CHAPTER 10

CONDUCT OF THE HEARINGS

10.1 Commissioner's Statements

I made statements from time to time when I felt it necessary to convey my views or expectations regarding the public inquiry process generally, or this Inquiry in particular, to the media, to the public, and even to counsel for the parties.[95] Among other things, I expressed my views on the purposes of inquiries, the principles guiding the Ipperwash Inquiry, the progress of the Inquiry, and my expectations with respect to procedure. I repeatedly returned to the theme of balancing fairness and thoroughness with efficiency, including cost-efficiency.

The Inquiry reached natural junctures for my remarks on progress, such as the conclusion of the examination of a group of witnesses. At other times, however, I had to be attentive to the timing of my statements. My concern for the pace of the Inquiry sometimes prompted statements pertaining to procedural decisions or adjustments, but these had to be timed so that they would not be interpreted as directed to one counsel or related to the testimony of one witness or group of witnesses.

During the two years of hearings, I made over a dozen statements, usually at the beginning or end of the hearing day. The text was included in the transcript of the day's proceedings and also posted separately on our website. I believe they served my intent, which was to communicate something to the public or to counsel. Excerpts were often included in news reports, and counsel sometimes referred to the statements, usually in an effort to demonstrate their understanding of my expectations. Taken together, these statements, which remain on our website, are an overview of my objectives for the Inquiry and provide some insight into the process, particularly the Part 1 phase.

10.2 Aboriginal Traditions

It is difficult for those with non-Aboriginal origins to fully understand the Aboriginal perspective on Canadian institutions, values, and traditions. One of the procedural adjustments I made to the conventional public inquiry process was to add a traditional opening to our hearings for standing and funding to acknowledge the

95 Appendix 14, Commissioner's Statements.

importance and significance of the traditions of Aboriginal peoples.[96] Elder Lillian Pitawanakwat conducted the traditional ceremony, which included smudging, the distribution of tobacco ties to all in attendance, and prayers. I invited her to conduct a similar ceremony at the conclusion of the evidentiary hearings.

At the hearings, Aboriginal witnesses were offered the choice of being sworn to testify while holding an eagle feather, a symbol of truth, or while placing a hand on a bible. Early in the hearings, it became apparent that conventional cross-examination techniques might be at odds with the traditions and beliefs of Aboriginal peoples. The non-Aboriginal reliance on documentation as evidence of fact is difficult to reconcile with the oral tradition of Aboriginal people. To mitigate apprehension on the part of the witnesses and concern on the part of counsel, we organized a two-day Indigenous Knowledge Forum to educate Inquiry personnel, counsel, and the parties about the traditions, practices, and beliefs of Aboriginal peoples and provide some context for the testimony of Aboriginal witnesses. As on later occasions, the event was marked by the participation of Aboriginal drummers. At the conclusion of the forum, drummers from three of the Inquiry's main parties, the Chippewas of Kettle and Stony Point First Nation, the Residents of Aazhoodena and the OPP, spontaneously came together and drummed as one group.

10.3 Hearing Schedule

Before the hearings began, and while the initial document analysis and the witness interviews were still in progress, commission counsel was already developing an overall framework for the hearings. The challenge was to develop an approach that would balance the need to fully understand the circumstances surrounding the death of Dudley George with our obligation to explore only what was necessary to meet the Inquiry's mandate.[97] Throughout the hearings, commission counsel gave considerable attention to the hearing schedule, taking into account the need to achieve this balance, as well a logical sequence for the witnesses and the likely time required for each.

From the outset, commission counsel grouped the seventeen parties with Part 1 standing, and the witnesses to be called, into three broad categories of interests: Aboriginal, Ontario government, and OPP. This was intended to assist in deciding the sequence of the witnesses and the order of cross-examination by the parties. Additional witness categories were emergency personnel directly

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

97 Appendix 14(n), Commissioner's Remarks, Final Day of Evidentiary Hearings, June 28, 2006.

involved with the events of September 1995, local cottage-owners, the federal government, and experts. We devoted the first days of testimony to expert witnesses who gave us an historical overview of the land and the Aboriginal people in the Ipperwash region to provide context for the investigation.

