R. 440, Cory J., speaking for the Supreme Court of Canada at para. 30, offered this useful reflection on commissions of inquiry and the purposes served by their open and public nature:

> It may be of assistance to set out what was said regarding the history and role of commissions of inquiry in *Phillips*, *supra*, at pp.137-38:
>
> > As *ad hoc* bodies, commissions of inquiry are

free of many of the institutional impediments which at times constrain the operation of the various branches of government. They are created as needed, although it is an unfortunate reality that their establishment is often prompted by tragedies such as industrial disasters, plane crashes, unexplained infant deaths, allegations of widespread child sexual abuse, or grave miscarriages of justice.

At least three major studies on the topic have stressed the utility of public inquiries and recommended their retention: Law Reform Commission of Canada, Working Paper 17, *Administrative Law: Commissions of Inquiry* (1977); Ontario Law Reform Commission, *Report on Public Inquiries* (1992); and Alberta Law Reform Institute, Report No. 62, *Proposals for the Reform of the Public Inquiries Act* (1992). They have identified many benefits flowing from commissions of inquiry. Although the particular advantages of any given inquiry will depend upon the circumstances in which it is created and the powers it is given, it may be helpful to review some of the most common functions of commissions of inquiry.

One of the primary functions of public inquiries is fact-finding. They are often convened, in the wake of public shock, horror, disillusionment, or scepticism, in order to uncover "the truth". Inquiries are, like the judiciary, independent; unlike the judiciary, they are often endowed with wide-ranging investigative powers. In following their mandates, commissions of inquiry are, ideally, free from partisan loyalties and better able than Parliament or the legislatures to take a long-term view of the problem presented. Cynics decry public inquiries as a means used by the government to postpone acting in circumstances which often call for speedy action. Yet, these inquiries can

> and do fulfil an important function in Canadian society. In times of public questioning, stress and concern they provide the means for Canadians to be apprised of the conditions pertaining to a worrisome community problem and to be a part of the recommendations that are aimed at resolving the problem. Both the status and high public respect for the commissioner and the open and public nature of the hearing help to restore public confidence not only in the institution or situation investigated but also in the process of government as a whole. They are an excellent means of informing and educating concerned members of the public.
>
> Undoubtedly, the ability of an inquiry to investigate, educate and inform Canadians benefits our society. A public inquiry before an impartial and independent commissioner which investigates the cause of tragedy and makes recommendations for change can help to prevent a recurrence of such tragedies in the future, and to restore public confidence in the industry or process being reviewed. [Emphasis added.]

This principle is codified in s. 4 of the *Public Inquiries Act,* R.S.O. 1990, c. P.41 which gives a commissioner discretion to depart from the openness principle in certain limited circumstances. It reads as follows:

> All hearings on an inquiry are open to the public except where the commission conducting the inquiry is of the opinion that,
>
> (a) matters involving public security may be disclosed at the hearing; or
>
> (b) intimate financial or personal matters or other matters may be disclosed at the hearing

> that are of such a nature, having regard to the circumstances, that the desirability of avoiding disclosure thereof in the interest of any person affected or in the public interest outweighs the desirability of adhering to the principle that hearings be open to the public,
>
> in which case the commission may hold the hearing concerning any such matters in the absence of the public.

Second, it is obviously important that this Commission be able to discharge the mandate given to it by the Lieutenant Governor in Council under the *Public Inquiries Act*. In this context, it is helpful to review the genesis of the Commission and what is expected of it.

The Order in Council makes clear that one of the reasons for establishing the Commission was the review conducted on behalf of the Chief Coroner for Ontario (the "Chief Coroner's Review"). It examined certain cases of suspicious child deaths where Dr. Charles Smith performed the autopsy or was consulted, and found that some of the factual conclusions were not reasonably supported by the materials available. In a number of these cases, the determinations of fact and opinion were submitted as evidence in criminal proceedings.

The Order in Council then tasks the Commission to conduct a systemic review of the role played by pediatric forensic pathology in the criminal justice system since 1981. The purpose of this review is to make recommendations to restore and enhance public confidence in how that role will be played in the future.

It is in the context of these principles that these applications must be considered.

