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The Scope and Approach of the Inquiry

The design and operation of a public inquiry is a significant responsibility. The inquiry must investigate, research, examine issues, and develop public policy in a way that allows the public to understand all this work. Many public inquiries must also hear from witnesses, test the witnesses' recollections and reliability, and find facts.

Although each inquiry's mandate is defined, its process is not. My mandate called on me to conduct a *systemic review* and to decide on my recommendations and complete my Report within a year. These requirements demanded innovation – procedures that deliberately integrated policy making with fact finding, ensured efficiency and cost savings, and adduced evidence in new ways.

The purpose of this chapter is to describe how we went about addressing the challenge. I do not, of course, mean to suggest that every public inquiry should be run in the same way. Each must be responsive to its particular context and mandate. However, I do think all inquiries best approach the task of designing the necessary processes by adopting creative procedures that maximize focus and efficiency without compromising fairness.

The Principles of the Inquiry Process

Public inquiries are not subject to the rules of procedure or evidence that govern criminal or civil trials. So long as they observe the rules of procedural fairness, each one is free to create its own rules and processes – those that will best accomplish its specific mandate. Our approach was guided by the terms of reference laid out in the Order in Council establishing the Commission, which mandated a systemic review and assessment.[1]

[1] See Appendix 1 and Appendix 2.

Commissioners and their counsel often begin their work by reviewing the rules and procedures developed by preceding inquiries: they select those they think are most appropriate for their own purposes. That too is how my counsel and I spent our first weeks. In very little time, we decided on three principles against which we measured a proposed rule or procedure: fairness, efficiency, and transparency. These three principles have all been well described in other reports of public inquiries, and we learned much from them.

Many inquiries have also emphasized "thoroughness" as a guiding principle – the importance of leaving no doubt that all issues relevant to the mandate have been fully explored. While I agree with that approach, it is important not to confuse thoroughness with exhaustiveness.

On the recommendation of my counsel, I was guided by the principle of proportionality as well as the principle of thoroughness. Investigative and hearing times were allocated in proportion to the importance of the issue to my mandate. This approach was necessary to allow me to be responsive to two key features of this Inquiry that were set out in the Order in Council: it was to be systemic in nature, and it had a strict time limit.

Our approach made it essential for Commission counsel, in consultation with me, to determine as early as possible the ground to be covered by becoming familiar with the factual and policy landscape raised by our mandate. Counsel were then able to design a process that enabled us to focus most on the major factual and policy issues and to pay far less attention to minor ones. For example, although the relationship between pediatric forensic pathology and child protection proceedings was explored, it was not a core issue that we examined at length. We conducted our investigation, document collection, witness identification, and hearing timetable with this proportionality in mind. Commission counsel did not follow every conceivable lead, interview everyone with any information that might be relevant, or collect all documents of possible relevance. Rather, we focused on what was significant. This approach was instrumental in allowing the Inquiry to proceed expeditiously.

The principle of proportionality is frequently invoked by those engaged in reform of the civil justice system, but, as I hope our process has demonstrated, it has great utility also in the context of a public inquiry. It requires the commissioner to be engaged in developing the contours of the mandate at an early stage. Preliminary decisions about the relative importance of particular issues cannot await the testimony from the first witness. Nor can the hearing process be allowed to resemble a lengthy multi-party examination for discovery in which questions of limited relevance are patiently tolerated. It is all a fine balance:

investigating the facts and presenting the evidence in a manner that is in proportion to their overall significance to the Inquiry's mandate. I am satisfied we achieved that balance.

Setting Up the Inquiry

Staff

Administrative Staff

The Commission was able to retain David Henderson as its chief administrative officer. Mr. Henderson's experience with other public inquiries and knowledge of government expenditure and administrative guidelines were of great assistance in setting up the Inquiry.

Carole Brosseau was the Commission's manager of finance and operations. Ms. Brosseau was responsible for overseeing all aspects of office management, including administering the budget, reviewing accounts, procuring technological and administrative support, and setting up the hearing room. Ms. Brosseau was assisted in her work by Tiana Pollari, administrative coordinator. Both had valuable prior experience with public consultation processes that was very helpful to us.

Commission Counsel and Staff Lawyers

I was fortunate to retain Linda Rothstein as lead Commission counsel. Ms. Rothstein had recently acted as the City of Toronto's lead counsel at the Toronto Computer Leasing Inquiry. Given that my mandate required that I examine pediatric forensic pathology in the context of the criminal justice system, I was also fortunate to retain Mark Sandler as special counsel, criminal law. Mr. Sandler acted for the Ontario Provincial Police at the Ipperwash Inquiry and served as associate counsel to the Commission on Proceedings Involving Guy Paul Morin, and as counsel to the Review to Make Recommendations to Identify and Prevent Sexual Misconduct in Ontario Schools.

I was also able to retain Robert Centa and Jennifer McAleer, both of whom had previous experience working on public inquiries, as my assistant Commission counsel. Priscilla Platt was our special counsel for privacy law. All made important contributions to the Inquiry.

In addition to Commission counsel, the Commission hired a talented team of seven staff lawyers: Ava Arbuck, Tina Lie, Jill Presser, Jonathan Shime, Robyn Trask, Sara Westreich, and Maryth Yachnin. This team was supported from time

to time by additional lawyers and law clerks, who were retained to assist with individual projects.[2]

I am convinced that a talented legal team of this size was instrumental to my ability to complete my mandate in an expeditious manner. As I describe elsewhere in this Report, the Commission spent a significant amount of time and energy reviewing and summarizing evidence and interviewing witnesses throughout the inquiry process. These tasks could not have been accomplished in such an efficient manner without the skill, size, and dedication of my legal team.

Policy and Research Staff

The Commission was also fortunate to retain Professor Kent Roach as the Commission's director of research. Professor Roach has been involved in many other public inquiries, including the Arar Inquiry and the Air India Inquiry. Professor Lorne Sossin also provided the Inquiry with valuable assistance in fulfilling its policy and research agenda.

Communications and Media Relations Officer

Given that this was a public inquiry which was likely to draw significant media attention, it was important to retain an individual with excellent media contacts and prior experience working with public inquiries. I found both qualifications in Peter Rehak, who was retained as the Commission's communications and media relations officer. Mr. Rehak's duties included drafting press releases, coordinating with the media regarding their attendance during the inquiry process, answering questions from the media about the inquiry process, overseeing the design and operation of the Inquiry's media room, and designing and maintaining the Inquiry's website.

Counselling and Outreach Manager

Ava Arbuck, in addition to her role as a staff lawyer, was the Commission's manager of counselling and outreach. Ms. Arbuck was responsible for contacting all the affected family members, coordinating the private consultations, and attending these meetings with me. She also coordinated provision of the counselling services.

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[2] The Commission would like to acknowledge the hard work provided by Emily Lawrence, Patrice Band, and Debra Newell.

Document Manager and Counselling and Outreach Coordinator

Heather Hogan came to this Inquiry having previously worked on the Toronto Computer Leasing Inquiry. Ms. Hogan ably discharged the task of overseeing the collection and distribution of documents, managing the Inquiry's database, and providing document support for the hearings and roundtables. In addition, Ms. Hogan assisted Ms. Arbuck in coordinating the private consultations and counselling services.

Infrastructure

Offices / Hearing Room

One of the Commission's first tasks was to obtain appropriate facilities. This was challenging. The Commission required both a hearing room and offices. Ultimately, it was able to acquire office space on the 22nd floor at 180 Dundas Street West, in Toronto. This location had been used for prior public inquiries, such as the Walkerton Inquiry and the SARS Commission. We were then able to have a hearing room designed and built on the 20th floor. This work took a few months to complete. We had decided that we would not start oral hearings until the fall of 2007, but it was still a tight schedule. It meant we had to make alternative arrangements for the standing and funding hearings, which were both held in a local hotel in August.

Our hearing room accommodated approximately 27 counsel. Each counsel table had two electronic monitors, which displayed the documents that were before a witness. We retained Christopher Riley as the Commission's registrar. Mr. Riley easily piloted the Inquiry's electronic database to retrieve documents from it quickly and have them available on the hearing room monitors. This allowed us to conduct a largely paperless process.[3] Counsel tables were wired for Internet hook-up, and wireless Internet was also available in the hearing room. A seating plan was prepared for the hearing room.[4]

The hearing room had a public gallery that accommodated approximately 25 people. As described below, our webcasting meant that many members of the public were able to follow the oral hearings from off-site.

Transcription services were provided by Digi-Tran Inc., which produced

[3] For each witness or panel of witnesses, the Commission prepared a binder (or binders) containing the documents that had been identified in the document lists of either my counsel or counsel for the parties. Copies of these binders were then provided to the witness, my counsel, and me for ease of reference. Counsel for the parties, for the most part, relied on the electronic images of the documents that were made available to counsel on their individual monitors.

[4] See Appendix 3.

same-day transcripts that were posted on the Inquiry's website at the end of each day.

The Commission decided that it was not necessary to retain a court deputy. Independent security arrangements were made when appropriate. The Commission also published Hearing Room Rules, which were posted for both counsel and members of the public.

The hearing room had an adjoining media room. It was set up to accommodate the media and was equipped with a large monitor so that members of the press could watch the evidence.