We notified counsel of the witness schedule weekly and posted the schedule on our website. We began with a hearing week of Monday through Thursday, with two weeks of hearings followed by a one-week adjournment. This is a common pattern in public inquiries. The adjournment allows counsel for the parties to prepare for the witnesses scheduled for the next two-week session and to attend to other matters. It also allows time for the commissioner and commission counsel to address other inquiry business and prepare for future witnesses.

After several months, it became clear that we would have to adjust the timetable if the hearings were to be completed within a reasonable time. Another hearing week was added to cycle, so that the one-week adjournment followed three weeks of hearings. As time went on, we also extended the hearing day by starting earlier, finishing later, and shortening the interval for lunch. From time to time, further adjustments were required owing to the unavailability of a witness, an unexpectedly heavy snowstorm, or other unforeseen circumstances. The rigorous schedule added to the strain of a demanding investigation. On number of occasions, I commended counsel for their responsiveness to all of these adjustments, for understanding why they were necessary, and for recognizing our mutual obligation to complete the investigation in a reasonable amount of time. By the final month, we heard evidence every day, with only a few exceptions.

In this way, we managed to complete the hearings on the schedule forecast some months earlier. In hindsight, now knowing the twists and turns an inquiry of this kind can take, I find it remarkable that the framework my counsel designed so early in the process proved to be such a sound and appropriate roadmap for the investigation.

10.4 Evidence/Examinations

10.4.1 Witness Binders

Before each witness testified, commission counsel compiled a binder based on a comprehensive review and analysis of relevant documents in the Inquiry database and on the interviews our investigators and counsel conducted with the witness. The binder included an outline of the anticipated evidence from the witness, and all relevant Inquiry documents. Five copies of the binder were made: one for me, one for commission counsel conducting the examination-in-chief, one

for the second commission counsel assigned to the witness, one for the registrar, and one for the witness. In accordance with the Rules,[98] commission counsel gave parties with standing an outline the witness's anticipated evidence and a list of the documents likely to be referenced or filed as exhibits. We disclosed Inquiry documents to counsel for the parties electronically, and therefore they also had electronic access to these documents in the hearing room.

Preparing the binders, particularly for key witnesses, was a great deal of work for commission counsel, but the effort contributed substantially to the efficiency of the hearings. The binders were exceptionally helpful in my own preparations for hearing testimony, in focusing the examination, in assisting the witness to recall events, and in guiding the registrar through the day's proceedings. I am very grateful for my counsels' diligence and hard work in this area. The work began at a very high level and the high standard was maintained throughout.

10.4.2 Examination and Cross-Examination

Commission counsel would call each witness. The witness was asked to swear or make affirmation to tell the truth, and commission counsel then led the examination. Commission counsel in a public inquiry has a responsibility to instill confidence in the impartiality of the inquiry in the parties and the public, and it was important that this questioning be carried out fairly and even-handedly.

Our Rules allowed for counsel for a party to apply to me if they wished to lead a witness's evidence,[99] but none of them sought to do so. On a number of occasions, counsel for a witness requested the opportunity to examine his or her own witness, after commission counsel's examination, to bring out issues in chief not led by commission counsel. I allowed this in order to be fair to counsel for the other parties, so that they would have the opportunity to cross-examine on the additional evidence.

Following commission counsel's examination, counsel for the parties had the opportunity to cross-examine the witness. To establish a fair and consistent sequence for the cross-examinations, we assigned an order to the parties within the board categories of interests determined by commission counsel. Cross-examinations proceeded in that order, except that the first group to cross-examine varied depending on the witness, and counsel for the witness was typically the last to cross-examine. Occasionally, counsel for the parties concurred on a change in the order among themselves, to which I usually agreed. After the cross-examinations, commission counsel re-examined the witness.

