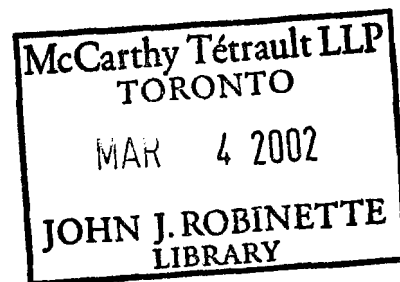


Accession no. 2000 0 1

Part One

**Report of the
Walkerton Inquiry:**

**The Events of May 2000
and Related Issues**



The Honourable Dennis R. O'Connor

Published by
Ontario Ministry of the Attorney General

© Queen's Printer for Ontario 2002

Cover Design: Tania Craan Design

ISBN: 0-7794-2559-6

Copies of this and other Ontario Government publications are available from Publications Ontario at 880 Bay St., Toronto. Out-of-town customers may write to Publications Ontario, 50 Grosvenor St., Toronto M7A 1N8. Telephone (416) 326-5300 or toll-free in Ontario 1-800-668-9938. Fax (416) 326-5317. Internet: www.publications.gov.on.ca. The hearing impaired may call toll-free in Ontario 1-800-268-7095. MasterCard and Visa are accepted. Cheques and money orders should be made payable to the Minister of Finance. Prepayment is required.

and human health. These risks included those resulting from reducing the number of proactive inspections – risks that turned out to be relevant to the events in Walkerton. The decision to proceed with the budget reductions was taken without either an assessment of the risks or the preparation of a risk management plan. There is evidence that those at the most senior levels of government who were responsible for the decision considered the risks to be manageable. But there is no evidence that the specific risks, including the risks arising from the fact that the notification protocol was a guideline rather than a regulation, were properly assessed or addressed.

In February 1996, the Cabinet approved the budget reductions in the face of the warnings of increased risk to the environment and human health.

1.3.12 Other Government Programs

The Inquiry heard evidence about a number of other government programs or policies that I conclude did not have an effect on the events in Walkerton. However, I consider it useful to briefly set out the nature of some of this evidence and the reasons for my conclusions. I do so in Chapter 12 of this report.

1.4 The Scope of the Mandate

An Order-in-Council sets out the mandate for this Inquiry. Those parts of the mandate that relate to the events in Walkerton are as follows:

2. The commission shall inquire into the following matters:
 - (a) the circumstances which caused hundreds of people in the Walkerton area to become ill, and several of them to die in May and June 2000, at or around the same time as *Escherichia coli* bacteria were found to be present in the town's water supply;
 - (b) the cause of these events including the effect, if any, of government policies, procedures and practices;

....

[i]n order to make such findings and recommendations as the commission considers advisable to ensure the safety of the water supply system in Ontario.

I am satisfied that the mandate should be interpreted broadly in order to fully reflect the purpose for which the Inquiry was called. Like many public inquiries, this Inquiry was called in the aftermath of a tragedy. The public was shocked by what had happened in Walkerton. People had assumed that treated drinking water was safe. There were questions from every quarter about how this happened, how it could have been prevented, what role public officials played, and what had happened to the government programs that were intended to prevent such tragedies from occurring.

The public's interest and concern are fundamental to the purpose for which the Inquiry was called. This Inquiry is intended to address all of the legitimate questions about what happened in Walkerton and why. The mandate should not be interpreted in a manner that leaves any of those questions unanswered.

Paragraph 2(b) of the Order-in-Council directs me to report on "the cause" of the tragedy, including "the effect, if any, of government policies, procedures and practices." I am satisfied that the term "cause" should not be interpreted in the same manner that is used in determining issues related to civil or criminal liability. This Inquiry has a different purpose from that of either civil or criminal proceedings.²⁶ The purpose of the Inquiry is not to make findings of liability or responsibility in a legal sense, but rather to report on all the circumstances surrounding the events in Walkerton and all the causes of those events so as to help ensure the safety of drinking water in the future. Understanding what went wrong in Walkerton should, in itself, prove helpful in the future to those responsible for regulating, managing, and operating water systems.

I am satisfied that I should report not only on acts or events that directly "caused" the outbreak in a positive sense, but also on those failures or omissions that did not prevent the outbreak, reduce its scope, or reduce the risk that the outbreak would occur. By way of example, I note that many government policies or programs are intended to reduce the risk that drinking water will be unsafe.

²⁶ I note that paragraph 3 of the Order-in-Council specifically precludes me from making findings of civil or criminal liability. It reads as follows: "The commission shall perform its duties without expressing any conclusion or recommendation regarding the civil or criminal liability of any person or organization. The commission, in the conduct of its inquiry, shall ensure that it does not interfere with any ongoing criminal investigation or criminal proceedings, if any, relating to these matters."

Given the language of paragraph 2(b) of the Order-in-Council, I have no doubt that the mandate directs me to report on the failures of any of these policies or programs to achieve their intended purposes. Likewise, I should also report on the failures of others to take steps that would have reduced the risk that the Walkerton tragedy would occur.

For the purposes of calling evidence, I asked my counsel to err on the side of inclusion. If matters were possibly relevant to the mandate, the evidence was to be called. However, the fact that evidence was called about a particular matter does not in itself mean that there is a connection to the events of May 2000. In determining what matters warrant comment or assessment in this report, I have attempted to take a common sense approach and to be guided by what the public might reasonably expect, based on the evidence at the Inquiry. I am careful not to draw conclusions about matters that are so removed from the events in Walkerton that a connection between those matters and the tragedy would be based on little more than speculation.

I want to make three points about the manner in which I have expressed certain conclusions. Because this is not, strictly speaking, a legal proceeding, in certain cases I have not made “findings of fact” based either on a balance of probability (the civil test) or on proof beyond a reasonable doubt (the criminal test). Instead of making findings of fact, in some instances I have set out my conclusions by expressing them in terms of the probability or likelihood of something happening or not happening. In some cases I increase the certainty of my conclusion by using the qualifier “very.” For readability, I use the words “probable” and “likely” interchangeably. One should not read a different meaning into the use of the two different words in similar contexts.

Several of my conclusions are qualified by rather remote possibilities. For the sake of the reader, I do not repeat qualifications that fall into the “possible but unlikely” category in all instances. This is particularly true in sections 1.2 and 1.3 above, but it occurs in the body of the report as well. I have, however, set out my qualifications very precisely whenever I first reach a conclusion in the body of the report.

Finally, throughout the report, I occasionally use terms such as “fault,” “responsible,” and “accountable,” which could have a legal connotation. I do not intend, in this report, to reach any conclusions in law. Readers should attach the normal, non-legal meaning to words of this nature.

REPORT OF THE

IPPERWASH



Province
of Ontario

INQUIRY

VOLUME 1 Investigation and Findings

VOLUME 2 Policy Analysis

VOLUME 3 Inquiry Process

VOLUME 4 Executive Summary

The Honourable Sidney B. Linden, Commissioner

INTRODUCTION

1.1 Inquiry Mandate

In 1995, Mr. Dudley George was shot during a land claim occupation and protest by Aboriginal people in Ipperwash Provincial Park and died of his wounds. Eight years later, in November 2003, the Ontario government established the Ipperwash Inquiry, pursuant to the *Public Inquiries Act*.

I discuss the purpose of public inquiries and the process of the Ipperwash Inquiry in detail in Volume 3 of this report. In this chapter, I describe more briefly the purpose of public inquiries and the process of conducting the investigation, or Part 1 of the Inquiry.

The mandate of the Ipperwash Inquiry, as set out in the Order-in-Council was

1. to inquiry into and report on events surrounding the death of Dudley George; and,
2. to make recommendations directed to the avoidance of violence in similar circumstances.

In broad terms, there are two types of public inquiries. One is an investigative inquiry, which examines and reports on a specific incident or series of events. Often, an element of public controversy is attached to the matter being investigated. Investigative inquiries are established to conduct an independent, comprehensive, and transparent review of the events. Unlike a civil or criminal trial, an inquiry is intended to uncover the truth rather than to establish liability. The purpose, in other words, is to find out what happened — to look back.

The other type of public inquiry focuses on the development of public policy in a specific area of public concern. Often, the need for such an inquiry arises from undesirable events or circumstances. In these cases, the inquiry serves as a means through which the contributing factors can be fully considered. Within that context, the inquiry may make recommendations for measures to prevent recurrence or for systemic improvement — in other words, to look forward.

Thus, a public inquiry can be an opportunity to look back or to look forward. It can also be both. An inquiry can be called to uncover the truth about a specific matter and, at the same time, to propose policy reform. The Ipperwash

Inquiry was established to meet both of those objectives — to conduct an investigation and to examine policy.

However, all public inquiries serve a further purpose. A public inquiry also informs the public by presenting evidence that, until that point, may only have been given in private, if at all. It provides a forum for citizens and groups to participate in the resolution of issues and the development of future policies and strategies concerning matters and events in which they may have a stake. In other words, what distinguishes a public inquiry from other types of investigations and policy reviews is that it is *public*: conducted in public view and with the participation of the public.

1.1.1 Two-Part Mandate; Two-Part Process

Part 1 of the Inquiry followed the evidentiary hearing model. It was a fact-finding process through which I would make findings, based on the evidence heard, regarding the events surrounding the death of Dudley George. Part 2 was a policy-based review to fulfill the broader part of the mandate of the Inquiry; namely, to make recommendations on measures to avoid violence in similar circumstances. The two parts of the Inquiry were conducted simultaneously.

In this volume (Volume 1), I report on the facts and findings arising from the investigation. Volume 2 explores the policy issues underlying the events of September 1995 and contains my recommendations for avoiding violence in the future. The inquiry process is described in Volume 3, and Volume 4 is an executive summary, which includes all of my recommendations stemming from the Inquiry.

1.1.2 Principles Governing the Inquiry, and Additional Goals

The principles that governed this Inquiry were similar to those of other public inquiries: thoroughness, expedition, openness to the public, and fairness. To get at the truth, and to meet the tests of impartiality and independence, the Inquiry had to be thorough. To inform the public and to restore public confidence, the Inquiry had to be conducted in an open forum, thereby ensuring that it would be transparent and open to public scrutiny. To ensure fairness, procedural safeguards had to be put in place and the Commission and the parties had to observe them. And finally, although the principles of thoroughness, openness to the public, and fairness were to be paramount throughout, the Inquiry had to be as expeditious as possible.

Throughout the process, my explicit and primary goal was to fulfill the two-part mandate as set out in the Order-in-Council. However, I also hoped to achieve

two additional goals through the Inquiry process. 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.

It should also be noted here that in light of the broad mandate of the Order-in-Council, I also committed to addressing the considerations of section 20 of the *Coroner's Act* in order to avoid unnecessary duplication of time and effort by the Office of the Chief Coroner for Ontario, which had the power to call an inquest into the circumstances of Mr. George's death.

1.1.3 Approach to the Investigation

In most investigative inquiries, the complexity of the task may not be apparent at the outset. Carrying out the investigation is not the difficult part. The difficulty lies in defining the task — articulating the “what” of it. Beneath an apparently straightforward set of circumstances might lie a multitude of matters which merit investigation.

The first part of my mandate was to investigate and report on the events surrounding the death of Dudley George. How narrowly or broadly I interpreted the requirement to investigate the events “surrounding” the death of Dudley George was critical.

The narrowest interpretation might have led me to investigate only the sequence of direct events and decisions in the immediate vicinity of Ipperwash Provincial Park, during the hours on September 6 immediately preceding the shooting in which Dudley George was killed. On the other hand, the broadest interpretation of events “surrounding” his death might have led me to an extensive investigation of the events and decisions which, in the years, decades, and even centuries before, might have directly or indirectly led to tragedy. Neither of these extremes would have been satisfactory. Nonetheless, defining the scope of the investigation was far from simple. In my view, the task was made more difficult by the number of years that had passed. In the years following the death of Dudley George, more and different issues and interests meriting consideration arose, beyond the facts of the shooting, which might not have arisen immediately after the event.

