

RULES OF PROCEDURE AND PRACTICE

THE IPPERWASH INQUIRY

LA COMMISSION
D'ENQUÊTE IPPERWASH

Rules of Procedure and Practice

1. Commission proceedings will be divided into two phases. Part I will focus on the circumstances and events surrounding the death of Anthony O'Brien (Dudley) George.

In Part II of the Inquiry, the Commission will review key policy issues raised by the events surrounding the death of Dudley George and will make recommendations directed to the avoidance of violence in similar circumstances. These issues will include the relationship between police and Aboriginal people, the relationship between police and government, the interaction between police and protestors, and the avoidance of violent confrontations over Aboriginal land and/or treaty claims in Ontario.

A. Rules – Part I.

I. General

2. Public hearings will be convened in the Ipperwash area at Forest in the Community Centre (Kimball Hall) and in Toronto at the Commission hearing room (250 Yonge St., 29th floor), and such other locations as the Commission designates, to address issues related to Part I of the Inquiry.

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3. All parties and their counsel shall be deemed to undertake to adhere to these Rules, which may be amended or dispensed with by the Commission as it sees fit to ensure fairness. Any party may raise any issue of non-compliance with the Commissioner.
4. The Commissioner shall deal with a breach of these Rules as he sees fit including, but not restricted to, revoking the standing of a party, and imposing restrictions on the further participation in or attendance at (including exclusion) the hearings by any party, counsel, individual, or member of the media.
5. Insofar as it needs to gather evidence, the Commission is committed to a process of public hearings. However, applications on some aspects of its mandate may be made to proceed *in camera* in accordance with s. 4 of the *Public Inquiries Act*. Such applications should be made in writing at the earliest possible opportunity pursuant to the provisions of Section III (vi) below.
6. Subject to s. 4 and s. 5 of the *Public Inquiries Act*, the conduct of and the procedure to be followed on the Inquiry is under the control and discretion of the Commissioner.
7. The Commissioner may extend or abridge any time prescribed by these rules.

II. Standing for Part I

8. Commission counsel, who will assist the Commissioner throughout the Inquiry and are to ensure the orderly conduct of the Inquiry, have standing throughout the Inquiry. Commission counsel have the primary responsibility for representing the public interest at the Inquiry, including the responsibility to ensure that all interests that bear on the public interest are brought to the Commissioner's attention. Persons or groups may be granted standing by the Commissioner, if the Commissioner is satisfied that they:

- (a) have an interest which is directly and substantially affected by the subject matter of Part I of the Inquiry in which event the party may participate in accordance with s. 5 (1) of the *Public Inquiries Act*, or
 - (b) represent distinct ascertainable interests and perspectives that are essential to the discharge of his mandate in Part I, which the Commissioner considers ought to be separately represented before the Inquiry, in which event the party may participate in a manner to be determined by the Commissioner.
- 9. The Commissioner will determine the extent to which a party granted standing might participate in Part I of the Inquiry.
 - 10. The term “party” is used to convey the grant of standing and is not intended to convey notions of an adversarial proceeding.
 - 11. Counsel representing witnesses called to testify before the Commission may participate during the hearing of such evidence as provided in these Rules.

III. Evidence

(i) General

- 12. In the ordinary course, Commission counsel will call and question witnesses who testify at the Inquiry. Counsel for a party may apply to the Commissioner to lead a particular witness’ evidence in chief. If counsel is granted the right to do so, examination shall be confined to the normal rules governing the examination of one’s own witness.
- 13. Subject to section 11 of the *Public Inquiries Act*, the Commission is entitled to receive any relevant evidence at the Inquiry, which might otherwise be inadmissible in a court of law. The strict rules of evidence will not apply to determine the admissibility of evidence.

14. Subject to the Order in Council (1662/2003), the Commission may rely on any transcripts or record of pre-trial, trial or appeal proceedings before any court in relation to the proceedings and prosecutions and such other related material as the Commission considers relevant to its duties.
15. Subject to Rule 20, the Commission may admit at the Inquiry evidence not given under oath or affirmation.
16. Parties are encouraged to provide to Commission counsel the names and addresses of all witnesses they believe ought to be heard by July 31, 2004 together with a brief statement of the witness's relevance to the Inquiry. If possible, parties should also provide Commission counsel with copies of all relevant documentation, including statements of anticipated evidence, at the earliest opportunity, and in any event by not later than August 30, 2004.
17. Commission counsel have discretion to refuse to call or present evidence.
18. When Commission counsel indicate that they have called the witnesses whom they intend to call in relation to a particular issue, a party may then apply to the Commissioner for leave to call a witness whom the party believes has evidence relevant to that issue. If the Commissioner is satisfied that the evidence of the witness is needed, Commission counsel shall call the witness, subject to Rule 11.