I hope that the facilities at 180 Dundas Street West will be available for the use of public inquiries in the future. This would greatly assist a new commission in completing its work within a limited time frame.

Communications

Paragraph 12 of the Order in Council provides that "[t]he Commission shall establish and maintain a website and use other technologies to promote accessibility and transparency to the public."

Shortly after starting with the Inquiry, Mr. Rehak set up the Inquiry's website, which was continually updated. The resources available on the website included hearing schedules and press releases; transcripts of the proceedings; copies of motion materials, rulings, and submissions; and information on Commission staff.

In addition, the Commission arranged to have the hearings webcast to the public. This process has recently been used at other public inquiries, such as the Cornwall Public Inquiry, the Air India Inquiry, and the Ipperwash Inquiry. Webcasting provided greater access to the public and allowed counsel for parties with standing to monitor the oral hearings without being present if they wanted to do so. It also allowed Commission staff to monitor the hearings from their offices. The webcast was accessed through the Inquiry's website.

Affected Individuals

Private Consultations

One of my first challenges was to determine how I would address the profound personal tragedies at the heart of my systemic review. I wanted to hear from individuals who had been directly affected by the events that precipitated the Inquiry, because of the useful context they would provide for my work. As well, I wanted to offer them an opportunity to be heard in some way.

Commission counsel and I considered a number of options. I rejected the option of calling any affected individuals as witnesses. My systemic mandate was not consistent with a trial of individual cases, and there were three other significant considerations: I wanted to avoid affecting any criminal or civil proceedings; I was concerned not to re-traumatize those who had already suffered much by exposing them to a formal hearing process; and I did not consider it fair to allow testimony or impact statements to be introduced as part of the Inquiry's record without cross-examination.

I found that my concerns were shared by the affected individuals. Some of them had counsel, and they were unanimously of the view that their clients needed privacy and confidentiality in order to feel comfortable telling me about their experiences. In the end, I decided that I would meet privately with individuals or families, with or without their lawyer, as they wished, and that our conversations would be confidential and would not form part of the fact-finding process. Counsel for all the parties endorsed this "off the record" approach.

My staff contacted the individuals, or their counsel, who had received the results of the Chief Coroner's Review.[5] Other individuals contacted us directly after seeing press reports about the Inquiry. My staff did not attempt to persuade anyone to meet with me. They simply explained that the Inquiry's mandate allowed such individuals to meet with me if they wished. The Commission assisted with travel arrangements and costs for those travelling from outside Toronto. Overall, approximately three-quarters of those contacted chose to meet with me. Many indicated to me that they would not have come had I not determined that these discussions would be kept confidential.

The first meetings took place in June 2007. Based on the overwhelming response, more meetings were scheduled for August. I also met with two other families, in January and February 2008, respectively. These meetings were held at a confidential, off-site location. Before discussions with me, each person met with Celia Denov, a social worker with many years of counselling experience, whom I asked to assist. Through Ms. Denov, these individuals were able to learn about the counselling program we could offer, which is described below, and to arrange for counselling services if they chose.

These private consultations did not form part of the Commission's fact-finding process, and no transcripts were made of these meetings.[6] I found it a sad but deeply moving experience. It was a unique opportunity for me to hear

[5] For a description of the Chief Coroner's Review, see Appendix 4.

[6] Our manager of counselling and outreach, Ava Arbuck, attended all the meetings and kept brief notes in order to assist with our subsequent discussions.

directly about every parent's worst nightmare – the loss of a child – and the added stress and shame that follow when that loss is the subject of criminal or child protection proceedings. The central role of pediatric forensic pathology in the criminal justice process was unmistakable.

I am grateful to those who attended for their candour about painful, personal subjects. At the same time, I am heartened and reassured by the response of so many of the individuals with whom I met. They made it clear that it helped to be able to discuss the events with someone who was charged by the government with recommending improvements to the system. They hoped that their input would assist me in accomplishing that work. They all urged me to do what I could to ensure that the criminal justice system never again relies on flawed pediatric forensic pathology. These meetings also made me understand that even an inquiry that is fundamentally systemic in nature can make a helpful contribution to the healing process that is essential following a tragedy.

Counselling

Paragraph 16 of the Order in Council authorizes me to provide for counselling services to anyone, including immediate family members, who has been affected by systemic failings relating to pediatric forensic pathology. It provides: "If during the course of the inquiry the Commission receives information, including in writing, from victims or families, the Commission may authorize the provision of counselling assistance." These services were encompassed within the budget provided to the Commission.

Many with whom I met during the private consultations expressed an interest in receiving counselling. With the professional assistance of Ms. Denov, we determined the type of counselling that would best meet their needs and put them together with qualified professionals in their communities. Each psychiatrist, psychologist, or social worker was chosen with the particular person's needs in mind.

I viewed counselling as an important part of our mandate and was encouraged by the number of people who responded positively to the offer of this assistance. We were the second inquiry in Ontario to offer counselling. We learned much from those involved in the creation of the first counselling program – the Cornwall Public Inquiry. Like Cornwall, the process we implemented preserved the privacy of those who used it and maintained client-counsellor confidentiality. In the result, Ms. Denov has informed me that, except in two cases, all the clients believe that the counselling experience has been very helpful to them in grappling with many difficult and long-term issues.

We have also received feedback from the professionals providing the coun-

selling. They are unanimous in their view that counselling was an important and necessary service to be provided by the Inquiry. Indeed, they believe that the government should, in the future, offer counselling assistance in the context of public inquiries, if merited by the circumstances. Each counsellor commented on the complexity of the cases and the fragility of their clients. Most pointed out that their clients continue to lead highly stressed and, in some cases, very chaotic lives. The very fact of the Inquiry itself has caused difficult and painful issues to resurface for many of them and for their children. For the clients who also continue to deal with legal issues, their criminal, employment, and financial circumstances remain challenging.

The counsellors were asked to consider the duration of counselling assistance offered by the Inquiry in relation to their individual clients. Each has acknowledged that it will take considerable work, over time, to assist their clients with current upheavals before work can begin on deeper, long-term issues. Thus, the professionals recommend, and I agree, that up to three years of counselling may be necessary to help individuals and families move on with their lives successfully. I initially authorized funding for counselling for a two-year period. I recommend that funding be provided for up to a further three years if the individual and the counsellor think it would be useful.

Finally, the professionals pointed out that, despite the great needs of their clients, most of them could not have afforded counselling on their own. Most of the counselling options offered through this Inquiry are not available through OHIP.

I am very hopeful that our counselling program will help many individuals and families who were affected by systemic failings relating to pediatric forensic pathology to move forward in a positive way.

Standing and Funding

In every public inquiry, commission counsel have the primary responsibility of representing the public interest, including the responsibility to ensure that all matters that bear on the public interest are brought to the commissioner's attention.

Subsection 5(1) of the *Public Inquiries Act*, RSO 1990, c. P. 41, also provides:

> A commission shall accord to any person who satisfies it that the person has a substantial and direct interest in the subject-matter of its inquiry an opportunity during the inquiry to give evidence and to call and examine or to cross-examine witnesses personally or by counsel on evidence relevant to the person's interest.

Individuals, groups of individuals, institutions, or associations with a "substantial and direct interest" in the subject matter to be reviewed by a public inquiry can apply for standing under this section of the *Public Inquiries Act*. The Act, however, provides no further guidance with respect to the basis on which standing is granted or the rights and responsibilities of those to whom standing is granted. These matters are generally left to the discretion of the commissioner.

In this Inquiry, the Order in Council permitted me to make recommendations to the Attorney General regarding funding to a party to whom I had granted standing where, in my view, the party would not otherwise be able to participate in the Commission.

Applications for Standing

Considerable publicity surrounded the release of the results of the Chief Coroner's Review and the subsequent announcement of this Inquiry. Many of the institutions and organizations with an interest in the subject matter were aware of it from the outset and contacted Commission counsel immediately. As a result, apart from doing so on our website, the Commission decided that it was not necessary to advertise our standing process[7] or to publish a Notice of Hearing.[8]

Rather, in my Opening Statement at our first public hearing on June 18, 2007,[9] I announced the publication of the Commission's Rules of Standing and Funding[10] and invited interested persons to submit applications for standing to the Inquiry. I also advised the public that the Commission's Rules of Standing and Funding, along with information regarding the schedule for applications for standing and funding, were available on the Commission's website.[11]

Applications

Our Rules of Standing and Funding required those seeking standing and funding to apply in writing by July 16, 2007. Given the nature of public inquiries, I was

[7] I understand that the Toronto Computer Leasing Inquiry adopted this practice.

[8] I understand that the Ipperwash Inquiry adopted this practice.

[9] See Appendix 5.

[10] See Appendix 6.

[11] Our media relations officer sent out press releases on May 24, 2007, and June 11, 2007, in advance of my Opening Statement. The press releases are found in Appendix 7. This session was well attended by members of the press, with substantial coverage given to the opening of the Inquiry.

careful to ensure that the rules provided that I could, in my discretion, also consider subsequent applications.

The Rules of Standing and Funding instructed applicants on the basic information to be included in support of their application. Through Commission counsel, the applicants were advised that it was not necessary to prepare formal application records with sworn affidavits. Ultimately, many of the applicants did choose to submit formal application records, while others did not. By July 16, 2007, I had received 11 applications for standing. Of the 11 applicants, seven also sought funding. Once Commission counsel reviewed the applications to ensure that they did not disclose confidential information, they were posted on the Commission's website.

