

IPPERWASH PUBLIC INQUIRY

COMMISSIONER'S RULING

RE MOTION BY THE CHIEFS OF ONTARIO AND

THE ESTATE OF DUDLEY GEORGE AND GEORGE FAMILY GROUP

The Chiefs of Ontario have brought a motion, requesting that I, as Commissioner of the Ipperwash Inquiry (the "Commission"), authorize and direct Commission Counsel to publicly release two audio recordings (the "audio recordings") provided to the Commission by one of the parties and produced by the Commission to the parties as part of the Commission's disclosure. The motion also requests that immediate and ongoing steps be taken to ensure that "any documentary evidence that is central to the mandate of the Inquiry" be released to the public as soon as practicable after such evidence becomes known to Commission Counsel. We have also been asked to take immediate and ongoing steps to publicly release any and all documentary evidence at the same time that it is provided to the Commissioner unless Commission Counsel or a party providing a particular document intends to take the position that the document should never be made public.

In a separate, parallel motion brought by the Estate of Dudley George and George Family Group, we have been asked to immediately assign an Exhibit number to and enter into the Inquiry public record, the same two audio recordings. Further, this motion seeks to have me authorize and direct Commission Counsel to immediately make these recordings available for public release and to release legal counsel for the parties to the Inquiry from their confidentiality and use undertakings in respect of these audio recordings.

The major part of this motion was heard in public, but a part of it that referred to the specific content of the audio recordings was heard *in-camera*.

Both of these motions have characterized the recordings as "documentary evidence that is central to the mandate of the Inquiry."

I have been appointed Commissioner to conduct this Inquiry by an Order in Council (1662/2003), dated November 12, 2003. Pursuant to s. 3 of the *Public Inquiries Act*, R.S.O. 1990, Chapter P. 41, (the "Act"), the conduct of this Inquiry is under the control and direction of the commissioner conducting the inquiry.

I have determined, pursuant to my authority under s. 3 of the Act and the Order in Council, that this Inquiry will be conducted under the Inquiry's Rules of Procedure and Practice (the "Rules"). All parties to the Inquiry have agreed to abide by the Rules which are available on our website.

Rule 12 of the Rules provides that:

In the ordinary course, Commission counsel will call and question witnesses who testify at the Inquiry. Counsel for a party may apply to the Commissioner to lead a particular witness' evidence in chief. If counsel is granted the right to do so, examination shall be confined to the normal rules governing the examination of one's own witness.

Pursuant to Rule 17, I have granted Commission Counsel, subject to my general authority over the conduct of the proceedings, the discretion to refuse to call or present evidence. This discretion includes, by implication, the discretion to call or present evidence in the order and manner deemed appropriate by Commission Counsel, and to disclose that evidence to the public as it is put before the Commission.

Pursuant to Rule 36, the general rule is that documents are to be treated as confidential "unless and until they are made public." That is the purpose of the confidentiality undertaking that all parties are asked to sign prior to full disclosure being made. The purpose of this Rule is to encourage comprehensive documentary production in a timely manner to the Commission. As importantly, this procedure allows the parties to participate fully in the proceedings and properly prepare for the witnesses who will be called to give evidence at the hearing. While Rule 36 does give the Commissioner the power to declare that a document should not be treated as confidential, in my view that power should only be exercised sparingly and for the reasons outlined below, should not be exercised to grant the relief sought in these motions.

In *Lyons v. Toronto (Computer Leasing Inquiry – Bellamy Commission)*, [2004] O.J. No. 648 (Ont. Div. Ct.), at para.38, Swinton J., set out the following passage cited by Commissioner Bellamy in her decision from the article by O'Connor A.C.J., "The role of commission counsel in a public inquiry" (*Advocates' Society Journal*, June 2003, p. 10):

"It is with the assistance of commission counsel that the commissioner carries out his or her mandate, investigating the subject matter of the inquiry and leading evidence at the hearings. Throughout, commission counsel act on behalf of and under the instructions of the commissioner."

These motions have requested that I override the discretion I have conferred on Commission Counsel with respect to the calling and public disclosure of certain evidence at the Inquiry. In my view, it is neither necessary nor appropriate to do so in the circumstances.