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98 Appendix 2, Rules of Procedure and Practice, Rule 37.

99 *Ibid*., Rule 12.

The Rules obliged counsel for the parties to provide commission counsel and the other parties with copies of any documents they intended to reference or file as exhibits. The Rules further obliged them to do so at least twenty-four hours before the witness was to testify,[100] but it was not always possible for them to comply. For the most part, I was satisfied that counsel made every effort to honour the intent of this requirement. Where they were unable to do so, the pace of the proceedings and/or the volume of documents were, without exception, the plausible reasons.

The principle of thoroughness applied to the latitude I allowed counsel representing parties. To the greatest extent possible, I allowed them to explore the areas they considered relevant in their examination of witnesses. I was reluctant to impose time limits on examination and cross-examination. I wanted counsel to have the opportunity to explore every avenue that could be helpful to our investigation. Often, what was helpful could only emerge in the course of the examination.

Nevertheless, it was necessary for me to provide some general guidelines and often necessary to urge efficiency. I tried to ensure that counsel did not duplicate evidence already elicited by others, that each examination was limited to the distinct interests of the party represented, and that the evidence brought out would be helpful to me in fulfilling my mandate. I reiterated those criteria on a number of occasions during the hearings, and made two specific requests to counsel. First, if commission counsel had dealt with an issue in direct examination, or another party had done so in some detail during cross-examination, I asked counsel to consider that it was not necessary or helpful to the investigation to review the same ground again. Second, I asked each of them to keep in mind the basis on which their parties had been granted standing when preparing cross-examinations, and to focus the examination on their parties' interest.[101]

I always asked counsel to estimate the time required for cross-examination in each instance. My general rule of thumb was that the time for all cross-examinations, taken together, should not exceed the time for commission counsel's examination. They were cooperative, and generally observed their projected time estimate.

Two witnesses who were important to the work of the Inquiry, OPP officer Kenneth Deane and cottage-owner Isobel Jago, died before their scheduled appearances at the Inquiry. In the case of Mrs. Jago, the commission had interviewed her and we therefore had the benefit of the transcript of that interview. Commission counsel prepared a synopsis of her interview, read it into the record, and filed the

100 *Ibid*., Rule 38.

101 Appendix 14(j), Commissioner's Remarks on Attendance and Cross-Examination, January 9, 2006.

interview transcript as an exhibit. In the case of Kenneth Deane, the Inquiry had the benefit of his sworn evidence, given at his criminal trial and at his examination for discovery in the *George v. Harris*[102] civil litigation. Again, commission counsel prepared and read into the record a synopsis of Mr. Deane's prior sworn testimony and filed the transcripts of his sworn testimony as an exhibit at the Inquiry.

Two individuals who would have been called as witnesses, Robert Isaac and Dale Linton, died before the Inquiry was called. A videotaped interview with Robert Isaac was played at the hearing and filed. With respect to Dale Linton, commission counsel filed a binder containing transcripts of evidence from his attendance at trials, statements made by him, transcripts of telephone calls and radio transmissions involving him, and related electronic files.

10.4.3 Concealing Witness Identity and Exceptions to Open Hearings

The Inquiry hearings were generally open to the public. However, pursuant to the *Public Inquiries Act* (and also as set out in the Rules[103]), I could conduct the hearings in private at my discretion if I was of the opinion that

1. matters involving public security may be divulged at the hearings; or

2. intimate financial or personal or other matters 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 hearings be open to the public.[104]

Witnesses could also apply to me to impose measures to conceal their identities. If I found that a compelling reason existed, I could grant "confidentiality" status to the witness. Such measures could include referring to the witness by non-identifying initials rather than by name in the transcript, other public records, and my report. I could also grant the witness the right to testify in private. Where a witness had confidentiality status, media reports related to the evidence of the witness had to avoid references that might identify the individual, and no photographic, audio, visual, or other representation of the witness could be recorded while the witness testified or when he or she entered or left the site of the Inquiry.