(ii) *Witnesses*

19. Anyone interviewed by or on behalf of Commission counsel is entitled, but not required, to have personal counsel present for the interview to represent his or her interests.
20. Witnesses will give their evidence at a hearing under oath or affirmation, which may be accompanied by some other form of conscience binding symbol.

21. If special arrangements are desired by a witness in order to facilitate that witness' comfort in testifying, a request for accommodation shall be made to the Commission sufficiently in advance of the witness' scheduled appearance to reasonably facilitate such requests. While the Commission will make reasonable efforts to accommodate such requests, the Commissioner retains ultimate discretion as to whether, and to what extent, such requests will be accommodated.
22. Witnesses may request that the Commission hear evidence pursuant to a summons, in which case a summons shall be issued.
23. Witnesses who are not represented by counsel for parties with standing are entitled to be represented by counsel of their choice while they testify. Counsel for a witness will have standing for the purposes of that witness' testimony to make any objections thought appropriate.
24. Witnesses may be called more than once.

(iii) *Order of Examination*

25. The order of examination will be as follows:
 - (a) Commission counsel will adduce the evidence from the witness. Except as otherwise directed by the Commissioner, Commission counsel are entitled to adduce evidence by way of both leading and non-leading questions;
 - (b) parties granted standing to do so will then have an opportunity to cross-examine the witness to the extent of their interest. The order of cross-examination will be determined by the parties having standing and if they are unable to reach agreement, by the Commissioner;
 - (c) counsel for a witness, regardless of whether or not counsel is also representing a party, will examine last, unless he or she has adduced the evidence of that witness in chief, in which case there will be a right to re-examine the witness; and

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(d) Commission counsel will have the right to re-examine.

26. Except with the permission of the Commissioner, and as hereinafter specifically provided, no counsel other than Commission counsel may speak to a witness about the evidence that he or she has given until the evidence of such witness is complete. In the event a witness has personal counsel, that counsel may speak to his or her client about areas of anticipated testimony that have not yet been the subject of examination. Commission counsel may not speak to any witness about his or her evidence while the witness is being cross-examined by other counsel.

(iv) *Access to Evidence*

27. All evidence shall be categorized and marked P for public sittings and, if necessary, C for sittings *in camera*.
28. A daily transcript will be posted to a website transcript repository which will be fully accessible to the parties, the public and the media. It will be available by both direct access to the court reporting service's website transcript repository and via link from the Commission's website. Full access will be available for viewing, downloading and printing capability.
29. The P transcript will also be available on an expedited daily basis, but the cost of this service will be the responsibility of the party or person ordering it. The Commission will not pay for expedited transcripts for any party or member of the public or media, nor will the cost be an assessable disbursement for parties with funded status.
30. One copy of the P exhibits will be available to be shared by the media.
31. Only those persons authorized by the Commission, in writing, shall have access to C transcripts and exhibits.

(v) Documents

32. The Commission expects all relevant documents to be produced to the Commission by any party with standing where the documents are in the possession, control or power of the party. Where a party objects to the production of any document on the grounds of privilege, the document shall be produced in its original unedited form to Commission counsel who will review and determine the validity of the privilege claim. The party and/or that 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 Regional Senior Justice in Toronto or His designate.
33. The term "documents" is intended to have a broad meaning, and includes the following mediums: written, electronic, audiotape, videotape, digital reproductions, photographs, maps, graphs, microfiche and any data and information recorded or stored by means of any device.
34. Originals of relevant documents are to be provided to Commission counsel upon request.
35. Counsel to parties and witnesses will be provided with documents and information, including statements of anticipated evidence, only upon giving an undertaking that all such documents or information will be used solely for the purpose of the Inquiry and, where the Commission considers it appropriate, that its disclosure will be further restricted. The Commission may require that documents provided, and all copies made, be returned to the Commission if not tendered in evidence. Counsel are entitled to provide such documents or information to their respective clients only on terms consistent with the undertakings given, and upon the clients entering into written undertakings to the same effect. These undertakings will be of no force regarding any document or information once it has become part of the public record. The Commission

