

THE DECISION TO ESTABLISH THE IPPERWASH INQUIRY

2.1 Events Leading to the Inquiry

In September 1995, Ipperwash Provincial Park was the site of an occupation and protest by Aboriginal people. One of the occupiers, Dudley George, was shot by an Ontario Provincial Police (OPP) officer and died of his wounds. Some were of the view that Ontario government officials, including Premier Michael Harris and a number of his Cabinet colleagues, had interfered with the OPP response to the protest. The officials repeatedly denied these allegations. Ultimately, this Inquiry was born of widespread anger and frustration arising from the tragedy and the circumstances surrounding it.

By the time the Inquiry was called, eight years after the death of Mr. George, a great deal had already been written and said about the events at Ipperwash Provincial Park. The Chief Coroner of Ontario undertook an investigation into the circumstances and events surrounding the death of Mr. George, pursuant to the *Coroners Act*²¹ of Ontario, including an investigation into the emergency medical services response to the shooting.²² Ontario's Special Investigations Unit (SIU) also conducted an investigation. The SIU is a civilian agency mandated to investigate all cases of death or serious injury resulting from police actions. It comprises experts in a number of fields (such as forensics) and has the power to lay criminal charges. These investigations deal only with determining whether individual officers are culpable, and not with questions of policy. At the end of its investigation, the SIU announced that OPP Acting Sergeant Kenneth Deane was to be charged with criminal negligence causing death.²³

21 *Coroners Act*, R.S.O. 1990, c.C.37.

22 The Chief Coroner made the results of his investigation available to the Inquiry and indicated in the application for standing that “[g]iven the broad mandate of the Order-in-Council creating the Commission of Inquiry, the Chief Coroner may determine that an inquest would be an unnecessary duplication of effort and expense and any benefit that an inquest would provide ... have been realized through the Commission of Inquiry.”

23 News release, SIU, July 23, 1996. See also Inquiry documents 1003934 and 9000301. Note that s. 113(7) of the *Police Services Act*, R.S.O. 1990, c. P.15 provides that “[i]f there are reasonable grounds to do so in his or her opinion, the director shall cause informations to be laid against police officers in connection with the matters investigated and shall refer them to the Crown Attorney for prosecution.”

The trial took place in April 1997. Acting Sergeant Deane was found guilty of criminal negligence causing death. He appealed the conviction, unsuccessfully, first to the Court of Appeal for Ontario and then to the Supreme Court of Canada.²⁴

Throughout this period, further questions were raised about the circumstances surrounding the shooting. The individuals and groups who felt that they were not getting answers channeled their frustration into repeated calls for a public inquiry. The original impetus had come from the family of Dudley George, but pressure mounted in the following months and years, even from abroad,²⁵ as both the provincial and federal governments resisted establishing an inquiry. Municipalities, churches, trade unions, human rights organizations, the media, and the Ontario Ombudsman all voiced support for a public inquiry.

Many of the same parties used the *Freedom of Information and Protection of Privacy Act*²⁶ to obtain documents relating to the Ipperwash incident, particularly those concerning the possible role of elected officials and their staff in the events. The information obtained in this way was generally made public, in the legislature and/or through the media, in an effort to put pressure on the government to call an inquiry.

The two opposition parties actively carried support for an inquiry to the provincial legislature. On three occasions in the eight years following the incident, opposition members introduced a private member's bill²⁷ to require the government to establish a commission of inquiry. The proposed legislation was not passed, but the opposition continued to press for an inquiry by other means and to challenge the government's resistance to holding one. Information obtained by Dudley George's family, friends, and counsel bolstered these efforts.

Sam George, Dudley George's brother, started two actions²⁸ arising from Dudley George's death against Premier Harris, members of his Cabinet, and the OPP. The government maintained that a public inquiry could not be called on

24 Acting Sergeant Deane was convicted of criminal negligence causing death after a trial by judge alone on April 28, 1997 (His Honour Judge H. Fraser). He was sentenced on July 3, 1997. His appeal to the Court of Appeal was dismissed on May 18, 2000, and his appeal to the Supreme Court of Canada was dismissed on January 26, 2001.

25 For example, the United Nations Human Rights Committee.

26 *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F. 31.

