DATE: 2007-10-10

INQUIRY INTO PEDIATRIC FORENSIC PATHOLOGY IN ONTARIO

RULING ON THE CPSO MOTION FOR DIRECTIONS

COMMISSIONER GOUDGE:

On April 25, 2007, Ontario established this Commission pursuant to the *Public Inquiries Act*, R.S.O. 1990, c. P.41 (the *PIA*). Broadly stated, its mandate is to conduct a systemic review of the role pediatric forensic pathology has played in the criminal justice system in Ontario in order to make recommendations to restore and enhance its ability to properly fulfill that role in the future.

Pursuant to that mandate, and s. 7 of the *PIA*, the Commission delivered a summons to the Registrar of the College of Physicians and Surgeons of Ontario (CPSO) on September 17, 2007. It requires the Registrar to attend before the Commission to give evidence and produce the following documents:

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;

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.

CPSO takes the position that it and its Registrar are precluded from complying with the summons because of the provisions of s. 36 of the *Regulated Health Professions Act,* 1991, S.O. 1991, c. 18 (the *RHPA*). It has therefore moved for directions regarding whether it is permitted to comply with the summons. If its arguments are successful, the

summons will effectively be set aside or quashed. If CPSO is unsuccessful, it has made clear that it will comply with my direction.

CPSO is joined in this motion by Dr. Smith. He supports CPSO, but also argues that the summons cannot compel the documents sought in paragraphs 1 to 4 because those documents are not relevant to the Commission's mandate and are subject to a privilege that Dr. Smith can and does assert.

Commission counsel argues that none of these arguments have merit and that I should order the Registrar to comply with the summons.

I turn first to the issue of relevance. CPSO does not contest the potential relevance of the documents sought by the summons. However, Dr. Smith says that the documents sought in paragraphs 1 to 4 of the summons fall outside the Commission's mandate, and are, therefore, irrelevant and cannot be summonsed.

To be admissible, the documents must be reasonably relevant to the mandate of the Commission: see *Bortolotti v. Ontario* (*Ministry of Housing*) (1977), 15 O.R. (2d) 617 at 624-625 (C.A.). Paragraph 4 of the Order in Council establishing the Commission

requires it, *inter alia*, to conduct a systemic review of the accountability and oversight mechanisms of pediatric forensic pathology in Ontario from 1981 to today.

Dr. Smith does not dispute that the documents referred to in paragraphs 1 to 3 of the summons relate to complaints to CPSO about his work as a pediatric forensic pathologist in three specific cases in Ontario within the relevant time frame. However, he argues that because the complaints process occurred after his work in these cases was concluded, it had no effect on that work, nor could it provide general guidance for pediatric forensic pathology because it dealt only with three specific cases. Thus he says these documents do not speak to an oversight or accountability mechanism of pediatric forensic pathology.

I disagree. The three cases were included in the Chief Coroner's Review that led to the establishment of the Commission. They will be included in the inquiry that the Commission must make. The complaints in these cases and the way CPSO dealt with them constitute one way in which Dr. Smith was held to account for his work as a pediatric forensic pathologist. A complaints process like this is no less a way of overseeing the work of a professional because it deals with specific cases. Thus, I think that these documents speak directly to an oversight or accountability mechanism that the Commission is required to examine and evaluate. The documents are, therefore, clearly relevant to the Commission's mandate.

Dr. Smith argues that paragraph 4 of the summons seeks documents that may relate to his work as a pathologist in non-forensic cases and that these would be outside the Commission's mandate.

Again, I disagree. How CPSO dealt with complaints that may have been made about Dr. Smith's pathology skills in non-forensic cases is relevant to his work in forensic cases because he was applying many of the same skills. Oversight by CPSO through its complaints process of Dr. Smith's expertise as a pathologist, albeit in non-forensic cases, must therefore be part of the Commission's evaluation of one of the oversight mechanisms of pediatric forensic pathology.

In summary, I would conclude that the documents sought by paragraphs 1 to 4 of the summons are relevant to the Commission's mandate.

CPSO's position turns not on relevance but on s. 36 of the *RHPA*. It says that ss. 36(1) and (3) prevent the Registrar from producing the documents sought by the summons. CPSO relies particularly on s. 36(1) and the confidentiality requirement it contains. While it acknowledges that the exceptions to that requirement were expanded by legislative

amendment in June 2007, it argues that none of them apply to a public inquiry. Section 36(1) (with the recent amendments underlined) and s. 36(3) read 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 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,

(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 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.