Oral Submissions

At the time that the Rules of Standing and Funding were published, I had not yet determined whether I would also require oral submissions from the applicants. In the Rules of Standing and Funding, I had asked the parties to indicate whether they wished to make oral submissions. Of the 11 applicants, only five expressed a desire to do so; two indicated they were prepared to do so if requested by me; and three others indicated that they were content to rely on their written submissions. One applicant did not take a position on the issue. Ultimately, to increase the transparency of our process, I decided that short oral submissions were in the public interest.

On August 8, 2007, I heard oral submissions from nine of the applicants in support of their applications for standing and funding. The other two applicants were content to rely on their written submissions. Counsel for the applicants were asked to confine their oral submissions to 15 minutes. Counsel were expeditious in their submissions, and we were able to conclude the oral submissions in 90 minutes.

Decision on Standing and Funding

On August 17, 2007, I delivered my ruling.[12] I granted standing to all 11 applicants:

[12] See Appendix 8 for my August 17, 2007, Ruling on Standing and Funding and Appendix 9 for my October 2, 2007, Supplementary Ruling on Funding.

- three institutions – the Office of the Chief Coroner for Ontario (OCCO), Her Majesty the Queen in Right of Ontario,[13] and the Hospital for Sick Children (SickKids);
- two groups of individuals – the Affected Families Group (AFG)[14] and the Mullins-Johnson Group[15] – who were involved in cases examined by the Chief Coroner's Review;
- five organizations involved in various ways in the criminal justice system – the Criminal Lawyers' Association (CLA), the Ontario Crown Attorneys' Association (OCAA), the Association in Defence of the Wrongly Convicted (AIDWYC), the Aboriginal Legal Services of Toronto and Nishnawbe Aski Nation Coalition (ALST/NAN), and Defence for Children International – Canada (DCI–Canada); and
- Dr. Charles Smith.

With respect to the seven parties who sought funding, I granted it to both groups of individuals (the Affected Families Group and the Mullins-Johnson Group) and to the four organizations that sought it (the CLA, AIDWYC, ALST/NAN, and DCI–Canada). I did not grant funding to SickKids.

The hourly rates for counsel who were granted funding were determined by Management Board of Cabinet Directives and Guidelines. My ruling set maximums as to the number of counsel who could be employed to act for a party or undertake various tasks; the maximum hours permitted per day or per week; and the extent to which law clerks could be used to undertake document management and preparation. To eliminate the need for either my counsel or the Ministry of the Attorney General to review the accounts of counsel for the parties, the ministry retained Larry Banack, a senior litigator in private practice, with no connection to our Inquiry, to review every account and to ensure that it was consistent with my ruling.

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[13] "Her Majesty the Queen in Right of Ontario" will be referred to throughout this volume as the Province of Ontario. The Province of Ontario, for the purposes of this Inquiry, sought and was granted standing on behalf of the ministries, agents, and servants of the Crown, with the exception of the OCCO, its employees and agents. The Province of Ontario's standing included representing the Ontario Provincial Police and Crown counsel.

[14] The Affected Families Group is made up of individuals who were subject to criminal investigations but not convicted, and their family members. In some cases, charges were never laid; in other cases, charges were laid but later withdrawn or stayed; in one case, an acquittal was entered.

[15] The Mullins-Johnson Group was made up of nine individuals, two of whom were identified by name and seven others who asked to maintain their confidentiality. All the members of the Mullins-Johnson Group allege they were convicted as a result, in whole or in part, of the opinions of Dr. Charles Smith, of crimes they did not commit.

Subsequent Applications

On August 10, 2007, I received an application for standing from Mrs. Anne Marsden on behalf of a group named Access for All. On August 22, I released my decision dismissing the application. My reasons are contained in my decision.[16]

On October 12, 2007, the College of Physicians and Surgeons of Ontario (CPSO) applied for standing. On October 17, I issued my ruling granting this application.[17]

On November 5, 2007, I granted limited standing and funding to Marco Trotta. The death of Mr. Trotta's eight-month-old son was one of the cases examined by the Chief Coroner's Review. At the time that I granted him limited standing, Mr. Trotta's appeal of his criminal conviction for the murder of his son was on reserve before the Supreme Court of Canada. One of the possible outcomes of the appeal was that a new trial would be ordered. Mr. Trotta sought to have counsel appear, as necessary, to protect his rights should a new trial be ordered. I granted limited standing to Mr. Trotta so that his counsel could attend on days when evidence that might be relevant to his ongoing criminal proceedings was presented to the Commission.[18]

I also received two subsequent applications, each on behalf of two individuals, requesting that they be granted standing as part of the Affected Families Group. I agreed and granted standing in my decisions of November 6, 2007, and January 8, 2008.[19] In the end, I granted standing to 13 parties: four institutions, two groups of individuals with common interests, five organizations, and two individuals.

Rights of Parties with Standing

It was clear from the beginning that some parties would have a more direct and substantial interest in the proceedings than others. That is true of all public inquiries. In recognition of these varying interests, some public inquiries have granted parties standing for only certain phases of an inquiry. In other public inquiries, the decisions granting standing have attempted to limit a party's participation to accord with the party's particular interests.

Section 12 of the Commission's Rules of Standing and Funding provides: "The

[16] See Appendix 10.

[17] See Appendix 11.

[18] See Appendix 12. Of note, on November 8, 2007, the Supreme Court of Canada released its decision ordering a new trial; see *R. v. Trotta*, [2007] SCR 453.

[19] See Appendix 13 and Appendix 14.

Commissioner may determine those parts of the Inquiry in which a party granted standing may participate and the form of their participation."

With the exception of Mr. Trotta's situation, I decided that I would neither formally create levels or categories of standing nor articulate preliminary limits on any one party's standing. Instead, as is discussed in greater detail below, I would reflect the varying interests of the parties through the time permitted for cross-examination. In my view, this process afforded me a greater degree of flexibility, since I could allocate the time counsel had to cross-examine according to that party's interest in a particular witness.

I was also guided by an appreciation that all the family members of the deceased children had a substantial and direct interest in the subject matter of the Inquiry. However, because of the systemic nature of the Inquiry and the short timeline in which to complete our work, it would not have been appropriate to grant separate standing to each such person.

I am grateful for the efforts and assistance of counsel for the Affected Families Group and the Mullins-Johnson Group, and to the individuals within those groups, who recognized the benefit of organizing themselves into groups with common interests. This cooperation achieved an essential objective for our efficiency and eliminated any need to impose groupings or otherwise limit the number of individuals to whom I granted standing.

Rules of Procedure

The *Public Inquiries Act* provides that, subject to certain provisions in the Act, the conduct of an inquiry and the procedure to be followed are under the control and direction of the commissioner conducting the inquiry.[20]

One of the first tasks I asked Commission counsel to do was to draft Rules of Procedure.[21]

Counsel collected the rules that had been used in many other provincial and federal inquiries. In the interests of time, counsel recommended that we issue our Rules of Standing and Funding first, to be followed by our Rules of Procedure. My counsel wanted to consult with those granted standing about our proposed Rules of Procedure before they released them.

After circulating the draft Rules of Procedure, Commission counsel held a meeting to discuss them with all counsel for parties with standing. Rule 11, which deals with privilege claims, was the only rule that drew some criticism. Instead of

[20] Section 3 of the *Public Inquiries Act*.

[21] See Appendix 15.

revising the rule, my counsel resolved this issue by adopting a flexible approach to the procedures provided for by the rules to meet these concerns.

It can be challenging to draft rules of procedure in the early stages of a public inquiry. The scope of the mandate is often still somewhat unclear, and it can be difficult to predict future problems. Although rules of procedure are an important road map for all involved in a public inquiry, I think a commission must maintain a pragmatic and flexible approach to its rules if it is to adapt to issues as they emerge.

Investigation

Document Production

The Commission's Rules of Procedure provide:

> 10. Copies of all relevant documents are to be produced to the Commission by any party with standing at the earliest opportunity. Production to the Commission will not constitute a waiver of any claim to privilege that a party may wish to assert. Parties are, however, requested to identify to the Commission, within a reasonable time period, any documents over which they intend to assert a claim of privilege.
>
> 11. Where a party objects to the production of any document on the grounds of privilege, a true copy of the document will be produced in an unedited form to Commission counsel who will review and determine the validity of the privilege claim. The party and/or the party's counsel may be present during the review process. In the event the party claiming privilege disagrees with Commission counsel's determination, the Commissioner, on application, may either inspect the impugned document(s) and make a ruling or may direct the issue to be resolved by the Associate Chief Justice of Ontario or his designate.

A significant challenge for any public inquiry is the collection and distribution of relevant documents. Our approach to document production was informed by several aspects of the terms of reference of the Order in Council. First, it required that I complete my work within a strict time limit. Second, it mandated a systemic approach. In light of these considerations, my counsel did not set out to collect every document that could potentially be relevant to our work. If they had done so, it would have been impossible to fulfill the mandate in a timely manner. Instead, my counsel applied a more focused criterion and

collected only those documents that appeared to be relevant and helpful to the systemic nature of the Inquiry. Commission counsel used proportionality as the guiding principle.