My decision regarding the scope of the investigation had an impact on many of my subsequent decisions, including my decisions on which individuals and organizations should be granted standing, which witnesses should be called to testify, and the extent to which examination and cross-examination by counsel would be helpful or relevant.

Although the precise limits of the investigation were not easy to define, commission counsel and I recognized at an early stage that the investigation would have

to take into account some of the history and circumstances of the Aboriginal people claiming title to Ipperwash Provincial Park. We began the investigation by calling two experts to provide an overview of the systemic or historical circumstances which may have contributed to the actions and decisions under investigation. Although many of these circumstances pre-dated the events that gave rise to calling the Inquiry, or could have appeared to fall outside its jurisdiction or mandate, my view was that they would shed light on and provide context for why those events occurred. I believed that this was the appropriate starting point for the parties and the public.

Following the historical overview of the land and the Aboriginal people, spanning the years from 1763 and the *Royal Proclamation* to 1942 and the appropriation of the Stoney Point Reserve for military purposes by the federal government, the investigation of the events “surrounding” the death of Dudley George moved to 1993 and the occupation of the federal army camp and barracks. The focus of the investigation then narrowed significantly, to the summer of 1995, and in particular the Labour Day weekend in September 1995 when Mr. George was killed, and also to examining some significant and relevant events in the days and weeks following the shooting.

Another challenge was to define the perspectives to be sought in the course of the investigation.

Commission counsel began by grouping 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 determining the sequence of the witnesses and the order of cross-examination by the parties. Additional witness categories included emergency personnel directly involved with the events of September 1995, local cottage-owners, and federal government officials.

However, simply identifying these broad categories of interests did not diminish the complexity of the task. For example, there was not only one Aboriginal perspective on the events surrounding the death of Dudley George. Six parties had interests broadly defined as “Aboriginal,” all of which required exploration. Seven parties fell into the category of the Ontario government and two parties represented the separate management and association interests of the OPP. It was a challenge throughout to maintain the balance between the need to proceed efficiently and the need to elicit evidence which added details to the investigation or helped me test or verify the evidence of others.

In making these decisions, I was always mindful of the less tangible, but in my view, equally important attribute of a public inquiry; that is, healing. While

my main task was to conduct a thorough investigation, the process offered an opportunity for points of view to be shared, sometimes for the first time. This sometimes had a cathartic effect and I thought it was important for us to encourage this.

1.2 Process of Part 1 of the Inquiry

1.2.1 *Commission Counsel*

Soon after my appointment, I appointed commission counsel. The primary responsibility of commission counsel is to assist the commissioner in carrying out his or her mandate by representing the public interest at the inquiry and ensuring that all perspectives bearing on the public interest are brought to the commissioner's attention. Commission counsel provides advice to the commissioner throughout the inquiry and conducts and supervises the investigation from beginning to end.

In a public inquiry, an effective investigation requires considerable planning and preparation before the hearings can begin. I worked with my lead counsel, Derry Millar, to establish our team of lawyers and investigators. We chose a legal and investigative team that collectively had the knowledge, skills, and experience to deal with the issues we expected to cover in the Inquiry and to accomplish our objectives.

1.2.2 *Rules of Procedure and Practice*

Subject to fairness, a commissioner has broad discretion in conducting a public inquiry in a manner that best meets the mandate. This discretion extends to defining the rules that underlie the conduct of the inquiry.¹ Typically, these rules, commonly known as rules of procedure and practice, are developed early in the inquiry process so that the public and participants will know the “rules of the game.”² They address procedural matters such as the granting of standing and funding for interested parties, the disclosure of documents, and the calling of witnesses. The rules may also address practical matters such as the location and schedule of inquiry hearings and other activities.

We modeled our Rules on those of similarly structured public inquiries and in keeping with the general principles I had articulated for the Inquiry. Commission

¹ For example, *Public Inquiries Act*, *supra* note 5 at c.P41.s.3.

² *A Handbook on Public Inquiries in Canada*, *supra* note 4 at 69.

counsel invited the parties with standing to comment on the draft Rules and we posted the final version on our website.

1.2.3 Standing and Funding Applications and Decisions

To be thorough and to obtain all relevant information and perspectives, public inquiries invite potential parties (interested individuals and groups) to apply for standing in the inquiry. Our Notice of Hearing, which was published in a number of national and local print media and on our website, invited applications for standing in one or both parts of the Inquiry. I assessed all of the applications for standing, and applications for funding from parties granted standing, against the test for standing and funding set out in our Rules. I heard the applications over four days in late April 2004, in the small town of Forest, Ontario, which is near Ipperwash Provincial Park.

I granted standing in the fact-finding phase to parties who demonstrated “an interest which is directly and substantially affected by the subject matter” in Part 1 of the Inquiry, or to parties who represented “distinct ascertainable interest and perspectives ... essential to the discharge of the Part 1 mandate.”³ Seventeen parties met the criteria for standing in Part 1.

Seven of the seventeen parties granted standing in the evidentiary hearing phase of the Inquiry applied for funding, on the basis that without it, they would not be able to participate in the proceedings. Funding covered counsel fees and reasonable disbursements such as travel and accommodation expenses, as set out in the Ministry of the Attorney General’s fee schedule for outside counsel and the guidelines for disbursements established by Management Board of Cabinet. In accordance with the Order-in-Council, I recommended to the Attorney General that these seven parties be granted funding to make possible their participation in the Inquiry and he accepted my recommendations.

1.2.4 Location for Evidentiary Hearings

The principle of public accessibility informed one of my earliest decisions regarding the Inquiry: where to hold the evidentiary hearings. With the benefit of input from counsel, staff, and the parties, I decided that the Inquiry should be held near the community most affected by the events being investigated. Accordingly, the hearings were held in the auditorium (Kimball Hall) of the Forest Memorial Community Centre, near Ipperwash Provincial Park.

³ The entitlements and obligations of parties with standing are set out in sections A.II (Part 1) and B.II (Part 2), Appendix 2, Rules of Procedure and Practice.

1.2.5 Broad Public Access to Hearings

The technology available today affords great opportunity to ensure public access to the proceedings of a public inquiry. Our website was designed to offer current and complete information on all aspects of the Inquiry.

The website provided information on the parties with standing. During the evidentiary hearings, we also posted hearing schedules, transcripts of testimony, and my public statements and decisions on motions. The transcripts were posted on our website the same evening as the testimony was heard, and they were therefore available to counsel to assist them in preparing for the next day.

The website also included a “feedback” link to allow visitors to the site to convey their views and to share or seek information. In terms of public access, however, the addition of a link from our website to a live webcast of the hearings had the greatest impact. It became possible for interested individuals, anywhere in the country and beyond, to see and hear the proceedings of the Inquiry in real time. I am grateful for the assistance of counsel for the Estate of Dudley George and George Family Group for helping us to make this service available.

The webcast offered other benefits to the Part 1 process. Commission counsel and other commission staff could follow the proceedings, even when other responsibilities or cost considerations made it impractical for them to travel to Forest. The same advantage applied to counsel for the parties with standing.

In view of the importance of public access to the proceedings of a public inquiry, we also arranged for broadcast-quality taping of the hearings, from start to finish, by a local audiovisual company. This served as a pool feed for the electronic media covering the hearings.

1.2.6 Disclosure and Management of Documents

A public inquiry is afforded wide-ranging investigative powers. Among them is the power to collect or require disclosure of documents, and if necessary, to compel the production of documents through a summons or a search warrant from the court.

Parties with Part 1 standing were required to provide all relevant documents (defined broadly to include materials in written, electronic, audio, video, and digital form, as well as photographic or other visual materials such as maps and graphs) in their possession or to which they had access. The Commission treated documents received from parties or other sources as confidential until and unless they were made part of the public record.

More than 23,000 documents were scanned into the Inquiry database, assigned an Inquiry document number, and made available to the parties in electronic

format. Where appropriate and relevant, we had audio materials transcribed and made available to the parties. Counsel for the parties with standing were required to sign a confidentiality undertaking with respect to documents.

1.2.7 Issues of Privilege

During the hearings, the Inquiry dealt with many documents that were the subject of a privilege or privacy claim. A protocol for handling documents that were the subject of any kind of privilege or privacy claim was included in our Rules.⁴

Where a party asserted privilege of any kind, I directed the party to disclose the subject documents, in unsevered form, to commission counsel for review, with an explanation of the grounds on which privilege or privacy was asserted and the basis for the assertion. The review of these documents took place in the presence of counsel for the party asserting privilege, if requested by the party. On the few occasions where a party asserted privilege, I issued a summons⁵ to the party to produce documents.⁶

In the course of reviewing documents over which privilege was asserted, commission counsel first considered relevance. If the document was not relevant and helpful to the discharge of the mandate of the Inquiry, then the document was returned to the party. If the document was deemed potentially relevant, but commission counsel agreed that the claim for privilege had been properly asserted (and not waived at law), then the document would either be returned in its entirety or maintained with the privileged sections severed (where feasible). Two options were available in the event of disagreement between commission counsel and a party regarding the validity of the privilege claimed (assuming relevance had been established): I could either order production of the subject documents for my inspection and ruling, or I could direct that the issue be resolved on application to the Regional Senior Justice in Toronto or his designate. Fortunately, no disputes arose which required this form of adjudication.

At the conclusion of the evidentiary hearing phase of the Inquiry, and in accordance with Rule 35, all parties were requested to return the electronic copy of the database, including any copies of any documents not made exhibits or belonging to the party. Only those documents made exhibits or those referred to during the hearings are part of the public record of the Inquiry. The originals of all documents disclosed over the course of the Inquiry were returned to the

⁴ Rule 32, Appendix 2, Rules of Procedure and Practice. Note that section 11 of the *Public Inquiries Act* (*supra* note 5) precludes admission of privileged matters into evidence.

⁵ Appendix 8(a), Summons to Witness to Attend and to Produce Documents.

⁶ *Public Inquiries Act*, *supra* note 5 at sec. 7(1)(b).

parties. In keeping with the archiving requirements of the Province of Ontario, the Inquiry retained copies in its electronic database, which was transferred to the Archives of Ontario at the conclusion of the Inquiry.

1.2.8 Identifying and Preparing Witnesses

In carrying out its investigation, a public inquiry is empowered to call witnesses to appear and testify under oath, and to produce documents identified by the commission. Without this authority to compel testimony and to produce documents, inquiries would be required to rely on the willingness of individuals to volunteer information. This could make it difficult, if not impossible, to uncover the truth.

The principles of fairness and thoroughness informed the selection of witnesses, and witnesses were called to testify if they could provide relevant and helpful information. However, this did not mean that all *possible* witnesses who had relevant and helpful information were called. The challenge throughout was the need to balance efficiency with ensuring that the investigation was thorough and fair.

Prior to testifying, one or more commission counsel and one or more of our investigators interviewed each witness and a transcript of key witness interviews was made. Given the number of years that had passed since the events in question, witnesses were given copies of documents from the Inquiry database before the interviews, when possible, to help refresh their memories. Information from one witness sometimes led to interviews of further potential witnesses. Also, on occasion, members of the public offered suggestions with respect to relevant witnesses. We considered each of these, and pursued the line of inquiry if we deemed it to be potentially helpful or relevant.

Under the Rules, witnesses called to testify at the Inquiry had certain procedural rights. For example, they had the right to be accompanied by counsel during the interview and to be represented by counsel when they testified.⁷ Several witnesses availed themselves of this right.