As Cory J. noted in *Canada (Attorney General) v. Canada (Commission of Inquiry on the Blood System)*, [1997] 3 S.C.R. 457 (at para. 30) (S.C.C.), citing *Phillips v. Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)*, [1995] 2 S.C.R. 97 (at pp. 137-138) (S.C.C.), one of the primary functions of public inquiries is fact-finding and investigation.

The investigative process of the Part I hearings of this Inquiry will involve, *inter alia*, the identification of those documents that are “central to the mandate of the Inquiry”. The role of Commission Counsel is to locate the documents, analyze them, put them into context and then to introduce them into evidence through witnesses testifying at the public inquiry. That is the process that has been followed in other inquiries and it is the process being followed in this Inquiry. In my view, this Inquiry is proceeding exactly as it is supposed to. A great deal of documentary evidence has been obtained, it is being analyzed and evaluated on an ongoing basis and it will be presented publicly at this Inquiry. The hearing component of the investigative process is in the early stages, with only a few of the many witnesses who will eventually be called having testified thus far.

The characterization, weight, and proof of any and all documentary evidence to be put before the Commission will continue throughout the proceedings and will be completed by my findings, once I have heard all of the evidence that will ultimately be put before the Commission.

The Chief of Ontario’s motion requests that those documents “central to the mandate of the Inquiry” be immediately disclosed to the public. To date, tens of thousands of documents have been produced to the Commission by the various parties. That production process has yet to be completed, with several of the parties having indicated that they have further documents to produce.

Given the number of documents produced to the Commission, the incompleteness of the documentary production process by the parties, the still relatively early stage of the investigation, and the lack of an evidentiary or testamentary foundation for the characterization or proof of such “central” documents, it is premature for either the Commission or parties to the Inquiry to identify all of those documents that will ultimately be considered “central to the mandate of the Inquiry”. Furthermore, the characterization of particular documents as “central to the mandate of the Inquiry” is, in essence, a finding as to the appropriate weight that should be placed on those documents. These recordings may indeed be central to the mandate of the Inquiry, but that is a finding that should only be made at the culmination of the Inquiry process after all of the evidence has been heard, rather than at its inception.

Commission Counsel have a duty to present the evidence to the Commission and public in a manner that is impartial, balanced, fair, thorough and orderly.

It would be premature and inconsistent with the duty of Commission Counsel to present evidence in an impartial, balanced, fair, thorough, and orderly manner, to characterize any document or documents as “central to the mandate of the Inquiry”,

and to disclose it to the public before it has been introduced in its proper context through the hearing process.

In my view, Commission Counsel need to retain the discretion afforded them under the Rules to call evidence in such a manner, order and timing as to permit the impartial, orderly, logical, fair, and probative presentation of all of the evidence that will ultimately be put before the Commission.

Commission Counsel in accordance with their duty have determined an order to the presentation of witnesses which in their view ensures the evidence is presented logically, comprehensively, and understandably to both the parties and the public as follows:

- (a) Expert historical witnesses (already called);
- (b) First Nations and other community witnesses (in progress);
- (c) Emergency medical personnel;
- (d) Police officers; and
- (e) Civil servants and politicians.

The need for an orderly and thoughtful plan is particularly important in an Inquiry such as this one with voluminous productions and numerous and complex factual issues.

This order is subject to change, due to the evolving nature of the investigation and evidence before the Commission, the availability of certain witnesses, and any other considerations that may affect Commission Counsel's evaluation of the appropriateness of this intended order. The submissions of the various counsel in this motion while differing in many respects, all acknowledged the importance of hearing evidence in context, and I am confident that Commission Counsel will continue to publicly disclose documentary evidence when it becomes relevant to the testimony afforded by each witness, or as it becomes otherwise necessary to comply with the obligation of the Commission to ensure procedural fairness in these proceedings.

The parties to the conversation on the audio recording as well as the parties mentioned in the discussions will be called as witnesses. These witnesses will be called in a manner and at a time to be determined at the discretion of Commission Counsel, and consistent with the duty of Commission Counsel to present evidence in a balanced, orderly, and logical fashion.

Mr. Horton has proposed, among other things, that Commission Counsel create a compendium of key documents for use by all of the parties and the Commissioner as is done in certain civil cases. At first blush, this proposal may appear to have some merit. However, in considering this proposal, it is important to remember what and how a compendium is used, for example, in Commercial Court, where it was first formally recognized, as provided in the Commercial Court Practice Direction.