- may, upon application, release any party in whole or in part from the provisions of the undertaking in respect of any particular document or other information.
36. Documents received from a party, or any other organization or individual, shall be treated as confidential by the Commission unless and until they are made part of the public record or the Commissioner otherwise declares. This does not preclude the Commission from producing a document to a proposed witness prior to the witness giving his or her testimony, as part of the investigation being conducted, or pursuant to Rule 35.
 37. Subject to Rule 35 and to the greatest extent possible, Commission counsel will endeavour to provide in advance to both the witness and the parties with standing relating to issues with respect to which the witness is expected to testify, documents that will likely be referred to during the course of that witness' testimony, and a statement of anticipated evidence.
 38. Parties shall at the earliest opportunity provide Commission counsel with any documents that they intend to file as exhibits or otherwise refer to during the hearings, and in any event shall provide such documents no later than 24 hours prior to the day the document will be referred to or filed.
 39. A party who believes that Commission counsel has not provided copies of relevant documents must bring this to the attention of Commission counsel at the earliest opportunity. The object of this rule is to prevent witnesses from being surprised with a relevant document that they have not had an opportunity to examine prior to their testimony. If Commission counsel decides the document is not relevant, it shall not be produced as a relevant document. This does not preclude the document from being used in cross-examination by any of the parties. Before such a document may be used for the purposes of cross-examination, a copy must be made available to all parties by counsel intending to use it not later than 48 hours prior to the testimony of that witness, subject to the discretion of the Commissioner.

(vi) *Confidentiality*

40. If the proceedings are televised or broadcast by some other medium, applications may be made for an order that the evidence of a witness not be televised or broadcast.
41. Without limiting the application of s. 4 of the *Public Inquiries Act*, the Commissioner may, in his discretion and in appropriate circumstances, conduct hearings in private when he is of the opinion that matters involving public security may be disclosed, or if considering intimate financial, personal or other matters that are of such a nature, having regard to the circumstances, that the desirability of avoiding disclosure outweighs the desirability of adhering to the general principle that the hearings should be open to the public.
42. Witnesses may apply to the Commissioner for measures aimed at protecting his or her identity for a compelling reason as determined in the sole discretion of the Commissioner. Upon a successful application to the Commissioner the witness may be granted the status of “Confidentiality”. For the purposes of the Inquiry, Confidentiality may include the right to have his or her identity disclosed only by way of non-identifying initials, and, if the individual so wishes, the right to testify before the Commission in private, together with any other privacy measures which the party may request and the Commissioner, in his discretion, grants. Subject further to the discretion of the Commissioner, only the Commissioner, Commission staff and counsel, counsel for parties with standing, counsel for the witness who has been granted Confidentiality and media representatives may be present during testimony being heard in private.
43. A witness who is granted Confidentiality will not be identified in the public records and transcripts of the hearing except by non-identifying initials. Any reports of the Commission using the evidence of witnesses who have been granted Confidentiality will use non-identifying initials only.

44. Media reports relating to the evidence of a witness granted Confidentiality shall avoid references that might reveal the identity of the witness. No photographic, audio, visual or other reproduction of the witness shall be made either during the witness' testimony or upon his or her entering and leaving the site of the Inquiry.
45. Any witness who is granted Confidentiality will reveal his or her name to the Commission and counsel participating in the Inquiry in order that the Commission and counsel can prepare to question the witness. The Commission and counsel shall maintain confidentiality of the names revealed to them. No such information shall be used for any other purpose either during or after the completion of the Commission's mandate.
46. Any witness who is granted Confidentiality may either swear an oath or affirm to tell the truth using the non-identifying initials given for the purpose of the witness's testimony.
47. All parties, their counsel and media representatives shall be deemed to undertake to adhere to the rules respecting Confidentiality.