Evidence in civil proceedings

(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 or 11.2 of the *Ontario Drug Benefit Act.* 1991, c. 18, s. 36(3); 1996, c. 1, Sched. G, s. 27(2).

In my view, neither s. 36(1) nor s. 36(3) stand in the way of the Registrar complying with the summons.

Turning first to s. 36(1), whatever the reach of the confidentiality requirement, the recent expansion of the exceptions would seem to signal a general legislative intent that its reach be somewhat diminished. Moreover, it is clear that the provision of a statutory promise of confidentiality does not bar the compelled production of documents by summons unless the documents meet the test for privilege, or the legislature has used language specifically prohibiting their introduction into evidence. See *Transamerica Life Insurance Co. of Canada v Canada Life Assurance Co.* (1995), 27 O.R. (3d) 291 at 301-2.

While s. 36(1) is clearly effective to require documents to be kept confidential in many circumstances, there is no explicit language that puts those documents beyond the reach of a summons. Nor do I think that the listing of exceptions in s. 36(1) can be said to do so by inference. However, even if that were so, and it could be said that the documents sought cannot be summonsed unless an exception applies, the CPSO position cannot prevail.

It is clear that if an exception is required, s. 36(1)(h) applies. Disclosure of the documents summonsed is required by the *PIA*. Sections 7(1) and 11 of that Act read as follows:

> **Power to summon witnesses, papers, etc.**
>
> 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. R.S.O. 1990, c. P.41, s. 7(1).
>
> ...
>
> **Privilege**
>
> 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. R.S.O. 1990, c. P.41, s. 11.

As I have explained, the documents sought are relevant to the Commission's mandate, and CPSO asserts no privilege over all of them. To argue that non-privileged relevant documents that are confidential can only be summonsed if, in addition, the Act authorizing the summons explicitly provides that the summons overrides the confidentiality requirement is to effectively amend s. 7(1) of the *PIA* by adding a third

condition to relevance and privilege. There is no warrant to do so. The plain meaning of s. 36(1)(h) is met by s. 7(1) of the *PIA,* which requires that the Registrar respond to the summons.

Moreover, in my view, it is of no moment that the recent amendment to the exception found in s. 36(1)(d) added the *Coroners Act*, R.S.O. 1990, c. C.37, but not the *PIA*. That exception addresses information required for the administration of the listed Acts. The *Coroners Act* entitles the coroner to obtain information in the investigation of deaths entirely apart from his or her power to summons documents at an inquest. The recent amendment to s. 36(1)(d) has removed the confidentiality impediment to that aspect of the coroner's work. By contrast, the *PIA* gives a commission no entitlement to acquire information except by summons. Thus, s. 36(1)(d) removes an impediment to a method of acquiring information that is unavailable to public inquiries. It is unsurprising, therefore, that the *PIA* is not included in that exception.

CPSO also argues that even if this is so, s. 36(3) prevents the Registrar from complying because a public inquiry is a civil proceeding and, therefore, no document prepared for a proceeding under the *RHPA* is admissible at this inquiry. Dr. Smith supports this position.

In assessing this argument, the recent case of *Winters v. Legal Services Society* [1999] 3 S.C.R. 160 is helpful. The relevant issue there was the meaning of the term "civil proceedings" in the *Legal Services Society Act,* R.S.B.C. 1979, c. 227, s. 3. Although he dissented in the result, Cory J. spoke for the Supreme Court on this issue. He concluded that the term must take its meaning from the particular statute in question. He looked for guidance to Black's Law Dictionary and then concluded that "civil proceedings" in the legislation in issue refers to the enforcement, redress or protection of private rights. At paragraph 62, he said this:

> [62] 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.

In the Ipperwash Public Inquiry, Commissioner Linden was required to consider the meaning of "civil proceeding" in s. 69(9) of the *Police Services Act*, R.S.O. 1990, c. P.15. That subsection precluded certain documents prepared pursuant to that Act from admission in a civil proceeding. Using the same approach as Cory J., he concluded that this prohibition does not apply to a public inquiry because an inquiry is an investigative, not an adjudicative process, and he could make no finding of civil or criminal liability. As he put it at paragraph 44 of his ruling: "… there is no *lis* in a public inquiry."