27 (1) Bill 3, *An Act to provide for a public inquiry to discover the truth about events at Ipperwash Provincial Park leading to the Death of Dudley George (Truth about Ipperwash Act, 1999)*, first reading October 25, 1999; (2) Bill 87, *An Act to provide for a public inquiry to discover the truth about events at Ipperwash Provincial Park leading to the Death of Dudley George (Truth about Ipperwash Act, 2002)*, first reading June 11, 2002; (3) Bill 46, *An Act to provide for a public inquiry to discover the truth about events at Ipperwash Provincial Park leading to the Death of Dudley George (Truth about Ipperwash Act, 2003)*, first reading May 22, 2003.

28 *George v. Harris*, Toronto Court File Nos. 96-CU-99569 and 97-CV-123415 (Ont. S.C.J.).

the grounds that court proceedings were pending. Attorney General David Young referred the members of the legislature to section 23(g) of the standing orders:

In debate, a member shall be called to order by the Speaker if he ... refers to any matter that is the subject of a proceeding that is pending in a court or before a judge for judicial determination.

The Attorney General also expressed the government's position that a public inquiry was not the best course of action, in any event, by comparing the processes of civil litigation and public inquiries:

Under the terms of the *Public Inquiries Act*, a public inquiry is normally launched only ... when there are broad systemic issues that are involved, issues that transcend the conduct of individuals. For situations where the conduct of individuals is questioned, the civil and criminal courts of this province are well equipped to find the truth.

[A] public inquiry is based on terms of reference that are usually handed down by the government; whereas a civil proceeding has its parameters set, its boundaries set, by the plaintiffs, who issue a statement of claim, who set out whatever issues they believe need to be resolved in the court.

An important difference in outcomes between an inquiry and a court action is that an inquiry cannot make a finding of civil or criminal liability ... It is true that an inquiry can, after giving due notice, include in its report, what is analogous to a finding of misconduct against one or more individuals, but it cannot find them liable in a civil or in a criminal sense. In fact, under the *Public Inquiries Act*, evidence given to an inquiry cannot be used in a civil or criminal court of law ... Even if an inquiry finds that misconduct occurred, the aggrieved party cannot collect damages on the basis of that finding. A civil proceeding ... can clearly assign blame and impose binding consequences upon those involved.²⁹

Subsequently, Sam George wrote to Premier Harris on behalf of the George family, informing him that the family was willing to drop the lawsuit if the government would commit to a full public inquiry into the death of his brother; that

²⁹ Young, David. "Opposition Day." In Ontario. Legislative Assembly. *Legislative Debates (Hansard)*. 37th Parl., 2nd Sess. (May 14, 2001) (Online). Available: <http://www.ontla.on.ca/hansard/hansardindex.htm>.

is, the civil suit would be held in abeyance during the inquiry and formally terminated upon release of its final report.³⁰ The government’s position did not change.

Opposition members emphasized other differences between civil litigation and the public inquiry process in support of their position in favour of an inquiry. Speaking in the Legislature, Michael Bryant, the Liberal Party’s justice critic at the time, quoted Professor Patrick Macklem of the University of Toronto Faculty of Law:

Professor Patrick Macklem ... had provided a legal opinion as to whether there ought to be a public inquiry in Walkerton based upon any alleged legal obstacles ... Professor Macklem ... writes: “[P]ublic inquiries are often able to investigate, inform and educate in ways superior to those available to the judicial and legislative branches of government. The judicial process ... tends to assign blame by fragmenting issues into a limited set of categories established by existing norms, whereas a public inquiry enables a broader examination of social causes and conditions ... [T]he civil litigation process will determine rights as between parties, the civil litigation process may result in determining who owes what in terms of damages, but a judge ... cannot make any recommendations for the future, as a public inquiry can. A judge is constrained by the legal and evidentiary rules ...”³¹

Adding to all that had already been written and said, a book by Peter Edwards, a journalist with the *Toronto Star*, was published in 2001. *One Dead Indian*³² explored some of the unanswered questions surrounding the shooting of Dudley George and called attention to the need for a public inquiry.

2.2 Commission of Inquiry Established

In November 2003, pursuant to an election campaign promise, the newly elected government of Premier Dalton McGuinty established a commission of inquiry under the *Public Inquiries Act*.³³ Attorney General Michael Bryant issued a news release: “[W]e are fulfilling our long-standing commitment to have a full and

30 Bryant, Michael. “Private Members’ Public Business.” In Ontario. Legislative Assembly. *Legislative Debates (Hansard)*. 37th Parl., 2nd Sess. (June 14, 2001). (Online). Available: <http://www.ontla.on.ca/hansard/hansardindex.htm>.