1.2.9 Summonses and Search Warrants

Pursuant to the Order-in-Council, the Inquiry was empowered to issue summonses⁸ to witnesses in accordance with Part II of the *Public Inquiries Act*.⁹

⁷ Rules 19 and 23, Appendix 2, Rules of Procedure and Practice.

⁸ Appendix 8(b), Summons to Witness to Appear.

⁹ *Supra* note 5 at sec. 7(1).

Pursuant to Part III of the *Act*, the Inquiry was also empowered to seek search warrants from a Justice of the Ontario Superior Court of Justice. On occasion, I issued a summons to a witness where the witness did not testify voluntarily, or when a witness requested a summons for other legitimate reasons such as to justify absence from work. It did not prove necessary to execute any search warrants.

The power to summons witnesses derived from a provincial statute, and while I had the power to issue summonses to individual employees or former employees of the federal government, I could not through them obtain documents relating to the areas of intended examination. These documents are in the control of the relevant Minister of the Crown in Right of Canada and, as a provincially appointed commissioner, I did not have jurisdiction to compel a Minister of the Crown in Right of Canada, in his or her official capacity, to appear and produce documents.¹⁰ Although invited to do so, the federal government did not apply for standing in the Inquiry and was not subject to the obligations set out in the Rules. However, the federal government cooperated in providing documents. Also, the federal officials we called as witnesses testified voluntarily and gave evidence on matters relevant to the Inquiry involving Indian and Northern Affairs Canada and the Department of National Defence.

1.2.10 Notices of Alleged Misconduct

Fact-finding, a key aspect of most public inquiries, carries with it the possibility that the evidence heard will affect individual or organizational reputations, particularly if the commissioner makes a finding of misconduct. The *Public Inquiries Act* affords legal protection to anyone who may be found by an inquiry to have been involved in misconduct. Subsection 5(2) of the *Act* provides that no finding of misconduct against a person may be made in the commissioner's report unless the person had received Notice of Alleged Misconduct (sometimes referred to as a "5(2) Notice") and had been given an opportunity to respond to matters described in the Notice.

To minimize anxiety on the part of a recipient, commission counsel, as a practice, started interviews by informing the potential witness of the statutory obligation of the Inquiry to issue Notices of Alleged Misconduct where warranted, and by explaining the meaning of "alleged misconduct" in accordance with the statute. Equally important, my counsel also informed the potential witness of what the Notice did not mean; that is, receiving one did not represent any prejudgment of my findings (if any) concerning the witness. In drafting the Notices therefore, we were careful not to use language that might be confused with potential findings of civil or criminal liability. Notices were delivered in confidence

¹⁰ Keable, *supra* note 3.

to the persons or parties to whom they related and, whenever possible, we issued Notices before the individual gave his or her testimony, either directly or through counsel if the witness was represented. It is important to point out here, as did the Commissioner of the Walkerton Inquiry, currently the Associate Chief Justice of Ontario, the Honourable Justice Dennis O'Connor, that where I use terms such as "fault," "responsible," and "accountable," I do not intend, in this report, to reach any conclusions of law. Accordingly, readers should attach the normal, non-legal meaning to words of this nature.¹¹

1.2.11 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. Once again, 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 mandate of the Inquiry.¹² Throughout the hearings, commission counsel gave considerable attention to the hearing schedule, taking into account the need to achieve this balance, as well as a logical sequence for the witnesses and the likely time required for each.

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. The adjournment week allowed counsel for the parties to prepare for the witnesses scheduled for the next two-week session and to attend to other matters. It also allowed time for me and for commission counsel to address other inquiry business, including meetings related to the policy phase of the Inquiry, and to prepare for future witnesses. After several months, we adjusted the timetable by adding another hearing week to the cycle, so that the adjournment week followed three consecutive weeks of hearings. As time went on, hearing hours were added to each week. By the final month, we heard evidence every day, with only a few exceptions, in order to meet the ending date we had already announced.

1.2.12 Evidence/Examinations

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

¹¹ The Honourable Dennis R. O'Connor, *Report of the Walkerton Inquiry*, Part I, at 37, (Toronto: Queen's Printer for Ontario, 2002)

¹² Appendix 14(n), Commissioner's Remarks, Final Day of Evidentiary Hearings, June 28, 2006.

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,¹³ commission counsel gave parties with standing an outline of 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, which gave them electronic access to these documents in the hearing room.

Commission counsel called each witness and led the examination. In view of commission counsel's responsibility in a public inquiry to instil confidence in the impartiality of the inquiry in the parties and the public, it was important that this questioning be carried out fairly and even-handedly. On a number of occasions, counsel for a witness examined his or her own witness, after commission counsel's examination, to bring out issues in chief not led by commission counsel. Following commission counsel's examination, counsel for the parties had the opportunity to cross-examine the witness in an agreed-upon sequence. I made it a practice to canvass counsel for an estimate of the time needed for cross-examination. Counsel cooperated throughout in estimating and adhering to what I considered to be reasonable times. Following the cross-examinations, commission counsel re-examined the witness.

1.2.13 Confidential 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),¹⁴ there were provisions for conducting hearing in private, if necessary, at my discretion.

There was 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 subsequently introduce 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 prematurely.¹⁵

¹³ Appendix 2, Rules of Procedure and Practice, Rule 37.

¹⁴ Rules 40 to 47, Appendix 2, Rules of Procedure and Practice.

¹⁵ 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.

A witness could request that measures be taken to conceal his or her identity. 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, in other public records, and in my report.

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.

1.2.14 Commissioner’s Statements

I made public statements from time to time when I felt it necessary to convey my views or expectations regarding the progress of the Inquiry to the media, to the public, and to counsel for the parties.¹⁶ Among other things, I expressed my views on the purpose of public inquiries, the principles guiding the Ipperwash Inquiry, my expectations with respect to procedure, and the process. I repeatedly returned to the theme of balancing fairness and thoroughness with efficiency, including cost-efficiency. The text of these statements was part of the transcript of the day’s proceedings and was also posted separately on our website. Together, these statements provide a chronology of the progress of the Inquiry.

1.2.15 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. Parties also had the option of replying to the submissions of other parties with Part 1 standing.¹⁷

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

¹⁶ Appendix 14, Commissioner’s Statements.

¹⁷ 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.

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 Commission 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.¹⁸

All parties with Part 1 standing chose to make oral submissions, and I assigned each a maximum of either one or two hours to do so, 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 closing submissions over the course of four days, August 21-24, 2006, in Forest.

At the conclusion of our investigation into the events surrounding the death of Dudley George, we had a database of 23,000 documents. The investigation lasted 229 hearing days (followed by the four days of oral closing submissions), during which we heard testimony from 139 witnesses, catalogued 1,876 exhibits, and produced over 60,000 pages of transcripts.

1.2.16 Aboriginal 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 importance and significance of the traditions of Aboriginal Peoples. 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.

To formally mark the conclusion of the hearings and as a symbolic conclusion of an important chapter in the events surrounding the death of Dudley George, 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 at the opening of the hearings on standing and funding. At the closing, Aboriginal drumming groups representing three of the parties with standing at the Inquiry, the Chippewas of Kettle and Stony Point First Nation,

¹⁸ 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.

the Residents of Aazhoodena and the OPP, performed together, as they had done spontaneously at another Inquiry event, the Indigenous Knowledge Forum organized by the Inquiry in September 2005. In my view, this was a meaningful and symbolic event.

1.3 Acknowledgements

As is the case with any public inquiry, I owe considerable gratitude to a very long list of individuals who contributed to or participated in the investigative phase of the Inquiry. Although I acknowledged them by name and in some detail in the Inquiry Process volume of this report, I want to reiterate here my heartfelt thanks to all of them for their dedication, professionalism, and skill. However, I would like to mention again a few people who were key to the investigation phase of the Inquiry and to writing this volume of my report.

I am deeply appreciative of the exceptional leadership ability of my lead commission counsel, Derry Millar, and I am grateful to commission counsel Susan Vella and Don Worme. Each of them performed their duties with skill and professionalism throughout. They were assisted by associate counsel Katherine Hensel, Megan Ferrier, and, for a shorter time, Jodie-Lynn Waddilove and Rebecca Cutler. The counsel team had invaluable help from our investigators: lead investigator RCMP Inspector Rick Moss, retired RCMP officer Jerry Woodworth, and Detective Sergeant Anil Anand of the Toronto Police Service.

The experience and skill of my senior legal analyst, Ronda Bessner, were instrumental in assisting me to analyze the large volume of evidence heard and in preparing my report. Erin Stoik, Suzanne Sinammon, Julia Milosh, and Deirdre Harrington helped her at various times.

I also appreciated the cooperation of the parties, their counsel, the press, and the community for their contribution to the process and outcome of the Inquiry. While the process was challenging, and at times particularly demanding, I hope everyone involved found the experience to be as rewarding as I did.

1.4 Organization of this Volume

This report begins with a history of Stoney Point and Kettle Point. Knowledge of the historical context is essential to understanding the reasons the Aboriginal people decided to occupy Ipperwash Provincial Park. This historical overview can be found in Chapters 2 to 5. The ancestors of the Kettle and Stoney Point people as well as what life was like on the Stoney Point Reserve are described. These chapters also review the historical relationship between the Aboriginal

people and the government, as well as the effects of the appropriation of the Stoney Point Reserve by the federal government in 1942 to establish an army training camp.

There were several attempts by Aboriginal people over subsequent decades to negotiate return of the Stoney Point Reserve but the Department of National Defence maintained that it needed the camp for military training. After decades of growing frustration, the former residents of the Stoney Point Reserve and their descendants decided to occupy the military ranges of Camp Ipperwash in May 1993 – described in Chapter 6. Meanwhile they persisted in their efforts for the return of the land.

In 1995, the occupiers' frustration increased because of the military's persistence in remaining on the land. At the end of July 1995, the Stoney Point people decided it was time to reclaim the army barracks which was done on July 29, 1995. This occupation is discussed in Chapter 7. Chapter 7 also discusses the reaction of the military, Kettle and Stoney Point First Nation, the OPP, and the government to the occupation of the army barracks and the potential occupation of Ipperwash Provincial Park after July 29, 1995 and during August 1995. It also includes the convening of a meeting of the provincial government's Interministerial Committee on Aboriginal Emergencies, placing undercover OPP officers in the park, the OPP meeting with MPP Marcel Beaubien and the activities of the MNR.

Chapter 8 deals with the planning by the OPP at the end of August 1995 and early September 1995 for the occupation of Ipperwash Provincial Park. The chapter describes the meetings held to develop the operation plan "Project Maple" to respond to the potential occupation of Ipperwash Provincial Park by Aboriginal people.

Chapter 9 examines the events that occurred on Monday September 4, 1995, when the Aboriginal people occupied the park.

Throughout the day on September 5, 1995, other Aboriginal people arrived at the park to support the occupiers. There was also an increase in police presence. That evening there was an altercation between police and occupiers over picnic tables the occupiers had brought into the sandy parking lot outside the park. These and other occurrences that day are documented in Chapter 10. Chapter 10 also examines the activities of the OPP and politicians and the Interministerial Committee meeting on September 5, 1995.

Chapters 11 to 18 examines the events of September 6, 1995: the day Dudley George was killed in a confrontation between the police and the Aboriginal occupiers.

Chapters 11 and 12 chronicle events during the day and early evening of September 6, including the removal by the police of picnic tables from the sandy parking lot, unsuccessful attempts by the OPP to communicate with park occupiers. Chapter 11 also reviews the activities at Queen's Park of the responsible ministers and civil servants and the Interministerial Committee meeting on Aboriginal Emergencies. It examines the meeting held in the Premier's dining room attended by the Premier, the Attorney General, the Solicitor General, the Minister of Natural Resources, their deputy ministers, political aides and seconded OPP officers.