I would take the same approach in determining whether "civil proceeding" in s. 36(3) extends to a public inquiry. In my view, the purpose of the subsection is to allow the complaints process under the *RHPA* to function without fear that a participant or a third party will use documents prepared for it for the collateral purpose of building or defending a civil case. This protects the integrity of the complaints process by preventing it from being used as a vehicle to assist in vindicating one's rights in another proceeding.

While I agree that the collateral proceeding need not necessarily be a civil action, to be true to that objective, it must be one (in the language of *Winters supra*) that involves the enforcement, redress, or protection of private rights. The subsection is clearly not designed to protect the privacy interest of a participant from exposure in a collateral proceeding since no such protection is offered in the complaints process itself where hearings are presumptively public. This reading of the purpose of s. 36(3) accords with that of Laskin JA speaking on behalf of the Court of Appeal for Ontario in *F.(M.) v. S.(N.)* (2000), 188 D.L.R. (4th) 296.

Given this legislative intent, the prohibition against admissibility in a civil proceeding cannot be read to extend to a public inquiry. A public inquiry does not decide upon private rights. Indeed the Order in Council establishing this Commission expressly

prohibits it from expressing any conclusion regarding the civil or criminal liability of any person or organization. The role of a public inquiry is quite different, as described in *Canada (Attorney General) v. Canada (Commission of the Inquiry on the Blood System)*, [1997] 3 S.C.R. 440 at paragraph 34:

> 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.

My conclusion that a public inquiry is not a civil proceeding for the purposes of s. 36 of the *RHPA* is also consistent with the way the legislature used the two terms in the *PIA*. In s. 9(1) of that Act, the legislature clearly refers to civil proceedings as those in which liability is established, and explicitly distinguishes such proceedings from an inquiry established under the Act.

I would, therefore conclude that neither s. 36(1) nor s. 36(3) of the *RHPA* prevent the Registrar from complying with the summons issued by the Commission.

The final argument raised to justify non-compliance with the summons is that the documents it seeks in paragraphs 1 to 4 are all protected by a privilege. Only Dr. Smith raises this point. He does not argue that there is an applicable class privilege (such as solicitor-client communications) but rather that all of the documents sought in paragraphs 1 to 4 of the summons meet the four common law criteria that the Supreme Court of Canada has set out to determine whether an individual communication is privileged. In *M. (A.) v. Ryan*, [1997] 1 S.C.R. 157 at para. 20, they are set out as follows:

> The applicable principles are derived from those set forth in *Wigmore on Evidence*, vol. 8 (McNaughton rev., 1961), sec. 2285. First, the communication must originate in confidence. Second, the confidence must be essential to the relationship in which the communication arises. Third, the relationship must be one which should be "sedulously fostered" in the public good. Finally, if all these requirements are met, the court must consider whether the interests served by protecting the communications from disclosure outweigh the interest in getting at the truth and disposing correctly of the litigation.

In my view, this argument must fail. To begin with, it has not been shown that if a privilege exists, Dr. Smith can assert it as one for whose benefit the privilege exists. It is at least possible that only CPSO holds any privilege, and while it reserves the right to assert privilege over specific documents, it claims no privilege over the documents as a whole. In addition, paragraphs 2 and 3 of the summons seek documents related to the Gagnon and Waudby complaints. If these complainants are the holders of any privilege

over any of these documents, such as the complaints themselves, past experience would suggest that the privilege would be waived.

Where privilege is asserted not on a class basis, but on a case by case basis, the presumption is that the communications are not privileged but are admissible unless the common law criteria are met. See *R. v. Gruenke* (1991), 67 C.C.C. (3d) 289 at 303. Dr. Smith has provided no record upon which it could be concluded that the criteria are met for all the documents sought in paragraphs 1 to 4 of the summons. That is especially true for the fourth criterion. Indeed, it would seem unlikely that this criterion could be met for all the documents. The same is true of the other criteria. For example, since the complaints process may culminate in a hearing which is presumptively public, it is hard to imagine that all documents originated in a confidence that they would not be disclosed as is required by the first criterion.

I would, therefore, conclude that Dr. Smith's argument fails. If, as individual documents are produced, a party wishes to advance a claim of privilege, it should proceed as contemplated by the Commission's Rules of Procedure.

In summary, none of the arguments advanced in support of the Registrar declining to comply with the summons issued by the Commissioner succeed. I find that he is obliged to comply, and direct that he do so.

RELEASED: October 10, 2007

Stephen Goudge
Commissioner