(vi) *Section 5(2) Notices*

48. The Commission will deliver notices pursuant to s. 5(2) of the *Public Inquiries Act* after information about alleged misconduct has come to the Commission's attention that *may* give rise to findings of misconduct. These will be delivered on a confidential basis to the persons or parties to whom they relate, and a copy will also be provided to the subject person or party's counsel, if such counsel has been identified to Commission Counsel. Supplementary notices may be delivered from time to time by the Commission as warranted by the information before it.
49. If any party believes that it is necessary to adduce documentary evidence or to call evidence to respond to allegations of possible misconduct for which a notice under s. 5(2) of the *Public Inquiries Act* has been received, then that party may apply for leave to call that evidence or may request that Commission counsel call

such evidence. If relevant and responsive to issues raised in the s. 5(2) notice, leave will be given. Cross-examination of the witness by counsel for other parties shall be limited to matters adduced in evidence during the examination in chief of the witness, except with leave of the Commissioner.

B. Rules - Part II

I. General

50. Because of the policy nature of the issues, the Commission will utilize a range of research and policy development processes. The objectives of Part II are to promote an informed discussion and analysis of the policy issues raised by the Inquiry and to ensure that parties with standing and the public have a meaningful and ongoing opportunity to participate. Amongst the various initiatives which may be adopted under Part II, the Commission will:

- (a) commission a range of research and policy papers (the “Research and Policy Papers”) from recognized experts on a broad range of relevant topics. The structure and format of the Research and Policy Papers will vary but will generally include a description of current practises, historical developments, an analysis of relevant issues, and potential options (if applicable) and a bibliography;
- (b) invite written and/or oral submissions from parties with standing and the public about any matter relevant to Part II, including the Research and Policy Papers;
- (c) convene meetings or symposia (the format of which may vary) to discuss issues raised by the Inquiry. Parties with Part II standing and the members of the public will be invited to participate; and
- (d) post commissioned research and policy material and public submissions on its website.

51. The Commission may call evidence during its hearings on matters relevant to Part II.

(i) Commission Papers

52. The Commission will establish one or more Research Advisory Panels (the “Panels”). The role of the Panels will be to make recommendations to the Commission on the subject matters of the Commission Papers and who should be retained to prepare them.
53. The Commission will set and publish a deadline by which all Commission Papers must be completed and the Papers will thereafter be published, in draft, on the Commission’s website.

(ii) Public Submissions

54. Any interested person may make a Public Submission, in writing, to the Commission dealing with any matter related to Part II of the Inquiry including responses to any matter raised in the Commission Papers.
55. The Commission will set and publish a deadline by which all public submissions must be received. All public submissions will be made available for public review either on the Commission’s website or at the Commission’s offices.

(iii) Public Meetings and Symposia

56. The Commission will convene a number of symposia and/or public meetings to discuss issues raised in Part II of the Inquiry. The format of the public meetings will be tailored to the topics discussed and may vary. The public meetings may include the Commissioner, authors of relevant Research and Policy Papers, parties granted standing in Part II (and their counsel or representative if identified to Commission Counsel or the Director of Policy for the Commission), members of Research and Policy Panel, and any other persons invited by the Commission whom the Commissioner concludes would contribute to the discussion.
57. The public meetings shall be recorded unless, on application of a party or other invited persons, the Commissioner in his discretion determines otherwise.

II. Standing for Part II

58. Persons or groups may be granted standing by the Commissioner for Part II of the Inquiry if the Commissioner is satisfied that:
- (a) they are sufficiently affected by Part II of the Inquiry; or
 - (b) they represent distinct ascertainable interests and perspectives that are essential to the discharge of his mandate in Part II, and which the Commissioner considers ought to be separately represented before the Inquiry. In order to avoid duplication, groups of similar interest are encouraged to seek joint standing.
59. Because of the different nature of the proceedings in the two phases of the Inquiry, the nature and extent of a party's participation will be different in Part II than in Part I, except where evidence is called by the Commission in which case the Rules governing evidence and witness testimony adopted in Part I shall apply with any necessary modifications.
60. In addition to the ability of all members of the public to receive Commission Papers and make Public Submissions, those persons or groups who have been granted standing in Part II shall be entitled to participate directly in the public meetings.

III Access to Evidence and Documents

61. Rules 26 to 39 regarding access to evidence and documents apply to Part II of the Inquiry.

C. Funding

62. The Commission may make recommendations to the Attorney General regarding funding to parties who have been granted standing, to the extent of the party's interest, where in the Commission's view the party would not be otherwise able to participate in the Inquiry without such funding.

63. Further information is available on the Commission's website at www.ipperwashinquiry.ca.