The events of the evening of September 6, including the confrontation between the police and occupiers during which Cecil Bernard George was arrested and injured and Dudley George was shot and killed, are examined in Chapters 13 and 14.

Chapters 15 to 17 details the stories of some Aboriginal people, including Marcia Simon, Nicholas Cottrelle and Cecil Bernard George, immediately following the confrontation with the police.

After Dudley George was shot, his brother, sister and a teenager transported him to the hospital. Chapter 18 describes this drive and the arrest of the car occupants upon arrival at the hospital. Dudley George was "vital signs absent" when he arrived and could not be resuscitated. The findings of the autopsy and the medical care provided to him are examined.

Chapters 19 and 20 provide an overview of the events that occurred during the hours, days and weeks following the confrontation. I review the testimony of some of the Aboriginal people and police officers that spoke about the emotional and psychological impact of these events. Chapter 20 concludes with a review of the investigation into the inappropriate and culturally insensitive memorabilia that was procured and purchased by a number of police officers following the confrontation.

I conclude this volume with a summary of the answers to some of the more important questions raised by the events of September 1995, including the future of the land.

ORDER IN COUNCIL**APPENDIX A**

Ontario
Executive Council
Conseil des ministres

Order in Council
Décret

On the recommendation of the undersigned, the Lieutenant Governor, by and with the advice and concurrence of the Executive Council, orders that

Sur la recommandation du soussigné, le lieutenant-gouverneur, sur l'avis et avec le consentement du Conseil des ministres, décrète ce qui suit :

A number of people have died or become ill in circumstances where *Escherichia coli* bacteria have been found in the water supply in that part of The Corporation of the Municipality of Brockton formerly known as the Town of Walkerton.

Under the *Public Inquiries Act*, R.S.O. 1990, c. P. 41, the Lieutenant Governor in Council may, by commission, appoint one or more persons to inquire into any matter of public concern, if the inquiry is not regulated by any special law and if the Lieutenant Governor in Council considers it desirable to inquire into that matter.

The Lieutenant Governor in Council considers it desirable to inquire into the following matters of public concern. The inquiry is not regulated by any special law.

Therefore, pursuant to the *Public Inquiries Act*:

Establishment of the Commission

1. A commission shall be issued effective June 13, 2000, appointing the Honourable Dennis R. O'Connor as a commissioner.

Mandate

2. The commission shall inquire into the following matters:
 - (a) the circumstances which caused hundreds of people in the Walkerton area to become ill, and several of them to die in May and June 2000, at or around the same time as *Escherichia coli* bacteria were found to be present in the town's water supply;
 - (b) the cause of these events including the effect, if any, of government policies, procedures and practices; and
 - (c) any other relevant matters that the commission considers necessary to ensure the safety of Ontario's drinking water.

in order to make such findings and recommendations as the commission considers advisable to ensure the safety of the water supply system in Ontario.

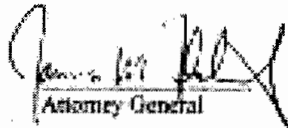
2

3. The commission shall perform its duties without expressing any conclusion or recommendation regarding the civil or criminal liability of any person or organization. The commission, in the conduct of its inquiry, shall ensure that it does not interfere with any ongoing criminal investigation or criminal proceedings, if any, relating to these matters.
4. The commission shall complete this inquiry and deliver its final report(s) containing its findings, conclusions and recommendations to the Attorney General who shall make such report(s) available to the public.
5. 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 otherwise be able to participate in the inquiry without such funding.
6. Part III of the *Public Inquiries Act* applies to the inquiry and the commission conducting it.

Resources

7. Within an approved budget, the commission may retain such counsel, staff, investigators and expert advisers as it considers necessary in the performance of its duties. They shall be paid at rates of remuneration and reimbursement approved by Management Board of Cabinet. They shall be reimbursed for reasonable expenses incurred in connection with their duties in accordance with Management Board of Cabinet Directives and Guidelines.
8. The commission may obtain such other services and things as it considers necessary in the performance of its duties within an approved budget. The commission shall observe Management Board of Cabinet's Directives and Guidelines and other applicable government policies when it obtains services or things.
9. All ministries, Cabinet Office, the Premier's Office, and all boards, agencies and commissions of the government of Ontario shall assist the commission to the fullest extent so that the commission may carry out its duties.

Recommended


 Attorney General

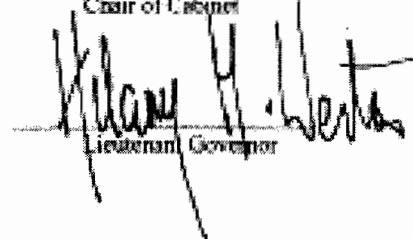
Concurred


 Chair of Cabinet

Approved and Ordered

JUN 13 2000

Date


 Lieutenant Governor

Case Name:
Ontario (Provincial Police) v. Cornwall (Public Inquiry)

Between
Ontario Provincial Police, Ontario Provincial Police Association, Cornwall Community Police Service, Ministry of Community Safety and Correctional Services and the Episcopal Corporation of the Diocese of Alexandria Cornwall, Appellants, and
The Honourable G. Normand Glaude, Commissioner, The Cornwall Public Inquiry, Respondent

[2008] O.J. No. 153

2008 ONCA 33

Docket: C47951

Ontario Court of Appeal
Toronto, Ontario

D.H. Doherty, M.J. Moldaver and E.E. Gillese JJ.A.

Heard: December 13, 2007.
Judgment: January 18, 2008.

(72 paras.)

Administrative law -- Public inquiries -- Procedure -- Appeal by the Ontario Provincial Police, et al. from a decision of the Divisional Court dismissing the appellants' application for an order directing the Commissioner to state a case -- Appeal allowed -- Commissioner erred in finding that the proposed evidence of two witnesses came within the subject matter of the Commission -- In so concluding, the Commissioner impermissibly redefined and expanded the scope of his mandate and committed jurisdictional error.

Appeal by the Ontario Provincial Police, et al. from a decision of the Divisional Court dismissing the appellants' application for an order directing the Commissioner to state a case. In April 2005, a Commission known as the Cornwall Public Inquiry was established pursuant to the Public Inquiries Act. As of July 2007, the Commission had heard from 64 witnesses, including 11 contextual expert witnesses, 19 corporate officials, 28 alleged victims and 6 relatives of alleged victims. The issue giving rise to the appeal concerned the evidence of two witnesses, identified for privacy purposes as C12 and C13. Commission counsel sought to lead their evidence before the Commissioner, while the appellants and the Attorney General for Ontario, as intervenor, sought to exclude it. The impugned evidence arose from an allegation by C12 that in December 1993, when she was 16 years of age and living in Alexandria, Ontario, she was sexually assaulted at knifepoint by two teenage boys. She reported the incident to police in Alexandria the next day. If permitted to testify, C12 and her mother, C13, would speak about the abusive, insensitive and unprofessional treatment that C12 allegedly received at the hands of an officer of the

Ontario Provincial Police who took her complaint and commenced the investigation. The appellants and the intervenor submitted that the proposed evidence fell outside the ambit of the Commission's mandate. They said that the phrase "allegations of historical abuse of young people" in the Order in Council ("OIC") establishing the Commission restricted the subject matter of the Commission to allegations of abuse of young persons in the Cornwall area by persons who were in positions of trust or authority, and which were reported to a public institution a considerable time after the abuse occurred. Commission counsel submitted that the subject matter of the Commission extended to all cases involving allegations of abuse of young people in the Cornwall area, including allegations of sexual assault such as those made by C12, so long as the allegation were made before April 14, 2005, the date on which the Commission was established. The Commissioner determined that the subject matter of the Commission was the more expansive one urged by Commission counsel. The Commissioner refused a request under s. 6(1) of the Act to state a case to the Divisional Court questioning his authority to receive the impugned evidence. The appellants' application to the Divisional Court for an order directing the Commissioner to state such a case was dismissed.

HELD: Appeal allowed. The Commissioner erred in finding that the proposed evidence of C12 and C13 came within the subject matter of the Commission. In so concluding, the Commissioner impermissibly redefined and expanded the scope of his mandate and committed jurisdictional error. Accordingly, the question posed on the stated case as to whether or not evidence of sexual abuse of a young person reported at or near the time it was alleged to have occurred was reasonably relevant to the Terms of Reference given the mandate of the inquiry to "... inquire into and report on the institutional response of the justice system ..." to allegations of historical abuse, was answered in the negative.

Statutes, Regulations and Rules Cited:

Public Inquiries Act, R.S.O. 1990, c. P.41, s. 6

Appeal From:

On appeal from the order of the Divisional Court (James D. Carnwath and Colin L. Campbell JJ., Harvey Spiegel J. dissenting) dated September 17, 2007, and reported at (2007), 229 O.A.C. 238, dismissing the appellants' application for an order directing the Honourable Justice G. Normand Glaude, Commissioner, to state a case.

Counsel:

Gina Saccoccio Brannan, Q.C. for the Ontario Provincial Police.

W. Mark Wallace for the Ontario Provincial Police Association.

David Rose for the Ministry of Community Safety and Correctional Services.

Peter E. Manderville for the Cornwall Community Police Service.

Brian J. Gover and Patricia M. Latimer for the respondent Commissioner.

Leslie M. McIntosh for the Intervenor, the Attorney General for Ontario.

The judgment of the Court was delivered by

1 M.J. MOLDAVER J.A.:-- On April 14, 2005, a Commission known as the Cornwall Public Inquiry was

established pursuant to the *Public Inquiries Act*, R.S.O. 1990, c. P.41 ("Act"). Mr. Justice G. Normand Glaude of the Ontario Court of Justice was appointed as the Commissioner.

2 The Commission has been functioning for the better part of two years. After sorting out a host of preliminary matters, including the issue of which parties would be granted standing, the Commission began hearing evidence in mid-February 2006. As of mid-July 2007, the Commission had heard from sixty-four witnesses, including eleven contextual expert witnesses, nineteen corporate officials representing various public institutions, twenty-eight alleged victims and six relatives of alleged victims.

3 Against that backdrop, it is hard to believe that the Commissioner, his counsel and the parties would, at this late stage, be involved in a debate about the subject matter of the Inquiry and the breadth of the Commissioner's mandate. And yet that is precisely the issue that lies at the core of this appeal.

4 The issue has its genesis in the evidence of two witnesses, identified for privacy purposes as C12 and C13. Commission counsel seeks to lead their evidence before the Commissioner, while the appellants and the Attorney General for Ontario, as intervenor, seek to exclude it.

5 In a nutshell, the impugned evidence arises from an allegation by C12 that on December 8, 1993, when she was sixteen years old and living with her mother in Alexandria, Ontario, she was sexually assaulted at knifepoint by two teenage boys. C12 reported the matter to the police in Alexandria the next day. If permitted to testify, C12 and her mother, C13, will speak about the abusive, insensitive and unprofessional treatment that C12 allegedly received at the hands of an officer of the Ontario Provincial Police who took her complaint and commenced the investigation. C12 will also speak about her loss of confidence in the police, her decision not to proceed with the charges and the emotional difficulties that she has suffered as a result of the incident.

6 The appellants, led by the Ontario Provincial Police ("OPP"), and the intervenor submit that the proposed evidence falls outside the ambit of the Commission's mandate. They say that the phrase "allegations of historical abuse of young people" in the Order in Council ("OIC") establishing the Commission restricts the subject matter of the Commission to allegations of abuse of young persons in the Cornwall area by persons who were in positions of trust or authority, and which were reported to a public institution a considerable time after the abuse occurred. Commission counsel, on the other hand, submits that the subject matter of the Commission extends to all cases involving allegations of abuse of young people in the Cornwall area, including allegations of sexual assault such as those made by C12, so long as the allegations were made before April 14, 2005, the date on which the Commission was established.