Practical Challenges

The Commission did not adopt an identical approach to document production from all the parties. Given the systemic focus of the Inquiry, our tight timeline, and the varying interests and institutional capacities of the parties, we used a more flexible and party-specific approach.

Even before the standing hearings were held or the Rules of Procedure finalized, my counsel consulted with counsel for the institutions and individuals from whom the Commission was seeking production. The purpose of these preliminary discussions was to consider the various issues related to collecting and distributing the relevant documents.

Although the Commission served summonses for document production, my counsel recognized that there was not time simply to wait for the documents to arrive. Many of the parties faced significant challenges assembling documents and had questions regarding the scope of the documents the Commission sought to have produced. If all counsel had not worked together to discuss the practical realities of fulfilling the Commission's mandate, document production would have taken much longer and the Commission would likely have received thousands of documents that it did not require.

Some parties, such as SickKids and Dr. Smith, provided Commission counsel with comprehensive lists of documents, itemizing those in their possession available for disclosure and those over which they claimed privilege. Commission counsel then reviewed the original non-privileged documents and identified those documents the Inquiry required. Although permitted by Rules 10 and 11, Commission counsel did not review the documents over which privilege was claimed by SickKids and Dr. Smith. Instead, after Commission counsel had considered the nature of the privilege claim and discussed the basis of the claim, further production was made. In some cases, Commission counsel also made requests for additional documents or categories of documents that had not been itemized on the original list of documents provided.

The Province of Ontario, rather than compile a comprehensive list of documents, which would have taken months, allowed Commission counsel direct access to its files. As provided in Rule 10, my counsel agreed that this access did not amount to a waiver of privilege. Thus, Commission counsel reviewed the original documents, comprising a total of approximately 100 boxes, and identified those sought to be produced. Lawyers for the Province of Ontario then

reviewed these documents to identify any documents over which privilege was claimed. My counsel and counsel for the Province of Ontario were able to resolve all privilege claims without recourse to the Associate Chief Justice of Ontario, who was charged with adjudicating privilege disputes. Document production from the Province of Ontario also required resolution of issues with respect to the protection of the names of youth under the *Youth Criminal Justice Act*, SC 2002, c. 1 and its predecessor legislation.

The Commission adopted a flexible approach to document production by the OCCO. The OCCO provided Commission counsel with unlimited access to the original files made available to the Review Panel (see below). It also provided my counsel with access to its original files pertaining to the one case in which a coroner's inquest was held. As with the Province of Ontario's files, my counsel reviewed the documents and identified those that counsel wished produced. Privilege claims were resolved through discussion. As the scope of the mandate became clearer, my counsel made additional requests for specific documents that were relevant to our work, and the OCCO brought other documents to my counsel's attention.

On September 17, 2007, the Commission served the CPSO with a summons for document production. The CPSO took the position that it was prohibited from complying with the summons because of the provisions of s. 36 of the *Regulated Health Professions Act, 1991*, SO 1991, c. 18. It moved for directions as to whether it was permitted to comply with the summons. On October 10, 2007, I issued my ruling, in which I concluded that the CPSO was obliged to comply with the summons.[22]

The Commission faced different challenges with respect to the production of files from the individuals who made up the AFG and the Mullins-Johnson Group. First, the AFG was in possession of documents it had obtained as a result of ongoing civil litigation. The deemed-undertaking rule applied to these documents, so they could not be produced without the consent of the party in the litigation that had produced them or by order of the court.

A second challenge arose because individuals in the AFG and the Mullins-Johnson Group had previously been the subject of criminal investigations. Thus, they were in possession of documents they had obtained as a result of the Crown's obligation to make disclosure in criminal proceedings. These documents could not be produced without either the consent of the Crown or a court order commonly referred to as a *Wagg* order.[23] Although the Crown was not

[22] See Appendix 16.

[23] *P.(D.) v. Wagg* (2004), 71 OR (3d) 229 (CA).

prepared to consent to the AFG and the Mullins-Johnson Group allowing my counsel access to the Crown briefs, it was prepared to produce the same documents to my counsel directly. This decision enabled the Commission to access all the documents that formed part of the Crown's disclosure in the cases. However, it was very difficult for counsel for the two groups to identify those documents that were not being provided by the Crown directly but that needed to be disclosed to the Commission. In one of the cases, for example, counsel for the AFG had a database of 10,000 documents that were not demarcated in this way. In hindsight, it might have been faster to obtain *Wagg* orders for the production of these documents.

A third challenge was that some of the documents in the files of defence counsel were protected by solicitor-client and litigation privilege and could not be produced, even under summons. Many relevant documents were originally covered by litigation privilege. Whether they continued to be covered by litigation privilege was complicated, given the potential in these cases for applications to extend the time for appeal and to file fresh evidence, or to apply to the minister of justice under s. 696.1 of the *Criminal Code*, RSC 1985, c. C-46. However, in light of the Commission's mandate, it was important to obtain access to at least some of these documents in order to learn what we could from the briefs of defence counsel who had acted in the original criminal proceedings. With the assistance of counsel for the AFG and the Mullins-Johnson Group, we were eventually able to obtain consent from clients to disclose some of these materials.

In the case of the five organizations involved in the criminal justice system,[24] the Commission neither reviewed their original files nor requested a list of documents. The Commission simply relied on the parties' obligations under Rule 10.

Rule 11 provides a process by which disputes over document production could be quickly resolved. I decided that I would hear any motion with respect to whether a document was relevant to my mandate, and that matters of privilege would be reserved to the Associate Chief Justice. I am grateful to him for agreeing to make himself available to do this. In the end, only one such motion was brought to the Associate Chief Justice,[25] and I did not have to hear any motions on relevance.

Confidentiality Undertakings

Many of the documents we obtained by summons were subject to statutory confidentiality provisions that constrained disclosure to others. As is discussed below,

[24] AIDWYC, ALST/NAN, DCI, CLA, OCAA.

[25] See Appendix 17.

my counsel sought advice from a privacy law expert before disclosing these documents to parties. Counsel for the parties were asked to sign the Confidentiality Undertaking of Counsel (the Undertaking).[26] The Undertaking also required counsel to have any person (including but not limited to clients, law clerks, information technology staff, or secretarial assistants) who needed to access, review, discuss, or handle the documents sign a Third-Party Undertaking, which was tailored to the individual circumstances of that third party. Commission counsel asked the counsel for the parties to provide a list of all the third parties requiring access, as well as a short explanation of the purpose for which access was sought. Commission counsel then provided an appropriately tailored Third Party Confidentiality Agreement.[27]

Distribution of Documents

The task of deciding how best to provide parties with access to the documents we would collect was difficult. Altogether, we collected more than 36,000 documents, comprising almost 180,000 pages of material. We also knew that, throughout the Inquiry, we would be distributing large volumes of material to parties with standing. We hired Platinum Legal Group Inc. (PLG) to provide technical support.

PLG scanned an image of each document into litigation-management software known under the brand name CT Summation iBlaze. PLG coded each document with a unique document number, as well as with its objective characteristics: author, recipient, date, source, and other information. In addition, the images were converted into text files using optical character recognition software, which permitted counsel to search across not only the coded data but the content of documents as well.

The next task was to distribute the data to counsel for the parties with standing. One possibility was to put the data onto CDs or DVDs and courier the disks to the parties. However, this process can be extremely time-consuming and expensive, and can make "rolling disclosure" (releasing small batches of documents as soon as they are ready) extremely difficult. With PLG's help, we were able to avoid these problems.

The Commission chose what it hoped would be a more efficient and effective method of distributing the documents to counsel for the parties. Documents were stored on a secure server that permitted the parties to download them over the Internet via a secure File Transfer Protocol (FTP) site. To protect the security of this highly confidential data, PLG created a multi-layered security system

[26] See Appendix 18.

[27] See Appendix 19 for an example.

involving firewalls, user-IDs, passwords, and RSA-authentication technology. Each party received an RSA security token, which generated a one-time authentication code that changed every 60 seconds. To access the secure FTP document disclosure folder, users had to combine their secret personal identification number with the code generated by the RSA token. Counsel for the parties could then securely download the documents and install them on their network servers or laptop computers.

Commission staff found this process to be a significant improvement over alternative approaches. Moreover, counsel for parties with standing indicated that sharing electronic files through the secure FTP site dramatically increased the efficiency and organization of such a large-scale, document-heavy undertaking.

Conclusion

The approach we took to document production, collection, and distribution succeeded for a number of reasons. It created a large but manageable database that was easily searchable by all parties. (My counsel estimated that an exhaustive approach to document collection would have doubled or tripled the number of documents obtained.) It also enabled Commission counsel and our staff lawyers to master the database quickly, since they had such a direct hand in defining its parameters. And it ensured that counsel did not become so buried in detail that they lost sight of the systemic focus of the Inquiry.

Witness Interviews

Most public inquiries spend much of their investigative time interviewing persons with knowledge or information relevant to the Inquiry's work. Some interviews help to identify those who should be called as witnesses. Many interviews assist with fact finding and document production. Others are simply educational, assisting the Commission staff in understanding the context or identifying issues. Interviews also allow individuals interested in the work of an inquiry to express their views and concerns. I did not personally participate in the interviews that were conducted, but my counsel informed me that our interviews served all these ends.