31 *Ibid.*

32 Peter Edwards, *One Dead Indian: The Premier, the Police, and the Ipperwash Crisis* (Toronto: Stoddart, 2001).

33 *Supra*, note 5 at c. P41.

independent public inquiry ... I look forward to receiving recommendations that will help us learn from the past and help promote peaceful resolutions in the future.”³⁴

As reflected in the Order-in-Council,³⁵ the Ipperwash Inquiry was to have the dual mandate of investigating the events surrounding the death of Dudley George and recommending ways to avoid future violence in similar circumstances. In other words, the inquiry was to be both an investigation and an examination of policy.³⁶

2.3 Two Additional Goals: Public Education and Healing

Although my explicit and primary goal was to fulfill the two-part mandate set out in the Order-in-Council, I hoped to achieve two additional goals through the Inquiry. The first was to further public education and understanding regarding the issues surrounding the shooting death of Dudley George. The second goal was to contribute to the healing of those affected by the tragedy. I talked about the broader goals of contributing to restoring good relations among the people affected, and to restoring their faith in the institutions of government and of democracy, in my first public statement as commissioner.³⁷

To further public education and understanding, we created a website and posted as much information as possible, throughout the Inquiry, including research papers commissioned by the Inquiry, submissions by the parties and the public, and summaries of consultations and panel discussions. The website had a link to teaching resources, and the Inquiry also made presentations to students and teachers about the Inquiry and the educational potential of the research gathered.

At the beginning of the hearings, the Inquiry retained two experts to testify on the long and complex history of the Aboriginal peoples in the Ipperwash area. I began the public hearings with this overview to provide context for the investigation of the facts and circumstances that was to follow and to serve as an appropriate starting point for the parties and the public. In my view, the Inquiry had an obligation to acknowledge that systemic or historic circumstances may have contributed to the actions and decisions under investigation. Although many of these

34 News release, Ontario Ministry of the Attorney General, November 12, 2003.

35 Appendix 1, Order-in-Council 1664/2003.

36 On June 28, 2005, one of Dudley George's brothers, Pierre George, brought a motion in the Ontario Divisional Court for an order directing the Commission to state a case to the Divisional Court on jurisdiction arising from an alleged conflict between the Order-in-Council creating the Commission and s. 109 of the Constitution Act, 1867. By order dated September 5, 2006, the proceeding was dismissed by the registrar of the Divisional Court.

37 Appendix 14(a), Commissioner's Remarks at the Hearings on Standing and Funding, April 20, 2004.

circumstances pre-dated the events that gave rise to this Inquiry, or could have appeared to fall outside its jurisdiction or mandate, they served to shed light on why those events happened. That is what is meant by context.³⁸ The challenge was to find a balance between context and focused fact-finding. That challenge arose frequently, in all areas of the Inquiry's work.

Furthering public education was one of my continuing objectives, but educating myself and all of the participants in the Inquiry was also important. Early in the Inquiry, we held an Indigenous Knowledge Forum for all parties participating in the hearings. Commission counsel and counsel for the parties with standing thus gained some awareness of Aboriginal views and beliefs, and some of the ways they differ from those held by non-Aboriginals. To further enhance understanding, we opened the evidentiary hearings and other Inquiry events with traditional ceremonies conducted by Elders.

Healing is a less tangible goal than education, and perhaps it is more difficult to achieve. Yet, in the words of Mr. Justice Cory, a public inquiry

can serve a type of healing therapy for a community shocked and angered by a tragedy. It can also channel the natural desire to assign blame and exact retribution into a constructive exercise providing recommendations for reform and improvement.³⁹

Our hope was that the Inquiry process itself would contribute to healing for those whose lives were affected by the events of September 1995, and that it would help them move forward. Throughout the Inquiry, sentiments would be expressed and clarified, questions would be asked, and answers would be given. Facts would be brought to light about what went wrong. Points of view would be shared, sometimes for the first time and sometimes with great emotion. New insight and new understanding would inevitably follow. In my view, that would be, at least, a foundation for healing.

I was encouraged by the response to the Inquiry. From time to time, witnesses conveyed their appreciation for the opportunity to testify. Many of the people affected by the events expressed hope for a better future. Before the end of the Inquiry, some parties had already taken steps toward that end, and I am optimistic that relationships among the parties and the circumstances of those involved will be better than they were at the outset of the Inquiry.

³⁸ *Ibid.*

³⁹ *Westray, supra* note 3 at para. 117.