7 Following a hearing in which the parties set out their respective positions, the Commissioner determined that the subject matter of the Commission was the more expansive one urged by Commission counsel. In his written reasons dated June 16, 2007, the Commissioner refused a request under s. 6(1) of the Act to state a case to the Divisional Court questioning his authority to receive the evidence of C12 and C13.

8 The OPP and others then applied to the Divisional Court under s. 6(2) of the Act for an order directing the Commissioner to state such a case. In the application to the Divisional Court, the appellants posed the following questions:

Question 1: Do the Terms of Reference of the Cornwall Public Inquiry contemplate the hearing of evidence of an allegation of sexual assault on a 16 year old female by a 16 year old male and a 17 year old male which was reported to the police on the day following the alleged offence given the mandate of the inquiry to "... inquire into and report on the institutional response of the justice system ... to allegations of historical abuse of young people ...?"

Question 2: In deciding to hear the evidence of C12 and C13, did the Commission of Inquiry properly exercise its jurisdiction or exceed its jurisdiction?

9 In a split decision, the Divisional Court dismissed the application to direct the Commissioner to state such a case. The majority concluded that the Commissioner did not err in construing his mandate broadly. They further held that it was open to him to find that the evidence of C12 and C13 was "reasonably relevant" to the subject matter of the Inquiry. Accordingly, they declined to direct the Commissioner to state a case.

10 H. Spiegel J., in dissent, came to the opposite conclusion. In his view, the Commissioner misconstrued the subject matter of the Commission and exceeded his jurisdiction in concluding that the proposed evidence of C12 and C13 came within it. He would have allowed the application and answered the questions on the stated case as follows:

Question 1: Is evidence of sexual abuse of a young person reported at or near the time it was alleged to have occurred reasonably relevant to the Terms of Reference given the mandate of the inquiry to "... inquire into and report on the institutional response of the justice system ... to allegations of historical abuse ...?"

Answer: No.

Question 2: In deciding to hear the evidence of C12 and C13 did the Commissioner properly exercise his jurisdiction or exceed his jurisdiction?

Answer: The Commissioner exceeded his jurisdiction.

11 For reasons that follow, I am respectfully of the view that the Commissioner erred in finding that the proposed evidence of C12 and C13 comes within the subject matter of the Commission. In so concluding, the Commissioner impermissibly redefined and expanded the scope of his mandate and committed jurisdictional error. Accordingly, I would allow the appeal and would answer the questions on the stated case, as framed by the appellants, in the same manner as did Spiegel J.

RELEVANT STATUTORY PROVISIONS

12 Section 6 of the Act states:

6.(1) Where the authority to appoint a commission under this Act or the authority of a commission to do any act or thing proposed to be done or done by the commission in the course of its inquiry is called into question by a person affected, the commission may of its own motion or upon the request of such person state a case in writing to the Divisional Court setting forth the material facts and the grounds upon which the authority to appoint the commission or the authority of the commission to do the act or thing are questioned.

(2) If the commission refuses to state a case under subsection (1), the person requesting it may apply to the Divisional Court for an order directing the commission to state such a case.

(3) Where a case is stated under this section, the Divisional Court shall hear and determine in a summary manner the question raised.

13 The relevant parts of the OIC dated April 14, 2005, which created the Cornwall Public Inquiry, state:

WHEREAS allegations of abuse of young people have surrounded the City of Cornwall and its citizens for many years. The police investigations and criminal prosecutions relating to these allegations have concluded. Community members have indicated that a public inquiry will

encourage individual and community healing;

AND WHEREAS under the *Public Inquiries Act*, R.S.O. 1990, c. P.41, the Lieutenant Governor in Council may, by commission, appoint one or more persons to inquire into any matter connected with or affecting the good government of Ontario or the conduct of any part of the public business thereof or the administration of justice therein or any matter of public concern, if the inquiry is not regulated by any special law and if the Lieutenant Governor in Council considers it desirable to inquire into that matter;

AND WHEREAS the Lieutenant Governor in Council considers it desirable to inquire into the following matters. The inquiry is not regulated by any special law;

THEREFORE, pursuant to the *Public Inquiries Act*:

Establishment of the Commission

1. A Commission shall be issued effective April 14, 2005, appointing the Honourable G. Normand Glaude as a Commissioner.

Mandate

2. The Commission shall inquire into and report on the institutional response of the justice system and other public institutions, including the interaction of that response with other public and community sectors, in relation to:
 - (a) allegations of historical abuse of young people in the Cornwall area, including the policies and practices then in place to respond to such allegations, and
 - (b) the creation and development of policies and practices that were designed to improve the response to allegations of abuse

in order to make recommendations directed to the further improvement of the response in similar circumstances.

3. The Commission shall inquire into and report on processes, services or programs that would encourage community healing and reconciliation in Cornwall.
4. The Commission may provide community meetings or other opportunities apart from formal evidentiary hearings for individuals affected by the allegations of historical abuse of young people in the Cornwall area to express their experiences of events and the impact on their lives.

ANALYSIS

14 I begin my analysis by referring in more detail to the reasons of the Commissioner for refusing to state a case on the issue whether he had jurisdiction to hear the evidence of C12 and C13. The appellants' position before the Commissioner was that the term "historical abuse of young people" in para. 2 of the OIC restricts the scope of the Inquiry to situations where the abuse complained of occurred to a child, by a person in authority, and which was only reported to an institution much later. In contrast, Commission counsel took the view that the word "historical" means abuse that occurred prior to April 14, 2005, the date of the OIC.

15 The Commissioner concluded that the proposed evidence came within the subject matter of the Inquiry and for that reason it was within his jurisdiction to admit it. This conclusion is made clear at p. 4 of his reasons where

he defined the issue confronting him as follows:

Finally, I should note that the parties did make submissions with respect to relevance of the evidence in question.

In my view, the question before me is *one of jurisdiction only* as relevance would go to issues such as admissibility generally and the weight to be given to such evidence, which is not the subject matter of a section 6 application². [Emphasis added]

16 In reaching this conclusion, the Commissioner expressed the opinion that both of the competing interpretations of "historical" that were advanced by the parties "have merit and that they are not mutually exclusive but are quite compatible." He acknowledged that "the main focus of Parliament" in appointing the Inquiry "was to highlight the cases that had been in the spotlight in the community at the time of the decision to convene this Inquiry; hence, the reference to allegations of historical abuse." More will be said later in these reasons about the nature of the cases that were in the spotlight in Cornwall at the time of the decision to convene the Inquiry. Suffice to say at this point that these cases involved allegations of historical abuse of young people by persons in authority or positions of trust.

17 Having identified the main focus of his mandate, the Commissioner was of the view that such mandate should not be read as being limited to a consideration of those particular cases:

I am of the view that while Parliament certainly indicated that historical allegations of abuse would be a central part of the Inquiry, the mandate certainly does not read to limit it to those specific cases.

To interpret the mandate in such a way is unduly restrictive and contrary to the spirit of the preamble and to section 3 of the Order in Council.

18 On the Commissioner's view of the expansive mandate created by the OIC, the proposed evidence of C12 and C13 came within the terms of reference and as such, it was clearly admissible.

19 The majority of the Divisional Court, in dismissing the appellants' application to direct the Commissioner to state a case, correctly articulated the principles that govern applications under s. 6 of the Act. These principles were first set out by Morden J. in *Re Royal Commission into Metro Toronto Police Practices* (1975), 10 O.R. (2d) 113 (Div. Ct.) and were later approved by Howland J.A. in *Re Bortolotti et al. and Ministry of Housing et al.* (1977), 15 O.R. (2d) 617 (C.A.). Howland J.A. held at p. 623 that applications under s. 6(1) of the Act are confined to matters of jurisdiction only:

Section 6(1) of the *Public Inquiries Act, 1971* no longer provides for a case to be stated as to the "validity of any decision, order, direction or other act of a commissioner". I am in agreement with the conclusion of Morden J., in *Re Royal Com'n into Metropolitan Toronto Police Practices and Ashton* (1975), 10 O.R. (2d) 113 at pp. 119-21, 64 D.L.R. (3d) 477 at pp. 483-5, 27 C.C.C. (2d) 31, that "authority" in s. 6(1) means "jurisdiction", and that *the statutory powers of the Court are now "supervisory only, i.e., confined to seeing to it that the Commission does not exceed its jurisdiction. They do not extend to enable the Court to substitute its discretion for that of the Commission where the latter has made a decision lying within the confines of its jurisdiction."* [Emphasis added]

20 Howland J.A. went on at pp. 623-24 to explain how the court on a s. 6 application is to assess whether the Commission has committed a jurisdictional error:

An error of jurisdiction arises where the Commission has not kept within the subject-matter of the inquiry as set forth in Order in Council 2959/76. In the exercise of its powers under s. 6(1) of the Public Inquiries Act, 1971, the Divisional Court has a supervisory role to perform respecting errors of jurisdiction. In considering whether the Commission has exceeded or has declined its jurisdiction, it is necessary to determine what evidence is admissible before the Commission ...

In my opinion, any evidence should be admissible before the Commission which is reasonably relevant to the subject-matter of the inquiry, and the only exclusionary rule which should be applicable is that respecting privilege as required by s. 11 of the Public Inquiries Act, 1971. [Emphasis added]³

21 *Bortolotti* thus directs that an error of jurisdiction occurs when the Commission admits evidence that is not reasonably relevant to the subject matter of the inquiry. Howland J.A. addressed the meaning of the phrase "reasonably relevant" at pp. 624-25:

Having determined that the test of reasonable relevance should be applied, it is necessary to consider the meaning of the words "reasonably relevant".

The definition of "relevant" which has been commonly cited with approval by the Courts is that in *Stephen's Digest of the Law of Evidence*, 12th ed., art. I. It states that the word means that "any two facts to which it is applied are so related to each other that according to the common course of events one either taken by itself or in connection with other facts proves or renders probable the past, present or future existence or non-existence of the other". *In concluding what evidence is admissible as being reasonably relevant to a commission of inquiry, I would adopt the statement in McCormick on Evidence, 2nd ed., at p. 438: "Relevant evidence, then, is evidence that in some degree advances the inquiry, and thus has probative value ..."*

In deciding whether evidence is reasonably relevant it is necessary to scrutinize carefully the subject-matter of the inquiry as set forth in Order in Council 2959/76. This is the governing document ... [Emphasis added]

22 Having correctly set out the applicable legal principles from *Bortolotti* at paras. 14-17 of their reasons, the majority did not go on to perform the review function that they had identified, namely, "to scrutinize carefully the subject matter of the inquiry as set forth in the Order in Council". Instead, the majority took a deferential approach to reviewing the Commissioner's decision on the subject matter of the Inquiry and simply concluded that it was "open to him to place a different construction on 'historical' and 'abuse' as set out in the Terms of Reference in order to carry out his mandate" (at para. 20).

23 In my respectful view, the majority erred in taking a deferential approach. No deference is owed to the Commissioner on the issue of the definition of the subject matter of the Inquiry. The Commissioner's jurisdiction is limited to that subject matter, which is prescribed by the legislature in the OIC creating the Commission. If the Commissioner defines the subject matter too broadly or too narrowly, he or she will have rewritten the OIC and redefined the terms of reference. That, of course, is impermissible and constitutes jurisdictional error.