Commission counsel decided against using non-lawyer investigators to do this work. Although interviewing witnesses is time-consuming, it was extremely important that my counsel develop a high degree of familiarity with the facts and the potential witnesses in order to make careful judgments about which witnesses to call and what questions to ask them.

My counsel interviewed people from across the province. The interviews began almost immediately and continued throughout the Inquiry, even after our public hearings began. Those interviewed included pathologists, coroners, police officers, Crown attorneys, defence counsel, university professors, medical and administrative assistants, administrators, and regulators. Some were interviewed individually; others were interviewed in groups. Some were interviewed on more than one occasion. Many individuals were interviewed in the presence of their counsel; others chose to meet without counsel.

All those interviewed did so voluntarily. The *Public Inquiries Act* does not permit me to compel people to be interviewed. With the exception of Dr. Smith, all those who my counsel sought to interview agreed.

The interviews were neither transcribed nor recorded. My counsel rejected this procedure for at least three reasons: a concern that transcribing the interviews would add a level of formality to the interviews which might make witnesses uncomfortable; a concern that it might even create an adversarial atmosphere; and a concern that generating transcripts would be costly and lead to delay. Instead, one of the Commission lawyers kept notes during the interview and prepared a draft summary for the person interviewed to review. After the person interviewed was satisfied with the summary, it was circulated to all counsel for parties with standing. Once circulated, the summaries remained subject to the Confidentiality Undertaking that counsel had previously executed, so they did not become public unless they were formally tendered as part of our public record. Pursuant to Rule 41 of the Rules of Procedure, neither parties nor Commission counsel were permitted to cross-examine a witness on any interview summary.[28]

My counsel chose to make the interview process and the overall investigation as transparent as possible. We asked counsel for the parties to identify possible persons to be interviewed. Interview summaries for every interview were circulated to the parties, even if the person interviewed was not called as a witness. This process enabled counsel to request that a person who had been interviewed be called as a witness and to ask more informed and focused questions of the witnesses who did testify. In addition, by making our investigation more transparent and by sharing more information with counsel for the parties, I hope we encouraged trust and cooperation from the parties. In total, the Commission interviewed 81 individuals and circulated 71 interview summaries.[29]

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[28] Rule 41 did provide that counsel could seek my leave to cross-examine on interview summaries, but no such request was made.

[29] Because some people were interviewed in groups, there were fewer interview summaries than people actually interviewed.

Unless an interview summary was entered into evidence (as discussed below), I did not review it.

Notices of Alleged Misconduct

Subsection 5(2) of the *Public Inquiries Act* provides:

> No finding of misconduct on the part of any person shall be made against the person in any report of a commission after an inquiry unless that person had reasonable notice of the substance of the alleged misconduct and was allowed full opportunity during the inquiry to be heard in person or by counsel.

"Misconduct" is not defined in the *Public Inquiries Act*. The Commission was guided on this issue by Justice Peter Cory's comments in *Canada (Attorney General) v. Canada (Commission of Inquiry on the Blood System in Canada)*.[30] In his consideration of a commissioner's power to make findings of misconduct, Justice Cory relied on the *Concise Oxford Dictionary* (8th ed., 1990), which states that "misconduct" is "improper or unprofessional behaviour" or "bad management."[31] Justice Cory also noted that findings of misconduct "should be made only in those circumstances where they are required to carry out the mandate of the inquiry."[32]

I instructed Commission counsel to concentrate primarily on the systemic issues and less on potential misconduct. It was a delicate balance. I wanted to ensure that I was in a position to find the facts of what went wrong. At the same time, I wanted to avoid allowing our hearing to become preoccupied with finger pointing. And most important, I was asked to conduct an inquiry that had a systemic focus.

In the result, some Notices of Alleged Misconduct were served. Recipients were informed that the notice was designed to assist in identifying allegations of misconduct that might arise during the course of the Inquiry and to permit them to respond fairly. They were cautioned that the notices should not be taken as any indication that I intended to make findings against them or that the allegations, if substantiated, necessarily constituted misconduct.[33] Neither the notices nor their existence was disclosed to others.

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[30] [1997] 3 SCR 440.

[31] *Ibid.* at 463.

[32] *Ibid.* at 470.

[33] See Appendix 20 for an example of the Commission's Notice of Alleged Misconduct.

The Review Panel

Paragraph 7 of the Order in Council provides:

> 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.

The "results of the Chief Coroner's Review" were contained in 45 separate two-page documents. The primary reviewer for each of the cases had completed an autopsy report review form, which evaluated the case against a uniform checklist and provided brief explanatory comments. These forms contained little if any narrative.

My counsel determined that the reviewers should be asked to prepare longer reports that set out the explanations for their conclusions.

Thus, in August 2007, the five reviewers returned to Toronto to review their work and prepare fuller reports. The OCCO greatly assisted in facilitating the return of the Review Panel. In addition, the CPSO agreed to defer its intended retainer of members of the Review Panel in order to accommodate the Inquiry's schedule. Commission counsel also solicited input from counsel for the affected parties (the Province of Ontario, Dr. Smith, the Affected Families Group, and the Mullins-Johnson Group) before formulating our instructions for the Review Panel.

The expanded reports were produced to all parties together with the instructions that had been prepared by Commission counsel. These reports then formed the basis of the testimony provided by the individual members of the Review Panel at the Inquiry.

To assist counsel for the parties in preparing for their cross-examinations of the Review Panel, arrangements were made to enable any counsel to meet with each member of the panel to ask questions, test theories, and develop a better understanding of their opinions. Commission counsel encouraged other counsel to meet with the members of the Review Panel to dispel any impression that they were Commission counsel's witnesses and therefore off limits.

Privacy Issues

Public inquiries are, by their nature, public. However, legislation may require that certain kinds of information cannot be made public. In addition, in some of our

cases, pre-existing publication bans arising from previous court proceedings placed limits on the information that could be made public. And s. 4 of the *Public Inquiries Act* itself provides that although hearings are presumptively open to the public, there are exceptional circumstances that permit hearings in the absence of the public.

Given the issues encountered by the Inquiry, these confidentiality requirements were a significant concern. To assist my counsel in addressing them, the Commission retained Priscilla Platt as special counsel, privacy law. Ms. Platt has more than 25 years of expertise in privacy, access to information, and related legal issues. She provided expert advice regarding the *Personal Health Information Protection Act, 2004*, SO 2004, c. 3, Sch. A, the *Child and Family Services Act*, RSO 1990, c. C.11, and the *Youth Criminal Justice Act*. The Commission was guided by the advice it received from Ms. Platt in its collection and distribution of documents.

My counsel were obliged to get two orders from the Ontario Court of Justice – Youth Court on September 25, 2007. These orders were necessary to obtain and produce documents from Ministry of the Attorney General files that related to cases which were subject to the provisions of the *Youth Criminal Justice Act* and its predecessor legislation.[34] In keeping with Regional Senior Justice Robert Bigelow's orders in these two cases, the Commission redacted the names of two young people before disclosing documents to counsel for parties with standing or to members of the press.

On October 19, 2007, I heard two motions to restrict the publication of names of various individuals. In accordance with the dicta of the Supreme Court of Canada in *Dagenais v. Canadian Broadcasting Corp.*,[35] the Commission gave notice of the proposed publication bans to representatives of the media and the parties. Notice was also published on the Inquiry's website. The media were given an opportunity to make submissions with respect to the propriety, scope, or nature of the publication bans that were sought. No representatives of the media chose to participate in these motions.

I issued my ruling granting the motions on November 1, 2007.[36] The ruling did not require my staff to redact the names of those protected by the publication ban in the documents contained in the Commission's database. Redactions were required to protect the identity of individuals investigated and prosecuted under the *Youth Criminal Justice Act*. This process would have been an extremely time-

[34] See Appendix 21.
[35] [1994] 3 SCR 835.
[36] See Appendix 22.

consuming exercise, taking many months. Instead, we restricted access to the unredacted documents to counsel for the parties and the media, all of whom were reminded of their professional obligations to comply with my ruling.

My ruling banned publication of the full names of any of the deceased children whose cases were the subject of the Chief Coroner's Review, as well as the full names of many of their relatives. My ruling also provided the single names or relationships by which individuals could be referred to in the hearing while respecting the privacy of their identities. A chart was prepared by my counsel and provided to counsel for the parties to assist them. Counsel were careful not to refer to these individuals by their full names during the course of the hearings. On the rare occasion when a banned name was mentioned inadvertently, the transcript was corrected. A delay was also built into the webcast, permitting our registrar to cut transmission in such a circumstance. Several of the individuals whose stories had received wide media attention saw no need for this protection and were content to have their full names used throughout.

Education and Consultation

Pathology Seminars

One of the initial challenges for my counsel and me was to familiarize ourselves with the basic concepts and controversies in pediatric forensic pathology. I did not want our learning process to monopolize important Inquiry hearing time. I recognized that there was much we could do apart from the formal hearing process to educate ourselves before the commencement of the hearings. Although we reviewed the leading academic texts in the area, we appreciated that it was a highly technical and complex science and that our self-study would benefit greatly from the assistance of experts. The field of pediatric forensic pathology is very small. We consulted with both domestic and international experts to assist us.

With respect to domestic expertise, I am grateful for the assistance Senator Larry Campbell provided in facilitating the first of our in-house seminars. Dr. Peter Markesteyn, former chief medical examiner for Manitoba, provided my staff and me with a full-day session that covered some of the basic concepts of forensic pathology within the field. I would like to thank Dr. Markesteyn for his assistance.