Commission Counsel's application seeks to protect the identities of those young persons who were involved in the infant death cases examined by the Chief Coroner's Review, and who as a result were involved in a proceeding under the *Youth Criminal Justice Act*, S.C. 2002, c. 1 (the "*YCJA*"), or its predecessor, the *Young Offenders Act*, R.S.C. 1985, c. Y-1 (the "*YOA*"), or the *Child and Family Services Act*, R.S.O. 1990, c. C.11 (the "*CFSA*"), or its predecessor, the *Child Welfare Act*, R.S.O. 1980, c. 66 (the "*CWA*"). These pieces of legislation provide that the identities of such young persons be protected, and to that end require that information which would identify them not be published or made public.

Commission Counsel's proposal is aimed at achieving this goal, while at the same time ensuring that the Commission can function efficiently and fulfill its mandate with a transparency that accords with the *Public Inquiries Act*.

The basic procedure proposed is that in those cases triggering the legislated protection, the deceased infant will be referred to by its first name only. Where a child involved in a case attracts the protection of the *CFSA* or the *CWA*, the child and other relatives of the deceased infant will be referred to by first name only, or by their relationship to the deceased infant. Where the young person involved in a case attracts the protection of the *YCJA* or the *YOA*, he or she will be referred to by initials only, as is required under that legislation, and others will be referred to either by their relationship to that young person or by their own initials.

The fundamental premise is that by using the first name only, or initials only, or by only describing the relationship, the identity of the child or young person involved is protected. This achieves the aim of the legislation. At the same time, Commission Counsel is confident that this presents no impediment to the efficient conduct of the Commission's hearings.

Commission Counsel proposes that there be two departures from this procedure. First, in those cases covered by the proposal where standing has been granted to adults, those adults will be referred to by full name. However, the procedure will be fully applicable to all others in those cases, including the child or young person whose identity is being protected.

Second, Commission Council proposes that the same modification should apply in one particular case where the adults have not been granted standing. This case has received wide publicity in the media, and in court proceedings as recently as several weeks ago, none of which spared the names of the adults or the deceased infant, or the participants in the child welfare proceedings that were involved.

Mr. Lockyer's proposal seeks to invoke s. 4(b) of the *Public Inquiries Act*, informed by the common law principles concerning open hearings and publication bans found in cases like *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835 and *R. v. Mentuck*, [2001] 3 S.C.R. 442.

Mr. Lockyer acts for nine adults who have been granted standing. Two of them are involved in cases that come within Commission Counsel's proposal. Since both want

their full names used at the Commission's hearings, both are content with Commission Counsel's proposal as it applies to their cases, and are not included in Mr. Lockyer's application.

In this sense, these two clients of Mr. Lockyer take the same position as Mr. Wardle's clients, known collectively as the Affected Families Group. Mr. Wardle acts for seven adults who have been granted standing. These seven are involved in four cases, all covered by Commission Counsel's proposal. Mr. Wardle made clear that all seven are very willing to have their full names used in the Commission's hearings. They see their cases and the use of their full names as an important part of the public scrutiny that the Commission must apply to pediatric forensic pathology in Ontario.

The other seven for whom Mr. Lockyer acts are extremely anxious to protect their identities. Three of these are involved in cases that are covered by Commission Counsel's proposal, but are not content with it, since it would not protect the use of their full names, given that they have been granted standing. The other four are involved in cases that do not attract the protection of either the *CFSA* or the *YCJA*. They seek to have their identities protected because of personal matters that may be disclosed at the hearing. These personal matters are of such a nature that avoiding disclosure is important and will

not significantly erode the openness principle that is vital to public inquiries, thus directly engaging s. 4(b) of the *Public Inquiries Act*.

Mr. Lockyer therefore proposes that these seven cases be dealt with in a manner similar to the procedure proposed by Commission Counsel. He proposes that the deceased infant be referred to by first name or initial only, and that relatives of the deceased infant be referred to only by their relationship to the infant. In addition, Mr. Lockyer asks that in three of the cases there be no reference to the municipality in which the events took place.

After considering both of these applications, I am of the view that the appropriate order is one that incorporates most, but not all, of these two proposals.

The basic procedure will be as follows:

> a) For those cases covered by Commission Counsel's proposal (which includes three of Mr. Lockyer's clients) and the four additional cases involving Mr. Lockyer's clients, the deceased infant will be referred to by first name only. In the two of these cases where the infant did not have a first name, the first initial of the last name will be used instead.

b) Except for the two departures from this procedure explained below, those related to or closely involved with the deceased infant will be referred to by their first name only, or by their relationship to the infant.

c) For those cases covered by Commission Counsel's proposal that also involve young persons to whom the youth justice legislation applies, the young persons will be referred to by their initials only as is required under the legislation. Those related to them will be described by first name only or by their relationship to the young person.