24 In my view, the Commissioner misconstrued the OIC and in so doing he enlarged the subject matter of the Inquiry and conferred a much wider jurisdiction upon himself than the legislature contemplated. In interpreting the OIC as he did, I believe that the Commissioner committed four errors:

- (1) he failed to consider the context and circumstances in which the Commission was established;

- (2) he failed to consider relevant wording in the preamble to the OIC that provided valuable insight into the nature and type of allegations at issue;
- (3) he failed to construe wording used in the OIC harmoniously and with reference to the document as a whole;
- (4) by reason of the first three errors, he misidentified the subject matter of the Inquiry and ascribed to himself a mandate that is beyond anything contemplated by the legislature.

25 I now propose to address each of the four errors.

(1) Failure to consider the context and circumstances leading to the creation of the Commission

26 The starting point for interpreting the Commissioner's mandate is a consideration of the terms of the OIC: *Bortolotti*, p. 623. In this case, however, the words of the OIC are not plain and obvious and do not admit of only one meaning. The Commissioner essentially acknowledged this difficulty at the outset of his analysis with his comment that the parties' competing interpretations of the word "historical" as used in the OIC both "have merit" and are "quite compatible". Likewise the word "abuse" - which appears in the paragraphs describing the mandate of the Commissioner and in the preamble - is capable of being broadly or narrowly construed, and yet the term is not defined in the OIC.

27 Given the unclear language used in the OIC, the Commissioner was entitled to and should have looked beyond the four corners of the document for assistance in interpreting its meaning. Had he done so, he would have gained valuable insight into the scope of his mandate from the background circumstances and context in which the Commission was created.

28 In upholding the Commissioner's interpretation of the subject matter of the Commission, the majority of the Divisional Court also failed to consider the background circumstances that led to the establishment of the Inquiry. With respect, I believe that it was necessary to have careful regard to these circumstances when defining the subject matter of the Inquiry.

29 The background circumstances that gave rise to calls for this public inquiry are referred to in summary form in the first two sentences of the preamble to the OIC as follows:

WHEREAS *allegations of abuse of young people* have surrounded the City of Cornwall and the citizens for many years. *The police investigations and criminal prosecutions relating to these allegations have concluded*⁴. [Emphasis added]

30 The factual matrix surrounding "the allegations of abuse of young people" in the City of Cornwall and the details of the completed "police investigations and criminal prosecutions relating to them" is described in the affidavit of acting Detective Superintendent Colleen McQuade of the OPP, dated July 18, 2007. In her affidavit, Det. Supt. McQuade details the background and history of allegations of historical sexual abuse involving children in the Cornwall area by persons in authority or positions of trust and how those allegations ultimately came to public attention. She refers to an initial complaint made in 1992 by a thirty-four year old Cornwall resident who claimed that, as a child, he had been sexually abused by a priest and a probation officer. She comments on the charges that were laid in relation to those allegations and how those charges eventually came to be withdrawn. She then details steps taken in 1994 by a member of the Cornwall Police Service that resulted in the public exposure of the original allegations, including the circumstances surrounding the withdrawal of charges relating to them, as well as further allegations of historical sexual abuse involving the priest made by two other adult complainants.

31 Det. Supt. McQuade's affidavit also outlines the repercussions arising from these allegations, including charges that were laid "under the *Police Act*" against the Cornwall police officer who disclosed the pertinent information, as well as an ensuing civil action that the officer brought against a number of "named individuals and organizations including the former and current Chiefs of Police of the Cornwall Police Service". According to Det.

Supt. McQuade, in the context of his civil suit, the Cornwall police officer and his lawyer "began to collect information regarding other alleged victims of child sexual abuse, a clan of pedophiles in the Cornwall area, a conspiracy [by the priest and the probation officer] and their lawyer ... in the fall of 1993, to murder [the officer] and the members of his family, and a conspiracy to obstruct justice in late summer 1993 by prominent members of the Cornwall community including, amongst others, [the lawyer of the priest and the probation officer], the Crown Attorney, the Bishop of the Diocese and the Chief of Police".

32 Det. Supt. McQuade explains that this information was delivered to the Chief of Police of the London Police Service in late 1996 and, by early 1997, it had found its way to the OPP and the Ministry of the Attorney General. Eventually, the Regional Director of Crown Attorneys for the Eastern Region of Ontario "requested that the OPP investigate the myriad of allegations contained in the information which [the Cornwall police officer] had provided". This in turn led to the commencement in July 1997 of an investigation by the OPP "into allegations of historic sexual abuse in the Cornwall area known as 'Project Truth'". That project ultimately resulted in "fifteen (15) persons being charged with one hundred and fifteen (115) offences involving thirty-four (34) alleged victims". All criminal proceedings arising from the project concluded on October 18, 2004. On November 4, 2004, the Premier of Ontario "announced that the Government of Ontario was committed to calling a public inquiry into Project Truth".

33 In my view, this information fleshes out the meaning of the first two sentences of the preamble to the OIC and makes it clear that the "allegations of abuse of young people" that had "surrounded the City of Cornwall and its citizens for many years" refer to the allegations of historical sexual abuse of young people by persons in authority or positions of trust that were the focus of Project Truth and the "police investigations and criminal prosecutions" in relation to those allegations that had now concluded.

34 I am fortified in this interpretation of the preamble to the OIC by various Hansard extracts that both pre-date and post-date the formation of the Commission on April 14, 2005. Three of the relevant extracts pre-date the OIC and the other post-dates it.

35 The first relevant Hansard extract is from April 20, 2004, when the MPP for Stormont-Dundas-Charlottenburgh, Mr. Jim Brownell, posed the following question to the Attorney General:

During the past decade in my riding of Stormont-Dundas-Charlottenburgh, there have been numerous cries for an independent public inquiry into childhood sexual abuse allegations and cover-ups in Cornwall. As a candidate in the last election, I wholeheartedly supported a public inquiry. The lives of many people have been touched by the issues surrounding these allegations. The citizens, police forces, public organizations and those who work in the judiciary system are in need of a sense of worth and community. A thorough investigation will have positive consequences for those who work to uphold pride, sensibility and the spirit of community in my riding.

36 The Attorney General Michael Bryant responded:

There is right now a criminal proceeding that is underway. ... A public inquiry cannot be held at this time, while this criminal proceeding is underway.

...

When the criminal proceeding is complete, at that point, we will be relying upon that member to continue to be an advocate on behalf of his community. ...

37 Another Hansard extract of significance is from November 4, 2004, when MPP Peter Kormos from Niagara Centre posed the following question to the Premier:

A cloud continues to hang over the city of Cornwall because you haven't kept your promise to hold a full public inquiry into the Project Truth investigation. It's a troubling story because, as you know, a citizens' committee itself uncovered evidence of sexual assaults on close to 50 victims, some of them as young as 12 years old. The OPP subsequently laid 115 charges against 15 people, yet only one person was ever convicted, and most of the cases were stayed by the crown because of prosecutorial delay.

38 In response to MPP Kormos' query, Premier Dalton McGuinty expressed his commitment to holding such an inquiry after the expiry of the appeal period in the criminal proceedings.

39 In Hansard from November 18, 2004, MPP Bronwell made the following remarks:

... On November 4, 2004, the Premier stood before this House and committed to the people of my riding that a full public inquiry would be called in the Project Truth investigations once all criminal proceedings were concluded.

I'm happy to announce today that on Monday, November 15, 2004, the last of the criminal proceedings were concluded, and yesterday the Premier, myself and the Attorney General, Michael Bryant, committed to holding a full public inquiry in this case. ...

The Project Truth investigations and subsequent criminal proceedings have clouded over the Cornwall area for the past decade. With the announcement of this public inquiry, the truth of allegations of misconduct and alleged cover-ups will be able to come to light. The people of Cornwall and area will be able to lift this cloud of allegations and have these investigations come to a conclusion. [Emphasis added]

40 The final relevant Hansard extract is from April 19, 2005, when MPP Brownell expressed his thanks to the Attorney General and Premier for ordering the Inquiry:

First let me congratulate and thank you and the Premier for the realization of a full public inquiry into the sex abuse scandal that has shaken the community of Cornwall and area. I was proud to be with you yesterday at city hall in Cornwall to see the looks of relief on the faces of the victims as it became clear that the McGuinty team was fulfilling its promise to hold an inquiry. From the formation of this government, you have worked tirelessly with me and with those involved in the community and area to see that this long-standing concern was addressed.

41 The Attorney General responded as follows:

Yes, with the public inquiry, under the *Public Inquiries Act*, he has all the tools at his disposal to leave no stone unturned and to provide recommendations that ultimately, we hope, will lead to some reconciliation and healing for the people of Cornwall. Along the way, we will work with the commission, as the commissioner sees fit, to ensure that victims get the services they need during what will inevitably be a very painful time for them. *Ultimately, with this public inquiry, we will finally get to the bottom of what happened and will get recommendations so we can proceed better in the future, in a way that not only can everybody have confidence in the system, but the victims can feel that justice has been done. [Emphasis added]*

42 In my view, these extracts are telling. They provide valuable insight into the background and purpose of the OIC. They were available to the Commissioner and the Divisional Court as an interpretative aid and should have been used in determining the legislative purpose for creating the Commission: see *Re Canada 3000 Inc.; Inter-*

Canadian (1991) Inc. (Trustee of), [2006] 1 S.C.R. 865 at paras. 57-59; *Bruker v. Marcovitz*, [2007] S.C.J. No. 54, 2007 SCC 54 at paras. 3-8.

43 Considered in conjunction with the factual matrix outlined by Det. Supt. McQuade in her affidavit, these Hansard extracts provide clear evidence of the context and circumstances in which the Commission was created. I would summarize them as follows:

- * a clan of pedophiles allegedly operated in the Cornwall area for a very long period of time;
- * prominent local citizens allegedly conspired to cover up the activities of the clan of pedophiles; and
- * Project Truth and the prosecutions it spawned failed to generate satisfactory results and a cloud of suspicion and mistrust continues to hang over the citizens of Cornwall.

44 Had the Commissioner or the majority of the Divisional Court referred to the Hansard extracts and the factual matrix as outlined by Det. Supt. McQuade in her affidavit filed with the Divisional Court, they would have recognized that the legislative intention in appointing the Inquiry was not to investigate the institutional response to all allegations of abuse in the Cornwall area that pre-date April 14, 2005, including allegations of sexual assault such as those made by C12. Rather, the legislative intention in ordering the Inquiry was more focused: the legislature sought to have the Commissioner investigate the institutional response to allegations of historical sexual abuse of young people in the Cornwall area by persons in authority or positions of trust and recommend ways in which those institutions could better respond to this type of allegation.

(2) Failure to consider relevant wording in the preamble

45 As set out above, the first two sentences of the preamble to the OIC state:

WHEREAS allegations of abuse of young people have surrounded the City of Cornwall and its citizens for many years. The police investigations and criminal prosecutions relating to these allegations have concluded.

46 In defining the subject matter of the Inquiry in broad terms, the Commissioner paid particular attention to the first sentence of the preamble. He mentioned this sentence in his reasons with a view to substantiating his conclusion that the legislature had chosen to give him a wide mandate. Thus, he noted that there was no reference in the preamble to "allegations of abuse at the hands of persons in authority" and that "the preamble clearly contemplates a general inclusive statement, not limited to historical allegations, but referring to 'allegations of abuse of young people [that] have surrounded the City of Cornwall'..."

47 With respect, the Commissioner's analysis ignores the second sentence of the preamble. As noted, that sentence narrows the so-called "general inclusive" allegations of abuse referred to in the first sentence to those that formed the subject matter of "police investigations and criminal proceedings related to these allegations [that] have concluded." Such allegations related to historical sexual abuse of young people in the Cornwall area by persons in authority or positions of trust that were the subject of the Project Truth investigations.

48 The Commissioner's failure to consider the second sentence of the preamble was serious and in my view it skewed his subsequent analysis of the subject matter of the Commission.