Within weeks of the Inquiry being called, Dr. Michael Pollanen, the Chief Forensic Pathologist for Ontario, was invited to provide my staff and me with a valuable overview of Ontario's pediatric forensic pathology system and the process employed during the Chief Coroner's Review.

We needed to locate a recognized expert who had no previous involvement in any of the cases before the Inquiry to act as a consultant to the Commission. Our search for an international expert led us to the Victorian Institute of Forensic Medicine in Melbourne, Australia. This institute is widely regarded as one of the pre-eminent forensic pathology facilities in the world, and we were fortunate to be able to retain Dr. Stephen Cordner, the director, as a consultant to the Commission. Dr. Cordner and his colleague Dr. David Ranson were important resources for my counsel throughout the Inquiry. In August 2007, Dr. Cordner travelled to Toronto to conduct a three-day seminar on forensic pathology for my staff.

These educational seminars were of great value to us. They not only assisted staff in their interviews and document review, but also provided us all with a basic understanding of the science at the core of our work.

The seminars were so useful that my counsel suggested we host a one-day seminar for all counsel for parties with standing. Although I have no doubt that counsel would have quickly familiarized themselves with the basics of the science, I did not want to lose valuable hearing time while counsel struggled with difficult concepts or medical terminology. Moreover, the seminar would give us a common knowledge base.

On October 24, 2007, Dr. David Ranson, the deputy director of the Victorian Institute, conducted a one-day education session on forensic pathology for me, my staff, and counsel for the parties. For those unable to attend, the Commission prepared a video/audio tape of the seminar. Many counsel who attended confirmed that they found the seminar very useful, and I am confident that it allowed counsel to ask more informed and focused questions of the witnesses.

Visits

Institutional Visits

On November 5, 2007, counsel for the parties and I visited two forensic pathology units. First, we toured the pathology department at SickKids, including its autopsy facilities. Then we toured the Provincial Forensic Pathology Unit and its autopsy facilities at the OCCO. I am grateful to the leadership of both institutions for arranging these visits. The backdrop they provided assisted in our understanding of the evidence.

Visits to First Nations Communities

On October 29 and 30, 2007, at the invitation of the Aboriginal Legal Services of Toronto and Nishnawbe Aski Nation (ALST/NAN) Coalition, I visited two Aboriginal communities in Northern Ontario – Mishkeegogamang and Muskrat

Dam. It was important to visit these communities in order to get some sense of the particular challenges related to the delivery of pediatric forensic pathology in remote northern communities. I am very grateful to both communities for the warm hospitality they extended to me, Ms. Denov, and Mr. Sandler. In both communities, I had the opportunity to meet with community leaders and with individuals and families who have suffered the tragedy of unexpected infant deaths. These visits, like the ones held in Toronto, were not part of the Commission's fact-finding process but were useful in providing me with important background information. Among other things, they brought home the enormous challenges of making pediatric forensic pathology and coronial services available to remote northern communities in general and, in particular, to First Nations communities.

Systemic Issues List

Well before the public hearings began, we thought it would be useful to compile and circulate to the parties a list of systemic issues that were exemplified by the 20 cases included in the Chief Coroner's Review. We grouped these issues into four areas of concern, recognizing that they were not watertight and that the issues did not necessarily relate to only one area. Our list of 80 systemic issues was also posted on our website on the first day of our oral hearings.[37]

In my view, it was useful to articulate, even before the hearings began, those issues that had been identified by the Commission during its initial investigation and documentary review. We made it clear that the list did not represent my final view of the key issues. It was not intended to be exhaustive or to prejudge the issues, but we hoped it would assist ongoing discussions with the parties about the scope and limits of the Inquiry; provide guidance for the examination of witnesses; and facilitate the ultimate development of recommendations to restore and enhance public confidence in pediatric forensic pathology in Ontario and its future use in the criminal justice system. My counsel also found that the list was particularly useful in explaining the Inquiry's focus to potential witnesses or roundtable panellists.

[37] See Appendix 23.

ALL-COUNSEL MEETINGS AND MOTIONS

All-Counsel Meeting on the Hearing Process

My counsel met regularly with counsel for the parties individually throughout the inquiry process. Each party had different concerns and interests. My counsel tried to respond to these concerns and interests by maintaining an open door and engaging in confidential meetings with counsel as appropriate. In my view, this approach and its successful execution made a vital contribution to the efficiency of our process.

In addition to these one-on-one meetings and discussions, my counsel held an all-counsel meeting early in the process to discuss the proposed Rules of Procedure. My counsel also organized an all-counsel meeting to explain the mechanics of the hearing process.

Held in the Commission's hearing room, it covered a range of administrative and technical topics such as webcasting, document projection, microphones, Internet access, and supervision and security. Commission counsel also described in detail the procedures that would govern the hearing process itself, some of which were novel, including the introduction of documents and Overview Reports (see below), the procedure for objections, the order of cross-examination, the use of interview summaries, the rules regarding speaking to witnesses under cross-examination, and the opportunity to meet with expert witnesses.

Counsel for the parties raised questions and concerns. Commission counsel used the discussion as an opportunity to ensure that their plans for the hearing process addressed all foreseeable problems.

Motions

In addition to the motions regarding standing and funding discussed above, I decided five other motions. On October 4, 2007, I heard a motion for directions by the CPSO related to the summons to its registrar to produce all relevant documents. My ruling on this issue was released on October 10, 2007.[38]

On October 19, 2007, I heard a motion for publication bans brought by Commission counsel and counsel for the Mullins-Johnson Group. On November 1, 2007, I issued my ruling.[39]

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[38] See Appendix 16.

[39] See Appendix 22.

On November 20, 2007, I issued my ruling on the application by Dr. Smith to be examined in chief by his counsel.[40] As discussed below, I later modified my ruling.

On February 8, 2008, ALST/NAN, AIDWYC, the CLA, and the Mullins-Johnson Group brought a motion to recall Dr. James Young, the former Chief Coroner for Ontario, on an issue that arose after he had completed his testimony. They sought to question him about whether the OCCO should permit forensic pathologists to testify on behalf of the prosecution in death penalty cases in the United States. After considering their submissions, I issued my oral ruling later that same day.[41]

Finally, on March 31, 2008, I ruled in response to a request by a member of the public to deliver oral submissions at the Inquiry.[42]

In addition to my rulings, Associate Chief Justice Dennis O'Connor issued a ruling on November 20, 2007, in the matter of certain documents that the Kingston Police Service objected to producing.[43]

Also, as I have already indicated, my counsel were required to obtain two orders from the Ontario Court of Justice – Youth Court in order to obtain and produce documents from Ministry of the Attorney General files that related to cases that were subject to the provisions of the *Youth Criminal Justice Act* and its predecessor legislation.[44]

Overview Reports

Our terms of reference in the Order in Council encouraged the Commission to use procedures that would reduce the need to call witnesses to prove facts. Paragraph 8 enables us to call representative witnesses, and paragraph 7 directs us to rely on "overview reports" wherever possible. It reads:

> 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.

[40] See Appendix 24.
[41] See Appendix 25 for the transcript of my oral ruling.
[42] See Appendix 26.
[43] See Appendix 17.
[44] See Appendix 21.

Commission counsel identified the concept of overview reports as an opportunity to develop an innovative process. My counsel believed that we could drastically reduce the number of witnesses if we prepared a written "overview" of 18 of the cases that formed part of the Chief Coroner's Review. Each report would summarize the relevant documents in the Commission's database and set out the core and background facts in a neutral, non-argumentative way. The goal was to detail carefully all the steps in the death investigation, the criminal proceedings, and the Children's Aid Society proceedings for each case and to document the involvement of the pathologist, coroner, police officer, Crown, defence counsel, and family members to the extent revealed by the documents, many of which had been prepared contemporaneously with the events. In this way, we would be better able to situate the work of Dr. Smith and others within the complex factual matrix that underlies every pediatric death investigation in criminally suspicious circumstances.[45]

Under the direction of Commission counsel, our team of staff lawyers spent four months preparing the Overview Reports. Most reports were more than 100 pages long and summarized thousands of documents. It was essential that there be scrupulous accuracy and no evaluation.

In the interest of fairness, before finalizing the reports, Commission counsel asked the parties to comment on them and suggest modifications, additions, or deletions. Because of the care with which the reports were prepared, there were few suggested revisions. This positive response speaks to the clear and objective approach adopted by the Commission's staff lawyers in preparing the reports, as well as the degree of cooperation consistently demonstrated by counsel for the parties. In the event that an irreconcilable difference arose, the parties had the option of addressing the issue through the evidence of the witnesses.

The Overview Reports were filed on the first day of the public hearings. For the most part, they were used as the primary document source on which witnesses were examined – a process that worked well because it significantly reduced the number of individual documents that had to be shown to any one witness. Commission counsel and counsel for the parties adapted to it with great ease. One of the reasons that witness examinations were so concise and effective was because the Overview Reports anchored every examination. I understand that many of the witnesses found it easy to prepare for their testimony by reviewing these reports.