With one addition to which I will refer, I am satisfied that this basic procedure will protect the identities of the children and young persons entitled to legislative protection of their identities. It will also protect the identities of the seven adults for whom Mr. Lockyer applies, who in my view meet the requirements for this protection found in s. 4(b) of the *Public Inquiries Act*. I am also satisfied that by applying the same protection to similarly situated persons, this procedure will be relatively easy for parties to apply, and therefore will not detract from the efficiency required to meet the time lines that have been given to the Commission.

In three of his cases, Mr. Lockyer requests the additional comfort of a publication ban on referring to the name of the city in which the events occurred. In my view, such an additional non-publication restriction cannot be justified for two of Mr. Lockyer's clients. In one of these, the individual no longer resides in the city concerned, and in the other, the city is sufficiently large that naming it is not a threat to anonymity.

I am, however, prepared to grant the request in the third case. While I think that the basic procedure I have outlined protects identity fully, in this case the city is small, and remains the home of the person's family. In addition, the person has received a pardon. Finally, Commission Counsel advises that as far as can be presently ascertained this limitation will not impede the Commission's work. In these circumstances, I think the person is entitled to the personal comfort that I am advised would come with an order that there be no reference to the name of the city in which the events occurred. Should this subsequently prove to be an impediment to the Commission's work, this restriction can be revisited.

The first of the two departures from the basic procedure that is needed for the Commission to properly fulfill its mandate relates to the two adults for whom Mr.

Lockyer acts who were not included in his application, and the seven adults (involving four cases) for whom Mr. Wardle acts. For several reasons, it is proper that these nine individuals be referred to by their full names.

First, all of these adults have all sought standing and funding to participate in this Commission and cannot be surprised to find themselves involved in a process which must be conducted in public if possible. They are distinguished from the other adults who have been granted standing, because they are not only willing to have their full names used - they want their names to be part of any public scrutiny of their cases undertaken by the Commission.

Second, the cases in which these adults are involved are, in my view, the most notorious among the cases considered by the Chief Coroner's Review. They have received wide coverage in the media and a number of them have been the subject of extensive court proceedings, all without any protection of identities and with use of full names. It is hardly surprising that this late in the day, these adults do not seek protection for their identities.

Third, because the names of these adults and the broad outlines of their cases have so often been referred to in the media, and because their cases were an important part of the genesis of the Commission, the Commission must be able to publicly demonstrate that it has examined their cases. This requires the use of their full names. Only in this way can the Commission show that it is fulfilling this aspect of its mandate.

Finally, I am satisfied that the protection the basic procedure affords to all others in these cases is sufficient to protect the identities of both the deceased infants and the children and young persons involved who are entitled to the legislative protection. This way of proceeding allows the Commission to effectively fulfill the legislature's requirement to protect the identities of certain persons and its requirement to hold public inquiries in public except where s. 4 of the *Public Inquiries Act* may allow otherwise.

The second departure from the basic procedure I would provide for is, like the first, proposed by Commission Counsel, and relates to a case in which the two adults involved have not been granted standing. In my view, it should be treated in the same way as the first exception. The adults' full names should be used. Apart from the first reason, described above, the other reasons supporting the first departure apply here with equal force. In fact, it could be said that the recent media and court coverage of this case has

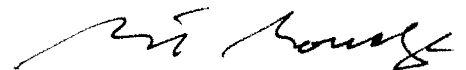
been the most intense and widespread of all, and with no protection of identities. Thus, I think this case also calls for the full names of the two adults to be used.

In summary, I think the procedure outlined in these reasons best achieves the protection of identities and the principle of openness that the Commission is obliged to observe and I order that it be used in the hearings of the Commission and by all who publish anything about the work of the Commission.

I attach to these reasons a schedule showing the full names of the individuals to whom the procedure applies and the references that are to be used for them in the Commission's hearings. For obvious reasons, this schedule will not be part of the public record, but will be provided to parties with standing and to members of the media who attend the hearings of the Commission and have familiarized themselves with these reasons.

Should a need arise to further address this broad issue, it can be revisited at that time.

RELEASED: November 1, 2007



Stephen Goudge
Commissioner