(3) Failure to construe the wording of the OIC harmoniously and with reference to the document as a whole

49 In determining that his mandate entitled him to look into institutional responses relating to any and all allegations of sexual assault involving young people in the Cornwall area prior to April 14, 2005, the

Commissioner focused heavily on para. 2(b) of the OIC. For convenience, para. 2 is again reproduced:

Mandate

2. The Commission shall inquire into and report on the institutional response of the justice system and other public institutions, including the interaction of that response with other public and community sectors, in relation to:
 - (a) allegations of historical abuse of young people in the Cornwall area, including the policies and practices then in place to respond to such allegations, and
 - (b) the creation and development of policies and practices that were designed to improve the response to allegations of abuse

in order to make recommendations directed to the further improvement of the response in similar circumstances.

50 The Commissioner noted that para. 2(b) contains no reference to "historical" abuse; rather, it refers to "policies and practices that were designed to improve the response to allegations of abuse". In the Commissioner's view, that provision, properly construed, calls for a "broad and liberal interpretation" as opposed to one that is restricted to "complaints [of historical abuse] reported by adults."

51 With respect, I believe that the Commissioner erred in reading para. 2(b) in isolation and in construing the words "allegations of abuse" differently from the words "allegations of historical abuse" used elsewhere in para. 2 and in other provisions of the OIC. In my view, he should have construed those phrases harmoniously and with reference to the document as a whole. Had he done so, I am satisfied for several reasons that he would have treated the words "allegations of historical abuse" and "allegations of abuse" synonymously.

52 First, as I have already pointed out, the Commissioner misconstrued the words "allegations of abuse" in the first sentence of the preamble. Had he read those words in conjunction with the second sentence of the preamble, he would have realized that the "allegations of abuse" were the allegations of abuse that formed the subject matter of Project Truth, i.e. allegations of historical sexual abuse of young people in the Cornwall area by persons in authority or positions of trust.

53 Second, it must be noted that para. 2, although divided into sub-paragraphs, is one complete sentence. Paragraph 2(b) must be read together with the language in para. 2(a) and with the concluding words in that provision, which refer both explicitly and implicitly to allegations of historical abuse. Paragraph 2(a) speaks of "allegations of *historical* abuse ... including *the policies and practices then in place* to respond to such allegations" [Emphasis added]. The concluding language of para. 2 speaks of "recommendations directed to further improvement of the response *in similar circumstances*" [Emphasis added]. Surely "similar circumstances" refers to allegations of historical abuse, as the appellant suggests, and not allegations of sexual assault of any kind, as Commission counsel suggests.

54 Third, the Commissioner failed to have regard to para. 4 of the OIC. Paragraph 4 is a free-standing provision that provides for informal opportunities "for individuals affected by *the allegations of historical abuse* of young people in the Cornwall area" to express their views and feelings [Emphasis added]. That provision dovetails with the third sentence in the preamble to the OIC and it reflects the view of community members that "a public inquiry will encourage individual and collective healing". If the subject matter of the inquiry were meant to include allegations of sexual assault such as those made by C12, it is illogical that the legislature would have restricted the community meetings and other informal opportunities to "individuals affected by allegations of historical abuse of young people in the Cornwall area". And yet, para. 4 is clearly restricted in that fashion.

55 When para. 2 of the OIC is read as a whole and in conjunction with the other provisions of the OIC including the preamble, it is apparent that the legislature was directing the Commissioner to look at institutional policies and practices - past, present and future - in responding to allegations of historical abuse of young people in the Cornwall area. Such allegations would include those that were the subject of the Project Truth investigation as well as any similar allegations of historical abuse of young people by persons in authority or positions of trust that were not investigated by Project Truth or that came to light after the Project Truth investigation ended. This interpretation harmonizes the meaning of the word "allegations" throughout the OIC, including its meaning in the preamble, para. 2 and para. 4.

56 In contrast, reading para. 2(b) as the Commissioner does leads to the untenable conclusion that, by virtue of this clause, the legislature intended the Commissioner to compare and contrast present-day institutional responses to any and all allegations of abuse, including but not limited to the allegations of historical abuse, with past institutional responses limited solely to allegations of historical abuse under para. 2(a). With respect, that interpretation is not logical. Moreover, it isolates para. 2(b) and promotes it from a clause that describes one discrete component of the Commissioner's mandate into a clause that single-handedly broadens his mandate beyond all proportions - something which in my view, the legislature did not contemplate. That leads me to the fourth error.

(4) Failure to interpret the OIC in a manner that was reasonable and within the contemplation of the legislature

57 The Commissioner identified the primary focus of his mandate as follows:

In reviewing the mandate, it is clear that the main focus of Parliament was to highlight the cases that had been in the spotlight in the community at the time of the decision to convene this Inquiry; hence, the reference to allegations of historical abuse.

...

I am of the view that while Parliament certainly indicated that historical allegations of abuse would be a central part of the Inquiry, the mandate certainly does not read to limit it to those specific cases.

58 The Commissioner further observed that the Commission was "nearing the end of the victims' evidence and it is not the intention of this Inquiry to now open the floodgates, or to widen the mandate that I have set to date."

59 With respect, these words of the Commissioner do not sit well with the expansive view he took of his mandate. As already indicated, by interpreting the OIC as he did, the Commissioner ascribed to himself a mandate that is truly breathtaking in its scope. By defining the words "historical" as he did, the Commissioner gave himself jurisdiction to assess the response of various institutions (past, present and future), including the justice system, the police, Children's Aid Societies and the like, to any and all allegations of sexual abuse made by young people in the Cornwall area, including historical allegations of abuse such as those investigated by Project Truth and allegations of sexual assault, such as those reported by C12, presumably from the date of Cornwall's inception in 1834 to April 14, 2005, the date on which the Commission was formed.

60 Such a wide-ranging mandate is inconsistent with the Commissioner's acknowledgement that the "main focus of Parliament was to highlight the cases that had been in the spotlight in the community at the time of the decision to convene this Inquiry; hence, the reference to allegations of historical abuse." I fail to see how, on the Commissioner's view of his mandate, he could reasonably hope to keep the floodgates from opening. If C12's evidence (which falls outside the Commissioner's view of the main focus of the Inquiry) were to be admitted, it would open the door to similar testimony from hundreds of complainants and their family members who might wish to come forward and speak of their experiences with the police and other institutions, both pro and con, not to

mention the hundreds of judicial officers, police officers, CAS workers and the like who would no doubt wish to respond.

61 In short, the Commissioner's view of his mandate runs the risk of standing the so-called "main focus" of the Inquiry on its head and creating an unwieldy, if not unmanageable, mega-inquiry that could go on for years at great public expense. Such an outcome would diminish the value to be gained from the important work that the legislature had assigned to the Commissioner.

Conclusion on the Subject Matter of the Commission

62 Properly construed, the OIC empowers the Commissioner to look into and report on institutional responses - past, present and future - relating to allegations of historical abuse of young people in the Cornwall area by persons in authority or positions of trust, including the allegations investigated in Project Truth as well as similar such allegations. Allegations that were reported at the time of the abuse, or years later, or both, would fall within this mandate. In other words, the Commissioner can look at the response of various institutions to allegations made and reported in the 1950s, as well as their response to allegations made for the first time or renewed in the 1990s⁵.

63 C12's evidence does not come within the subject matter assigned to the Commissioner by the terms of the OIC. With respect, the Commissioner erred in holding otherwise. The same holds true for C13's evidence. For these reasons, Questions 1 and 2 of the stated case should be answered as Spiegel J. did in his dissenting opinion.

Is the evidence of C12 and C13 reasonably relevant to the subject matter of the Inquiry?

64 Although the evidence of C12 and C13 falls outside the subject matter of the Inquiry, it could nevertheless be admissible if it were found to be "reasonably relevant to the subject matter of the inquiry": *Bortolotti* at p. 624. It would meet that test if it had a bearing on an issue to be resolved and could reasonably, in some degree, advance the inquiry. A decision to admit evidence on this basis will attract a high degree of deference from a reviewing court and will be judged against a standard of reasonableness.

65 Affording a high degree of deference to such a ruling makes eminent good sense. Otherwise, Commissions would constantly be in a state of "stop and go" as disgruntled parties trundled off to the Divisional Court to challenge evidentiary rulings with which they disagreed. If the Commissioner believes that an item or body of evidence, though peripheral to the subject matter of the Commission, bears on an issue to be resolved and will in some degree advance the inquiry, so long as the Commissioner's view is reasonably based, the admission of the evidence will not constitute jurisdictional error. (For a general discussion of the standard of reasonableness see *Canada (Director of Investigation and Research, Competition Act) v. Southam Inc.*, [1997] 1 S.C.R. 748 at paras. 56-62 and *Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247 at paras. 46-56).

66 The Commissioner made no finding on whether the evidence of C12 and C13 was reasonably relevant to the subject matter of the Inquiry. To be precise, he did not turn his mind to the issue, having concluded that their evidence came within his mandate and was thus clearly admissible.

67 In circumstances where the Commissioner has not ruled on whether the proffered evidence is reasonably relevant to the subject matter of the Inquiry, I would normally refrain from commenting on whether the evidence is capable of passing the deferential test of "reasonably relevant" as set out in *Bortolotti*. However, the issue was canvassed by the parties in oral argument and I think it would be helpful to address it, in an effort to avoid further delays.

68 Assuming that the evidence of C12 and C13 stands alone and is not the prelude to an avalanche of other such evidence from like complainants and their family members, I fail to see how it could reasonably advance the inquiry that the Commission had been asked to perform. Without wishing to minimize the seriousness of C12's complaint or the gravity of her allegations against the investigating officer, her evidence, if true, essentially comes

down to one person having been treated inappropriately by a police officer in a case where she allegedly was sexually assaulted by other teenagers. Her evidence does not speak to systemic problems that may or may not exist in the way police respond to allegations of sexual abuse of young people by persons in a position of trust or authority. In other words, it has no probative value in relation to the Commissioner's mandate.

69 On the other hand, if C12's evidence does not stand alone but is a prelude to an avalanche of similar evidence - the reception of which is likely to be very time-consuming, hotly contested and liable to deflect the Commissioner from the task at hand - any marginal probative value that such evidence might have would, in my view, be greatly outweighed by its prejudicial effect. As such, it would likewise not pass the "reasonably relevant" test.

70 In so concluding, I do not wish to leave the impression that there can be no meaningful overlap, in so far as institutional responses are concerned, between cases such as the one described by C12 and the cases such as those investigated by Project Truth. Nor am I suggesting that allegations of historical sexual abuse of young people by persons in authority or positions of trust are a breed apart and entirely distinct from all other allegations of sexual abuse, including allegations of sexual assault committed by teenagers. By way of example, studies that have explored the systemic responses of institutions such as the police to general allegations of abuse made by young people might well pass the reasonable relevance test, even though the subject matter of the study will not be precisely the same as the subject matter of this Inquiry.

71 For these reasons, I am of the view that the proposed evidence of C12 and C13 is not reasonably relevant to the subject matter of the Inquiry and should therefore not be received.

72 In conclusion, I would answer the questions in the stated case as framed by the appellants as follows:

Question 1: Do the Terms of Reference of the Cornwall Public Inquiry contemplate the hearing of evidence of an allegation of sexual assault on a 16 year old female by a 16 year old male and a 17 year old male which was reported to the police on the day following the alleged offence given the mandate of the inquiry to "... inquire into and report on the institutional response of the justice system ... to allegations of historical abuse of young people...?"

Answer: No.

Question 2: In deciding to hear the evidence of C12 and C13, did the Commission of Inquiry properly exercise its jurisdiction or exceed its jurisdiction?

Answer: The Commissioner exceeded his jurisdiction.

M.J. MOLDAVER J.A.