The Overview Reports contained some information that was never tested for

[45] See Appendix 27 for a sample Overview Report.

its truth, and I was always conscious of this fact. The reports recounted the perceptions, information, and views of many people, which may or may not have been based on accurate facts. In some cases, the reports detailed spurious allegations, which were later proven false. In other cases, they contained allegations that have yet to be proven one way or the other, or that are incapable of proof. They also documented the views individuals held at a particular time; these views may no longer accord with the views those individuals hold today.

My counsel decided, however, that it was important that the Overview Reports contain *all* this information: the fact that such views were held, or that such allegations were expressed at the time, might provide insight into the actions or omissions that ultimately occurred. It was left to me to decide how much or how little weight should be placed on the information contained in the reports. For these reasons, I have included only one sample Overview Report in this volume. However, in order to give readers an understanding of the basic facts of the 20 cases that formed part of the Chief Coroner's Review, brief summaries of each of the cases are included.[46]

Institutional Reports

During the investigative stage of our process, my counsel concluded that many of the policies, procedures, practices, and institutional arrangements, as they related to the practice and use of pediatric forensic pathology between 1981 and 2001, could be summarized in writing. They invited the OCCO, SickKids, and the CPSO to prepare Institutional Reports that described in neutral, non-argumentative language their relevant policies and procedures, as well as the applicable legislation and regulatory provisions. In effect, we asked each of the major institutions to prepare a detailed account of what would otherwise have comprised the evidence-in-chief of their primary institutional witness or witnesses.

Commission counsel concluded that it was better to ask these parties, rather than our staff lawyers, to do this work in order to capitalize on the specialized knowledge within these three institutions.

The Institutional Report prepared by the Office of the Chief Coroner for Ontario was 220 pages in length. It set out the framework for death investigations in Ontario. It described the work of the OCCO and those who work for it. The Institutional Report by SickKids was 162 pages long. It described the history and

[46] See Appendix 28.

work of the Ontario Pediatric Forensic Pathology Unit. The Institutional Report of the College of Physicians and Surgeons of Ontario was 35 pages long. It described the college's regulatory functions and its processes.

The reports were adopted by the representative witnesses from those institutions at the outset of their examinations-in-chief. Commission counsel and counsel for the parties were entitled to cross-examine these witnesses on any aspects of their Institutional Reports. In the end, there was very little cross-examination on the facts described in the Institutional Reports.

This use of these reports dramatically reduced the length of the testimony from these witnesses. It also avoided the need to call a larger number of witnesses to give evidence about matters that were largely uncontentious. Quite apart from these obvious advantages, written evidence about an institution's history, policies, and infrastructure is preferable to oral evidence on these issues because it is generally better organized, it is more likely to be precise, and it summarizes detailed information in easy-to-use graph or chart form.

Hearings

From the beginning, I asked Commission counsel to look for techniques that would allow me to streamline the hearing process. I had a responsibility to the public to be thorough and fair, while at the same time being mindful of efficiency, time, and cost. It was important that we move at a consistent pace. In addition, because this process was publicly funded, the public had the right to expect that we would conduct our work with economy and expedition.

Proceeding expeditiously was also important because recommendations to restore public confidence in pediatric forensic pathology should be brought forward as soon as possible, given the important role it plays in our criminal justice system.

I took the advice of my counsel and did not rush to commence our oral hearings. Oral hearings are costly and have the potential to take on a life of their own if they are not carefully structured. Considerable pressure is often put on a commission to begin public hearings. Although we began with a 12-month mandate, my counsel recommended that we allocate six-and-a-half months to conduct the investigation and to prepare for the hearings. My counsel predicted that this process would allow us to keep the public hearings relatively short and efficient. This proved absolutely correct. Their preparation time was vital in allowing us to identify and understand the important issues on which to focus the hearings. Moreover, the flexibility of the public inquiry process permits commission counsel to employ creative techniques to put evidence before the commission.

Although oral hearings are certainly important and may be more familiar to counsel, the public, and the press, they are not the only tool at a commission's disposal. Our oral hearings were significantly shortened not just by careful preparation but also by the various ways that documents were used in lieu of oral testimony.

Documentary Evidence

As previously discussed, the Commission relied on Overview Reports, the written reports of the Review Panel, and the Institutional Reports – all of which built much of the factual foundation of our work. And, as is discussed below, Dr. Smith also filed evidence in writing.

On three occasions, affidavits were filed instead of calling the witnesses to testify. Commission counsel filed the affidavit of Justice Patrick W. Dunn because Dr. Smith did not seek to cross-examine him. Commission counsel also filed an affidavit from Dr. James Cairns, the then Deputy Chief Coroner for Ontario, on a discrete issue that arose after he had finished testifying. Since no party wished to cross-examine him on the point, we were able to avoid recalling him as a witness. Similarly, Commission counsel filed an affidavit from Sergeant Mark Holden of the Barrie Police Service about a discrete issue arising from one of the 20 cases that continues to be the subject of a police investigation.

I have previously explained how the Commission prepared and circulated interview summaries for each of the individuals or groups of individuals who were interviewed. My counsel decided that although it was not necessary to call several individuals as witnesses, I would benefit by reviewing the interview summaries for these individuals. Commission counsel advised the other counsel that these summaries would be filed as evidence unless there were objections. This process worked well. In the result, I received evidence in this way from four individuals, the Royal College of Physicians and Surgeons of Canada, and the Ontario Association of Pathologists.

My counsel also recommended that we find a way to avoid the time-consuming and often tedious task of requiring counsel to "prove" documents they intended to rely on. Given the large number of documents that make up the database of most public inquiries, it can create significant challenges for the registrar, who must somehow keep track of hundreds if not thousands of exhibits. Commission counsel suggested that documents would be referred to by the PFP number (the unique six-digit document identifier used to catalogue all documents in our database). These documents were then treated as part of the evidentiary record on which I could rely, provided they met simple admissibility conditions specified by

Commission counsel.[47] The decision not to mark and file documents as exhibits further streamlined the hearing process.

Oral Evidence

Informed by the knowledge acquired through the intensive preparation stage, Commission counsel recommended a 60-day hearing schedule, including 15 days of "roundtables" (discussed below). Given the magnitude of the factual and policy issues we confronted, this schedule was very compressed. We were able to focus and therefore shorten the hearing phase because, before we called our first witnesses, my counsel were in a position to make informed judgments about which witnesses should testify, how long each one would require, and what the important aspects of their evidence would be. These assessments proved to be sound.

Time Limits for Examination and Cross-Examination

I imposed firm time limits on my counsel and counsel for the parties in both examination and cross-examination. I adopted the same practice used by my colleague Associate Chief Justice O'Connor in his two public inquiries; namely, that the norm was to allocate no more than the same amount of time to all cross-examinations as was allocated to Commission counsel for evidence-in-chief. After taking requests for cross-examination time, I subdivided the time among requesting counsel according to the interests of their clients in the evidence. Counsel cooperated fully, and the result was focused cross-examination that was very helpful. I am confident that this process assisted the efficiency of the hearing process without compromising its fairness.

Equally, my own counsel never exceeded their time limit of one-half of the witness's total time. This restriction required extensive preparation and a distillation of what often appeared to be volumes of material. Counsel used slides, charts, and other visual aids where it made things simpler and easier to digest. This approach enabled us to fully cover all the significant issues of fact and policy. As with other aspects of our process, we applied the principle of proportionality.

[47] The evidentiary record consisted of the Overview Reports, the Institutional Reports, affidavits, and interview summaries entered into evidence; documents referred to in an Overview Report or one of the Institutional Reports; Dr. Smith's written evidence; documents referred to in a documentary notice; documents referred to by a witness in testimony and then subsequently obtained; documents produced by a party after a witness had testified; documents produced in one of the roundtable compendia; and documents referred to by a participant at the roundtables and subsequently obtained.

Panels

Commission counsel also recommended that we call many of the witnesses in panels. This made good sense. I knew that very few of my recommendations would turn on assessments of witnesses' credibility or their unaided ability to recall specific events. I wanted, wherever possible, to avoid duplication of evidence and to identify efficiently those areas in which there was consensus. When witnesses were particularly important to my task of determining what happened, or where credibility might be an issue, they were called individually. However, the use of panels facilitated our ability to elicit opinions about the important systemic issues from those who also had some fact evidence to give. This provided an important source of information for my ultimate recommendations. It meant that I was able to look to more than our policy roundtables and our research papers.

In total, the Inquiry called 48 witnesses during the oral hearings. Of these, only 11 testified alone. The panels each consisted of two or three witnesses. When questioning a panel of witnesses, Commission counsel typically began by reviewing the background of each witness. After that, the examinations were organized in the way that most logically presented the material, without concern for whether one of the witnesses was being asked all the questions on a particular topic. When two or more witnesses from a particular institution were examined, it was easy to avoid needless repetition of material.

On cross-examination, counsel had the option of directing their questions to a particular witness or to the panel as whole. Again, given the systemic nature of this Inquiry and the fact that credibility was not often an issue, I found that counsel were generally able to target their cross-examinations effectively, even if more than one witness might wish to respond to the question asked.

There was great value in proceeding in this way. It was efficient. For example, after one doctor recounted his practice with respect to a particular procedure, counsel could simply turn to the next doctor and ask whether his or her practice varied. They did not have to summarize the prior witness's evidence or lead up to the question with a lengthy hypothetical question.

