

IPPERWASH PUBLIC INQUIRY

COMMISSIONER'S RULING RE MOTION BY ABORIGINAL LEGAL SERVICES OF TORONTO AND THE AAZHOODENA AND GEORGE FAMILY GROUP HEARD MAY 23, 2006

INTRODUCTION

1. This a motion brought by Aboriginal Legal Services of Toronto and the Aazhoodena and George Family Group for the relief set out below. This motion is supported by The Estate of Dudley George and members of the George Family, the Residents of Aazhoodena, the Kettle Point & Stony Point First Nation and the Chiefs of Ontario. The motion is opposed by the Ontario Provincial Police Association and the Ontario Provincial Police. The Province of Ontario and the other parties, took no position on this motion.
2. The motion seeks the following:
 - 1) An order by the Honourable Commissioner Linden directed at the Ontario Provincial Police (the "OPP") and the Ontario Provincial Police Association (the "OPPA") as follows:
 - i) That the OPP by operation of formal order require all officers to preserve and surrender any and all memorabilia, mementoes or souvenirs relating to the events at Ipperwash Provincial Park from August 1 to November 1, 1995, including but not limited to any forms of clothing (including t-shirts), mugs or any other items that relate to or commemorate Ontario Provincial Police operations at Ipperwash Provincial Park during the designated time period;
 - ii) That the OPPA formally notify its members of its obligations pursuant to this Honourable Commission's Rules of Procedure and Practice with specific reference to the obligations of the members to preserve and surrender any and all memorabilia, mementoes or souvenirs relating to the events at Ipperwash Provincial Park from August 1 to November 1, 1995, including but not limited to any forms of clothing (including t-shirts), mugs or any other items that relate to or commemorate Ontario Provincial Police operations at Ipperwash Provincial Park during the designated time period;

1a) The issuance of a summons pursuant to s. 7 of the *Public Inquiries Act* directed at the Ontario Provincial Police and/or Commissioner Gwen Boniface requiring the collection and production to the Inquiry of any and all memorabilia, mementoes or souvenirs in the possession of Ontario Provincial Police officers relating to the events at Ipperwash Provincial Park from August 1 to November 1, 1995, including but not limited to any forms of clothing (including t-shirts), mugs or any other items that relate to or commemorate Ontario Provincial Police operations at Ipperwash Provincial Park during the designated time period;

2) An order by the Honourable Commissioner providing for the release of the unedited versions of exhibits P1051, P1052 and P1053 (the “discipline records”); and

3) In the alternative, an order by the Honourable Commissioner providing for the disclosure of all edited information in exhibits P1051 and P1052 (the discipline records) that pertains to the identity and role of any individuals and/or officials who participated formally or informally in the investigative and discipline process.

BACKGROUND

3. In my ruling dated August 15, 2005, I found that there was no statutory privilege attached to the discipline documents. I ordered production to Commission counsel of discipline files maintained by the OPP in respect of the mugs and t-shirts distributions and the discipline files maintained by the OPP in respect of the "discreditable conduct" of Detective Constable James Dyke and Detective Constable Darryl Whitehead for a case-by-case privilege review. In addition, the discipline files in respect of a beer can and feathers, a bulls-eye and arrow and certain cartoons and comments on a Pinery Park blackboard were covered by my order as well as the discipline file in respect to Constable Chris Cossitt relating to the comments made by Fraser, J., in his reasons for judgment in *The Queen v. Kenneth Deane*. Pursuant to my order, the files were provided to Commission counsel. The OPPA requested that I state a case to the Divisional Court with respect to my ruling on the issue of statutory privilege and the production of the documents. The request by the OPPA was supported by the OPP and the Province of Ontario.

4. Discussions took place between my counsel and counsel for the OPPA, OPP and the Province of Ontario. The parties and my counsel agreed, subject to my approval, on the following which was noted on the record on February 6, 2006 at pages 13 to 16:

We are able to avoid this outcome by settlement which we negotiated on your authority with the Ontario Provincial Police, the Ontario Provincial Police Association and the Province.

Let me describe the settlement in simple terms. The OPP, OPPA, and Province have consented to releasing the discipline files to the Commission for distribution to the Parties on the following conditions.

First, the names and information which could reasonably identify the police officers who had no involvement with the events from September 4th to 6th, 1995, have been redacted and second the names and information which could reasonably identify the MNR or the Ministry of Natural Resources personnel who were interviewed by the OPP investigators have been redacted.

Let me be clear, however, as to what is remaining in the records. First, the names of all police officers who had some involvement in the events from September 4 to 6, 1995, remain in the record and are disclosed by virtue of their consent.

This includes references made to and/or statements given by the Incident Commander then Inspector John Carson, then Acting Detective Staff Sergeant Mark Wright, Staff Sergeant Klaus Bouwman, Sergeant Kent Skinner, then Superintendent Anthony Parkin.