Paragraph 47 of the Commercial Court Practice Direction states as follows:

“In appropriate cases, to supplement any required formal record, counsel are requested to consider preparing an informal Compendium of key materials to be referred to in argument (fair extracts of documents, transcripts, previous orders, authorities, etc.) to assist in focusing the case for the Court: (see Saskatchewan Egg Producers’ Marketing Board v. Ontario, [1993] O.J. No. 434.) Relevant portions of the Compendium should be highlighted or marked. Counsel are urged to consult among themselves in the preparation of a joint compendium, if possible. The compendium should contain only essential material. The use of a loose-leaf format is particularly helpful to the Court both for conducting hearings and for writing decisions.”

The Rules of Civil Procedure also recognize compendiums in Rule 61.10 for use on appeals. The compendium forms part of the Appeal Book and Compendium and is separate from the Exhibit Book. It is clear from reviewing Rule 61.10(1) that the compendium for use on appeals is to serve the same purpose as the Commercial Court compendium, that is, to assist in the argument of the appeal by putting together extracts from transcripts and the documents that are going to be referred to during the argument of the appeal.

We are not close to the argument stage or submissions in this Inquiry, and the preparation of this type of compendium would not, in my view, be of any assistance, at this stage.

Mr. Horton and Mr. Klippenstein suggested that Commission Counsel create a compendium which is more like a joint exhibit book of key documents prepared for use at trial in many civil cases. However, in a civil case, counsel put together an Exhibit Book, on consent. With 17 parties, plus Commission Counsel, the process of attempting to create such an agreed upon joint Exhibit Book would in all likelihood be so time consuming as to be unworkable. Each party would need to identify what they suggest are the “key documents”. All of the parties would then have to agree on the characterization of those documents as “key documents”, to be included in an Exhibit Book. Such an exercise with two, three or even four parties would take a long time and in the end, might not be successful. With seventeen parties, many with different interests, this process could take weeks if not months. Ultimately, there might be so little agreement that the time would have been wasted. And rather than focusing on presenting the evidence and moving forward with the Inquiry, Commission counsel would be focused on trying to achieve a consensus among the parties as to the documents to go into the Exhibit Book. This exercise would ultimately greatly delay the completion of this Inquiry as witnesses would be deferred until this Exhibit Book was compiled. I do not believe, it is in the general public interest to prolong this Inquiry by engaging in this proposed exercise.

On the other hand, if the Compendium were simply composed of every document that every party considered to be a key document, it might not look much different than the productions themselves and be of very little value.

Mr. Horton submitted that just because certain procedures have been followed in other inquiries is no reason to slavishly follow them in this Inquiry. I agree with that submission and we are prepared to consider new or better ways of proceeding. Mr. Horton acknowledged that the Osgoode Symposium and the forthcoming Indigenous Knowledge Forum are examples of our willingness to be innovative.

However, to allow the Chiefs of Ontario's motion could fundamentally alter the nature of the public inquiry process. That may not have been the applicant's intention, but, as one counsel noted in his oral submissions opposing the motion – and I'm paraphrasing – it could result in 'wholesale dumping' of documents into the public realm without a real opportunity to evaluate their significance and before they are tendered through witnesses at the Inquiry who are entitled to comment upon their accuracy, their reliability or to give context to them. He further noted that this could contribute to a process where it becomes more important to argue one's case in the media, rather than in the inquiry. That is not a process that I wish to contribute to.

From the outset of this Inquiry, I have asked Commission Counsel to consult with parties regarding the process to be followed by this Inquiry. I am also encouraging any party who has suggestions to make regarding the conduct of this Inquiry to meet with Commission counsel to discuss them. That is the approach that has been followed in this Inquiry to date and will continue throughout the Inquiry. I value and appreciate the suggestions of any party to these proceedings.

When it is determined that the evidence on the audio recordings are sufficiently relevant, Commission Counsel will enter the recordings as evidence and they will be made public before this Inquiry at that time.

At the risk of being repetitive, it is important for me to repeat that the audio recordings are not secret. They will be introduced in this Inquiry and thereby will be made publicly available. However, in my judgment, their immediate release and the other relief sought in these motions is neither required nor advisable. Accordingly the motions are dismissed.

October 12, 2004