Calling witnesses in panels also facilitated discussion about the practical consequences of particular policies. I was able to test policy proposals and generate some very interesting discussions and debates. This outcome would not have been as easy with individual witnesses. Moreover, calling the witnesses in panels assisted in putting them at ease. Commission counsel informed me that many witnesses were less reluctant to testify when they learned that they would be sharing the witness stand with colleagues.

Cross-Examination

I looked to all counsel to make every effort to ensure that their cross-examinations added value to the Commission's mandate. I urged counsel to consult among themselves to avoid duplication and to be conscious of our systemic focus. From very early on in our public hearings, counsel for the parties used much of their time in cross-examination to explore the systemic and policy issues rather than getting bogged down in factual minutiae.

We did not use precious hearing time to debate and adjudicate time allocations. Rather, midway through the examination by Commission counsel, counsel for each of the parties was asked how long they intended to be in cross-examination. These time requests were recorded, and then reviewed by me. Before the conclusion of Commission counsel's examination, the precise times for each cross-examination were posted on the hearing-room monitors for all counsel to see. Only a very few objections to these allocations were ever raised.

All counsel impressed me with their focused questioning – their emphasis on what mattered. Our hearing time was thus both productive and interesting.

Dr. Smith's Evidence

At an early stage in our investigation, my counsel recognized that the fairness of our process would be measured in large part by the way in which we presented Dr. Smith's evidence. My counsel ensured that her examination of him was probing but respectful. Cross-examinations by other counsel also were focused. We set aside a week for his evidence, as sufficient to explore with him what happened without exposing him to endless public vilification.

In order to achieve these objectives, it was necessary to have detailed information about Dr. Smith's anticipated evidence well in advance of his testimony. Because Dr. Smith would not agree to be interviewed in advance, my counsel requested that he prepare a detailed summary of his evidence, which could be circulated to all parties. This issue overlapped with an issue raised by Dr. Smith – that his counsel be permitted to lead his evidence-in-chief. Indeed, Dr. Smith brought a motion to formally request this relief. I initially dismissed this motion but indicated that, if new circumstances arose before Dr. Smith was scheduled to testify, he could renew his request.

After further discussion and negotiation, my counsel recommended that I allow Dr. Smith's counsel to lead his evidence-in-chief for three-quarters of the first day, provided that he prepare a comprehensive written statement that reviewed all of our cases together with a number of systemic issues. It was also agreed that this statement would form part of Dr. Smith's sworn evidence and thus be subject to examination by Commission counsel or any other party.

Dr. Smith and his counsel prepared a thorough 138-page statement and provided it to Commission counsel and the parties approximately a week before he began his testimony. It was very helpful. It significantly reduced the time needed for Dr. Smith to give his evidence-in-chief. It allowed for thoughtful and informed preparation for cross-examination. And it avoided transforming Dr. Smith's oral evidence into an unfair test of his memory.

Questions from the Commissioner

Throughout our hearings, I took my investigatory role seriously. I saw it as my role to ask questions necessary to clarify a point or to further my own understanding of an issue. I hope that my questions also provided counsel with greater insight into the areas in which I was particularly interested and assisted in focusing both their questions and their submissions.

Conclusion

Our oral hearing schedule was possible owing to a combination of procedures we developed to streamline the process: the use of Overview and Institutional Reports to lay out the uncontested facts (in total, 2,055 pages of evidence); the use of witness panels; the dispensing of the requirement to formally prove documents; and enforcement of strict time limits for examination-in-chief and cross-examination. In my view, these procedures facilitated an efficient and fair oral hearing process that thoroughly canvassed all of the main systemic issues.

Roundtables

In order to assist in the development of specific recommendations, the Commission held a series of 18 roundtables in February 2008. Twelve of these roundtables were held in Toronto, and six were held in Thunder Bay. Each roundtable was designed around a particular theme, and many comprised both domestic and international experts. Their purpose was to ensure that the most difficult policy questions could be addressed by leading academics and practitioners.

Commission counsel carefully selected the participants at the roundtables. Some roundtables had as many as six panellists, others as few as two. We wanted input from those who could speak to both the theoretical and the practical aspects of the systemic issues. Participants included academics, pathologists, and lawyers from around the world, in addition to a number of professionals from Ontario's legal, medical, and child-protection communities. Some people had previously testified at the Inquiry; others had prepared research studies for the

Commission; and still others had played no previous role with the Commission. I am grateful to all of those who participated in these roundtables.

For each theme, Commission counsel prepared a series of questions to be discussed and debated by the participants.[48] Participants were informed that the questions were not intended to be exhaustive and that their inclusion did not necessarily mean that they would be addressed in my Final Report. The Commission circulated the themes and proposed questions to the participants and the parties in advance in order to give them the opportunity to consider the issues. We invited comments, including additional questions. The Commission also provided the participants and parties with a compendium of relevant articles and documents for each roundtable.

The roundtables were led by Commission counsel using a question-and-answer format, with the exception of the First Nations roundtables in Thunder Bay. Participants were not required to prepare any submissions in advance or deliver opening statements or positions. Dialogue among the participants was encouraged. Counsel for the parties had a brief opportunity to ask questions at the end of each roundtable. This was not cross-examination, however, and the participants were not sworn. I was also very much involved in the discussions and asked many questions. These roundtables gave me an opportunity to seek out information about the areas I found the most challenging. They were extremely valuable, engaging, dynamic, and full of important insights about the systemic problems.

Submissions

Parties

The parties were required to file written submissions by March 20, 2008. These submissions were circulated to the other parties for download through the Commission's secure FTP site. The parties then had the opportunity to provide written reply submissions by March 27, 2008. In these submissions, I asked the parties to set out any specific findings of fact or systemic recommendations they wished me to make. I imposed no page limits on them.[49] All written submissions were posted on the Inquiry's website.

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[48] See Appendix 29 for the list of those who participated at the roundtables and the issues that were discussed.

[49] See Appendix 30, Memorandum from Linda Rothstein to Parties with Standing, dated February 20, 2008.

Oral submissions were heard on March 31 and April 1, 2008. The Commission asked the parties to provide estimates of the time required for their oral submissions before March 21, 2008. I then allocated the time for oral submissions in much the same way I had for cross-examinations. The oral submissions proceeded as scheduled. Both the written and oral submissions were very helpful.

Non-Parties

The Commission also accepted written submissions from non-parties. These were also posted on the Inquiry's website. In total, the Commission received submissions from four non-parties.[50]

The Delivery Date for the Report

The original Order in Council set a date of April 25, 2008, for delivery of the Final Report. I have described the various steps we took immediately, once the Inquiry was established, and how particularly important it was to engage in an intensive investigation and preparation process before beginning the evidence. The time devoted to this permitted us to have a focused and efficient hearing schedule.

We began on November 12, 2007, and concluded on February 29, 2008, after some 60 days of hearings. Counsel for the parties then required a reasonable period of time to prepare their final submissions. As I have said, these submissions concluded on April 1, 2008.

The Order in Council required the Commission to ensure that the Report complied with the *Freedom of Information and Privacy Act* and other applicable legislation. More important for timing purposes, it also assigned to the Commission the responsibility for the translation and printing of the Report in sufficient quantities for public release. These steps, which took some nine or 10 weeks, had to be done within the prescribed timeline.

With the time required for investigation and preparation, hearings, submissions, writing, translation, and production, it was clear by early 2008 that meeting the original delivery date would not be feasible. As a result, on March 27, 2008, I requested and received an extension to September 30, 2008.

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[50] Submissions were received from Dr. Ernest Cutz, who had previously testified as a witness at the Inquiry; Dr. David King, a retired forensic pathologist and former head of the Regional Forensic Pathology Unit at Hamilton General Hospital; the Office of the Provincial Advocate for Children and Youth; and the federal Department of Justice.

Research

Shortly after my appointment as Commissioner, I asked Professor Kent Roach to be the Commission's director of research. Professor Roach holds the Prichard-Wilson Chair of Law and Public Policy at the University of Toronto Faculty of Law, and he has had extensive experience working on public inquiries in Canada.

Over the summer of 2007, Professor Roach retained experts from Australia, Canada, the United Kingdom, and the United States to prepare research studies related to pediatric forensic pathology and its interaction with the justice system. Eleven research studies were prepared for the Commission, and each one was posted on the Inquiry's website.

Establishing the right balance between the research and hearing components of a public inquiry is always challenging. Many public inquiries segregate the policy development / research component from the fact-finding component of their work by creating separate phases. Sometimes these phases take place concurrently and sometimes they follow each other, but they are nonetheless separate. Given the systemic nature of my mandate, I did not believe that separating our work into two distinct phases was appropriate or useful.

The majority of the authors of the studies participated as panellists at the roundtables. Having the researchers as well as other experts at the roundtable panels enabled the Commission to examine carefully the practical implications of conclusions or recommendations made by the researchers.

I read all the research studies carefully as soon as they were available to me. I found them to be thorough and insightful. They assisted me in identifying and addressing issues of importance, comparing alternative approaches, articulating questions for witnesses and panellists, and considering the submissions of the parties during my deliberations.

Conclusion

Designing a process that achieved the objectives of our systemic review was a rewarding challenge for my counsel and me. We spent many weeks developing our approach and refining our procedures. We strove to conduct a fair, efficient, and transparent inquiry. I am confident we succeeded. Hopefully, some of our ideas will be useful to other public inquiries.