As well, other officers have consented to their names being publicly disclosed including Commissioner Gwen Boniface, former Deputy Commissioner Nagel, former Commissioner Tom O'Grady, and the lead investigator on the Omnibus complaint, Dennis Atkin (*sic*).

It also includes the three (3) subject police officers who were involved in the events from September 4 to 6, 1995, being Detective Chris Cossitt and Detective Constables Whitehead and Dyke.

Second, of the police officers whose names have been redacted, none of these officers had any involvement in the events of September 4 to 6, 1995, but rather came after September 6th, 1995. Further, none of these police officers were local; that is none were assigned to the Forest detachment at the relevant time period.

Two (2) other conditions were attached to the proposal by the OPP, OPPA, and the Province. First, they have consented to the release and public disclosure of this information without prejudice to their positions as originally argued before you regarding the applicability of the Police Services Act and the existence of privilege.

Second, while they do not consent to these documents being made exhibits in this proceeding they will not challenge the admissibility of the files and the circumstances of the resolution of this matter so that the Inquiry may continue to complete Part 1 without the interruption and delay which would be caused by court proceedings.

Your Counsel carefully considered these conditions in their review of the discipline files and have concluded that they are fair and reasonable and will not prejudice the Commission's investigation.

The material condition for our purposes was the redaction of names and identifying information relating to certain police officers and the MNR personnel. We believe that this information is not relevant to the work of the Inquiry since these police officers had no involvement with the events from September 4th to 6th, 1995.

Similarly, the names of the MNR witnesses interviewed in the course of the police investigation are not relevant nor are they material to assist in the Inquiry in its work, that is, an inquiry into and reporting on the events surrounding the death of Dudley George.

What is important is what is left intact and remaining in the records, namely, the substance of what these officers and MNR personnel saw, heard, and understood in relation to these matters as well as their candid views as to the propriety of these episodes. As well, the complete investigation, analysis, and outcome of each of the discipline investigations are fully revealed.

In addition the names of those officers who did have some involvement with the events of September 4 to 6, 1995, are transparent and revealed fully in the records.

Hence, the public will now know the extent to which the allegations were found to be true, whether or not they were found to constitute discreditable conduct and what, if any, discipline was administered as well as the OPP institutional response to these events. From a systemic perspective the public will know what others who witnessed or were a party to the various episodes thought about the propriety or lack thereof of those episodes.

5. On February 6, 2006, I accepted the settlement proposed by my counsel and the discipline files redacted as noted above were marked as Exhibits P-1051, P-1052 and P-1053. I stated as follows at p. 23 of the transcript:

That's fine. I want to commend counsel -- or Commission counsel and all counsel who worked very hard to achieve this objective. I understand that Mr. Falconer and others may have some comment down the road.

But at this point, we're able to produce an incredible number of documents relating to discipline files which will allow a fulsome cross-examination on issues that I believe are relevant to this Inquiry without the necessity of having a stated case.

So, I wish to commend counsel. Now we'll leave the -- I think we should mark them as exhibits subject to whatever Mr. Falconer and you discuss and if you have some alterations or additions, we'll deal with that later on.

RECENT DEVELOPMENTS GIVING RISE TO THE MOTION

6. The Inquiry has heard evidence of the existence of mugs and t-shirts, photographs of which were marked as Exhibit P-438. On May 11, 2006, my counsel disclosed to the parties the existence of another t-shirt which had not been previously identified. A photograph of the logo on the t-shirt was subsequently marked as Exhibit P-1494 and the t-shirt itself was marked as Exhibit P-1497. On May 11, 2006, counsel for the OPP advised me as follows at pages 15 and 16 of the transcript:

First of all, I wish to indicate, sir, that this matter first came to our attention on Tuesday of this week. Neither Mr. Sandler nor myself nor Commissioner Boniface was aware of it beforehand.

An important lesson learned at this Inquiry is that when an apology is appropriate, it must be made immediately.

Accordingly, Commissioner Boniface has advised me to apologise at this time to the First Nations community and to the George family for what has come to light. Furthermore, she has directed that an investigation into this matter be commenced immediately by the Professional Standards Branch of the OPP. I have been further advised that steps are being taken to commence that investigation this morning.

In addition, I have been asked to convey that the OPP is shocked and appalled by the existence of these items and that it is unfortunate that they were not captured in the original investigation.

As you know, Mr. Commissioner, Commissioner Boniface is scheduled to testify before this Inquiry in the upcoming weeks and I anticipate, sir, that she will make a more formal apology at that time.