There was only one instance of in-camera proceedings during the Inquiry. This involved certain tapes of telephone conversations, which had not been made public and which commission counsel intended to introduce (and did introduce)

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102 *Supra* note 28.

103 Rules 40 to 47, Appendix 2, Rules of Procedure and Practice.

104 *Supra* note 5 at sec. 4.

through a witness who had been part of the conversation. Counsel for some of the parties brought a motion for the early public disclosure of these tapes. The motion was argued in public, but I heard the portion of the motion that dealt with the specifics of the conversations in camera so that the content of the tapes would not be disclosed inadvertently.[105]

There was one request for confidentiality regarding the identity of a witness. In the case of one OPP officer, counsel for the Ontario Provincial Police Association requested that the officer's face not be photographed or webcast. The officer was involved in sensitive police work, which would have been jeopardized otherwise, and I agreed to the request for that reason. The parties fully supported my decision.

10.5 Closing Submissions and Replies in Part 1

On March 30, 2006, I informed the parties that the hearings would be completed by June 29, and I described the procedures for closing submissions and replies. I invited all parties with standing in Part 1 to submit written closing submissions and, if they wished, to also make submissions orally. They also had the option of replying to the submissions of other parties with Part 1 standing.[106]

I asked the parties to file written submissions, in both a hard copy and electronic format, and to distribute them electronically to the other parties who participated in the hearings within one month following the conclusion of the evidentiary hearings. If the parties in Part 1 chose to reply to submissions by other parties with Part 1 standing, they were to deliver the written replies within two weeks of that date, filing and distributing them in the same manner as the submissions. We posted all written submissions and replies on the website on the first day of the oral submissions. In the interest of fairness, I directed parties not to publish their submissions or replies before that date.

Once the parties choosing to make oral submissions had advised the Inquiry of their intention, we determined and circulated the order of presentation. I advised the parties that I would not allocate the unused time of one party to another party, and that at the conclusion of each party's submission, I would call the next party scheduled.[107]

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105 Appendix 13(b), Commissioner's Ruling on a Motion by the Chiefs of Ontario and the Estate of Dudley George and George Family Group, October 12, 2004.

106 Appendix 15(a), Memoranda to Parties with Standing re Closing Submissions Process: from Lead Commission Counsel to Counsel for Parties with Standing in Part 1 and Part 1 and 2, May 19, 2006.

107 Appendix 15(b) Memoranda to Parties with Standing re Closing Submissions Process: from Lead Commission Counsel to Counsel for Parties with Standing in Part 1 and Part 1 and 2, July 14, 2006.

I assigned parties with Part 1 standing a maximum of either one or two hours for oral submissions, depending on the nature and scope of the party's interest or perspective. They divided the time as they chose: to address the main points of their written submissions and/or to reply to the submissions of other parties. I heard oral submissions over the course of four days (August 21 to August 24, 2006) in Kimball Hall.

The investigation into the events surrounding the death of Dudley George concluded after 229 hearing days, hearing testimony from 139 witnesses, receiving into evidence 1,876 exhibits, and four days of closing oral submissions.

10.6 Formal Closing of Evidentiary Hearings

From the outset of the Inquiry, I hoped that, at the conclusion of a fair and thorough inquiry into the events surrounding the death of Dudley George, those whose lives were affected would have gained a sense of closure. To mark the conclusion of the hearings formally, as a symbolic end of a chapter in those events, we arranged a closing at Kimball Hall to bring together those who participated in the process. I invited Elder Lillian Pitawanakwat to conduct a traditional ceremony, as she had done for the opening of the hearings on standing and funding. At the closing, Aboriginal drumming groups from the Chippewas of Kettle and Stony Point First Nation, the Residents of Aazhoodena and the OPP, each representing one of the main parties in the Inquiry, once again performed together, as they had done spontaneously at the Indigenous Knowledge Forum. It was a distinctive and powerful highlight of the Inquiry.