7. On May 16, 2006, counsel for the OPPA advised Commission counsel that the individual who originated the second version of a t-shirt, marked as Exhibit P-1097, had identified himself. Commission counsel immediately advised the parties of this information on May 17, 2006, and subsequently disclosed to the parties the name of the individual, Constable William Klym. The parties were informed that Constable Klym would be called as a witness at the Inquiry during the week of June 5th, 2006, on the issue of the t-shirt.
8. On May 25, 2006, during the evidence of Sergeant James Irvine, Commission counsel asked the witness about a pin, which had on it the TRU team crest and the badge number of Kenneth Deane. A photograph of the pin was marked as Exhibit P-1606. Sergeant Irvine testified that the pin had been created to support Kenneth Deane on his appeal. On May 27, 2006, Sergeant Irvine testified that a t-shirt had been prepared with the words "I Support Kenneth Deane" or similar words on it. Counsel for the moving parties requested that I take into account on the motion the existence of this pin and t-shirt.
9. On May 26, 2006, Commission counsel was provided with certain documents from the OPP relating to the pin, which will be introduced into evidence. As well, they were advised by counsel for the OPPA that there existed in the Inquiry database (Inquiry Document No. 1005375, Page 175), a copy of the pin under the heading: The Ken Deane Defence Fund Pin. None of the parties had previously identified this document notwithstanding its productions to all parties as part of the Inquiry's disclosure of documents in 2004.

DECISION

10. I agree with the comments made by Commission counsel on May 11, 2006:

However, the road to healing and reconciliation will not be built if obstacles to that goal of healing and reconciliation are not excavated and the conduct of individuals not examined in the light of day.

It is in the nature of a public inquiry and the investigation that it involves to bring to light matters that have been previously confidential. It is one (1) of the goals of a public inquiry that the examination of the actions of individuals will lead to better understanding and learning so the conduct will not reoccur.

11. As mentioned above, I have heard evidence of the existence of memorabilia arising from the events at Ipperwash Provincial Park. The evidence has disclosed the following forms of memorabilia: t-shirt with a horizontal feather, a mug with an OPP crest on it, one with an arrow through the crest and the other without, a beer can with a feather and OPP tape, a bulls-eye and arrow, certain cartoons and a second version of a t-shirt, with the TRU crest, an anvil with the letters ERT and a broken arrow between the TRU crest and the anvil. (Exhibits P-438, P-1494 and P-1497)

12. In my view, the creation of memorabilia, whether racist or not, arising from an incident where someone has died is inappropriate. Where the memorabilia is insulting and offensive to the community involved, it is even more troubling. As noted above, the person who created the logo and t-shirt depicted in Exhibits P-1494 and P-1497 has identified himself and will be called as a witness at the Inquiry to explain what he did and why he did it.

13. The overriding question for me is what evidence do I need to carry out my mandate. I have the evidence of witnesses on the issue of memorabilia as well as the discipline files (Exhibits P-1051, P-1052 and P-1053), which reveal the identity of officers who had any involvement with the Ipperwash policing operation between September 4th and 6th, 1995, as well as the complete investigation, analysis and outcome of each of the discipline investigations. In my view, with the evidence that I have and the evidence that I will hear from Constable Klym, Commissioner Boniface and former Commissioner O'Grady and perhaps others, I will have sufficient evidence to deal with any issues that arise from the existence of the memorabilia.
14. In my report, I intend to deal with the allegations of racist souvenirs and what was done by the OPP in response to these souvenirs as well as to other memorabilia. But in my view trying to collect all items of memorabilia is not necessary to enable me to undertake an examination of the role, if any, that racism had, within the OPP, on the events surrounding the death of Dudley George or to inform my recommendations directed to the avoidance of violence in similar circumstances.
15. I have said on other occasions, this is not an inquiry into systemic racism in the OPP nor the justice system. As well this is not an inquiry into the adequacy of the OPP complaint and discipline processes nor the investigation carried out by the OPP as outlined in Exhibits P-1051, P-1052, and P-1053. The names that have been redacted from the material are not necessary for me to execute my mandate.
16. Having said that, I agree with much of what was said by counsel for the moving parties, in their oral submissions. I would hope that the Commissioner of the OPP, having expressed her view that she was "shocked and appalled" by the existence of the second t-shirt, will take measures to ensure there is a complete and thorough investigation with respect to the t-shirt. Further, I would hope that the Commissioner of the OPP will do whatever she can to ensure that there are no other offensive t-shirts or other memorabilia in existence commemorating the events of September 6th, and if there are, she will use her best efforts to ensure they are destroyed and not displayed in any way.

17. While the Kenneth Deane Defence Fund Pin (Exhibit P-1606) and the "I support Ken Deane" t-shirt may have been in bad taste given the death that gave rise to the charge of criminal negligence, in my view, these items do not fall into the same category as the memorabilia that was directly related to the events at Ipperwash on September 6th, 1995. These items are not something that "commemorates" the events of September 6th, 1995 at Ipperwash Provincial Park and, in any event, the response of the OPP to these items will be dealt with in the evidence that will be called at the Inquiry.

18. For these reasons, the motion is dismissed.

Released: June 5, 2006

**The Honourable Sidney B. Linden
Commissioner**