D.H. DOHERTY J.A.:-- I agree.

E.E. GILLESE J.A.:-- I agree.

cp/e/ln/qlhjk/qljnn/qltxp

1 The first question on the stated case as set out by Spiegel J. is worded slightly differently than the first question as framed by the appellants. In the Commissioner's factum filed with the Divisional Court, he also framed questions that he would have stated in the event he were directed to do so by the Divisional Court. It

is not necessary to set out these questions; although the Commissioner included much more detail, the ultimate questions he raised do not differ in any significant way from the questions posed by the appellants.

2 The Commissioner's statement that matters of relevance, such as "admissibility generally and the weight to be given to such evidence" are "not the subject matter of a section 6 application" is not entirely accurate. As was held by this court in *Re Bortolotti et al. and the Ministry of Housing et al.*, discussed *infra*, such matters can give rise to jurisdictional error if the proposed evidence is not "reasonably relevant" to the subject matter of the inquiry.

3 Section 11 reads:

11. Nothing is admissible in evidence at an inquiry that would be inadmissible in a court by reason of any privilege under the law of evidence.

4 More will be said about these two sentences shortly. For now, I note that in his reasons purporting to identify the subject matter of the inquiry, the Commissioner made no mention of the second sentence.

5 I do not agree with the dissenting opinion of Spiegel J. to the extent that he concluded at para. 31 that the term "historical" in para. 2(a) of the OIC imports a requirement that there must necessarily be a lapse of time between the time of the abuse and the time of reporting for the allegation to be considered as historical.

[Indexed as: MacDonald v. Ontario (Cornwall Public Inquiry, Commissioner)]

**MacDonald v. Glaude; Citizens for Community
Renewal et al., Interveners**

271 D.L.R. (4th) 436

Ontario Superior Court of Justice, Divisional Court
Court File No. 357/06

Carnwath, Spence and Sachs JJ.

Heard: August 14, 2006

Judgment rendered: September 5, 2006

Public inquiries — Jurisdiction — Provincial government appointing commission to inquire into institutional response of justice system to allegations of historical sexual abuse — Commissioner ruling that alleged victims could give evidence before commission — Applicant applying for order quashing commissioner's ruling — Commissioner clearly stated intention not to make specific findings of wrongdoing — Commissioner's assessments of credibility would not be findings that allegations were true, but would be relevant to investigation of response of justice system — Commissioner's ruling did not turn commission into investigation of applicant's criminal conduct — Application for judicial review of commissioner's ruling dismissed.

The government of Ontario appointed a commission of inquiry to inquire into and report on the institutional response of the justice system in a city to allegations of historical sexual abuse. The commissioner ruled that alleged victims could be called as witnesses before the inquiry. He stated that although the commission would be reviewing criminal allegations and proceedings, it would not try or re-try the cases and would not make findings expressing an opinion as to criminal or civil responsibility. The applicant, whose conduct would come under scrutiny in the course of the inquiry, applied for an order quashing the commissioner's ruling and for a declaration that the commission had no authority to inquire into specific allegations of sexual abuse or other wrongdoing. In the alternative, he sought an order directing the commissioner to place limits on the examination and cross-examination of the alleged victims.

Held, the application should be dismissed.

If a provincial inquiry was or became a substitute for a criminal investigation, it would be intruding on matters within exclusive federal jurisdiction. However, the commissioner had clearly stated his intention not to make specific findings of wrongdoing; any assessments of credibility that he made would not be the same as finding that an allegation was true, and his ruling did not have the effect of turning the commission into an investigation into the applicant's criminal conduct. The commissioner's purpose was to investigate the response of the justice system and other public institutions to allegations of sexual abuse. In assessing the validity of a [page437] complaint, the commissioner would not be deciding whether it was true, but would be asking what the justice system should have done in response to it.

Cases referred to Consortium Developments (Clearwater) Ltd. v. Sarnia (City) (1998), 165 D.L.R. (4th) 25, [1998] 3 S.C.R. 3, 8 Admin. L.R. (3d) 165, 48 M.P.L.R. (2d) 1, 114 O.A.C. 92, 230 N.R. 343, 40 O.R. (3d)

158n, 83 A.C.W.S. (3d) 118, 39 W.C.B. (2d) 533, 1998 CanLII 762 -- refd to Jakobek v. Toronto Computer Leasing Inquiry, Commissioner (2004), 23 Admin. L.R. (4th) 272, 49 M.P.L.R. (3d) 262, 188 O.A.C. 259 sub nom. Jakobek v. Bellamy, [2004] O.J. No. 2889 (QL) -- refd to Nelles v. Grange (1984), 9 D.L.R. (4th) 79, 42 C.P.C. 109, 46 O.R. (2d) 210, 3 O.A.C. 40, 12 W.C.B. 39 sub nom. Royal Commission of Inquiry into Certain Deaths at the Hospital for Sick Children (Re) -- consd Starr v. Houlden (1990), 68 D.L.R. (4th) 641, 55 C.C.C. (3d) 472, [1990] 1 S.C.R. 1366, 41 O.A.C. 161, 110 N.R. 81, 72 O.R. (2d) 701n, 37 O.A.C. 398n, 20 A.C.W.S. (3d) 354, 9 W.C.B. (2d) 727 -- consd

APPLICATION FOR JUDICIAL REVIEW of a ruling of the commissioner of a provincial inquiry that the commission would hear evidence from alleged victims of sexual abuse.

Raj Anand, for applicant, Father Charles MacDonald.

Brian Gover and Patricia Latimer, for respondent, Honourable G. Normand Glaude, Commissioner of the Cornwall Public Inquiry.

Peter C. Wardle, Dallas Les and Steven Canto, for interveners, Citizens for Community Renewal, Victims Group and The Men's Project.

John E. Callaghan, for interveners, Cornwall Community Police Service and Cornwall Police Services Board.

Gina Brannan, Q.C., for intervener, Ontario Provincial Police.

W. Mark Wallace, for intervener, Ontario Provincial Police Association.

Leslie M. McIntosh, for intervener, Attorney General for Ontario.

The judgment of the court was endorsed on the record as follows:

BY THE COURT:--

Introduction

[1] The Applicant applied to judicially review a ruling of the Commissioner of the Cornwall Public Inquiry. In that ruling, the Commissioner determined that the Commission could hear evidence from the alleged victims.

[2] The application for judicial review was heard and dismissed on August 14, 2006, with reasons to follow. These are those reasons. [page438]

Issues Raised

[3] The Applicant submitted that the Commissioner erred in law and exceeded his jurisdiction in three ways:

1. The Commissioner failed to recognize that by hearing specific allegations of criminal wrongdoing he would be embarking upon an inquiry which is in pith and substance a substitute police investigation against Father MacDonald and therefore outside the scope of a provincial commission of inquiry and the Commission's mandate;
2. The Commissioner failed to recognize that he will have to assess the truth of the allegations -- both because it will be necessary in order to determine the adequacy of the institutional response and because the other parties to the

Commission could delve into the truthfulness of the allegations -- thereby exceeding the Commission's mandate which prevents it from making findings of civil or criminal responsibility; and

3. The Commissioner's ruling is unreasonable because the prejudicial effects of the evidence outweighs its probative value, since hearing such evidence will leave Father MacDonald factually guilty in the perception of the public, in a situation where the institutional response can be assessed through less prejudicial means.

Relief Requested

[4] The applicant requested an order in the nature of certiorari quashing or setting aside the Commissioner's Ruling and a declaration that the Commission has no authority to inquire into specific allegations of sexual abuse or other wrongdoing made by the alleged victims against Father MacDonald. In the alternative, the Applicant requested that this Court direct the Commissioner to place limits in advance on the examination and cross-examination of the alleged victims.

Standard of Review

[5] All parties agreed that the applicable standard of review on this application was correctness.

Has the Commissioner's Ruling Converted the Inquiry Into One that is in Pith and Substance a Substitute Police Investigation?

[6] There was no dispute that the Commission is validly constituted and that its mandate is intra vires the provincial government. [page439]

The Terms of Reference setting out that mandate require the Commission to inquire into and report on the institutional response of the justice system and other public institutions to allegations of historical sexual abuse against young people in Cornwall. The Commissioner found that "the calling of alleged victims is essential in order for the Commission" to fulfill its mandate. However, he also made it clear that while the Commission would be reviewing "criminal allegations, investigations and criminal proceedings, it is not allowed and does not intend to try or re-try the cases and make findings expressing an opinion as to criminal or civil responsibility in law".

[7] There is no question that if a provincial inquiry is or becomes what amounts to a substitute criminal investigation, then it would be intruding on matters that are exclusively within federal jurisdiction, namely criminal law and procedure. However, it is equally true, as this Court noted in *Jakobek v. Toronto (Computer Leasing Inquiry)*, [2004] O.J. No. 2889 (QL), that a provincial inquiry that is:

in pith and substance directed to matters within provincial jurisdiction may proceed despite the possible and incidental effects on the federal criminal power. An otherwise validly constituted provincial or municipal inquiry will not be rendered ultra vires if, as part of its larger mandate, it investigates or makes findings of misconduct, provided that such findings are necessary to fulfill the purpose of the inquiry, as described in the terms of reference, or properly relevant to the broader purposes of the inquiry, as set forth in the terms of reference. (para. 18, cites omitted)

[8] In this case, unlike in *Jakobek*, the Commissioner has made it clear that he will not be making any findings of misconduct against the Applicant. The only adverse comment that could be made about Father MacDonald would be that, as an employee or official of a public institution, he failed to properly respond to allegations of abuse. However, the Applicant's concern is that if the alleged victims are allowed to testify as to the specific allegations they made against Father MacDonald, assessing the institutional response to these allegations will inevitably lead to an assessment of the merits of those allegations. According to the Applicant, if the Commissioner finds that a particular complainant's allegation had merit and that complainant has alleged that he was sexually abused by the Applicant, then the Commissioner will effectively be determining the civil or criminal responsibility of the Applicant for a particular crime, which he cannot do. [page440]

[9] In making his submission, the Applicant primarily relied on two decisions -- *Re Nelles and Grange* (1984), 46 O.R. (2d) 210, 9 D.L.R. (4th) 79 (C.A.), and *Starr v. Houlden*, [1990] 1 S.C.R. 1366, 68 D.L.R. (4th) 641, 55 C.C.C. (3d) 472. In *Nelles*, the commissioner stated a question for the court asking whether he could express his opinion as to whether the death of any child was the result of the actions of a named person or persons. In that case, as in this, the Order in Council that established the inquiry limited the commissioner by forbidding him to express any conclusion of law regarding civil or criminal responsibility for a death or deaths. The Court of Appeal found that if the commissioner made findings of fact that a particular person caused a particular death, then this finding or conclusion "would be considered by the public as a determination" and, "if no charge is subsequently laid, a person found responsible by the Commissioner would have no recourse to clear his or her name" (p. 220).

[10] In *Starr*, a Commission of Inquiry had been appointed by the Province of Ontario to inquire into certain allegations of an improper relationship between Ms. Starr and any corporation or person she represented or acted for and any elected or appointed government official. The majority of the Supreme Court of Canada found that the Inquiry's terms of reference exceeded the Province's jurisdiction as, in effect, it was to serve as a substitute police investigation and preliminary inquiry into a specific offence under the Criminal Code, R.S.C. 1985, c. C-46, alleged to have been committed by one or both of two named individuals. In making this finding, Lamer J., writing for the majority, noted at p. 1402:

The terms of reference name private individuals and do so in reference to language that is virtually indistinguishable from the parallel Criminal Code provision. Those same terms of reference require the Commissioner to investigate and make findings of fact that would in effect establish a prima facie case against the named individuals sufficient to commit those individuals to trial for the offence in s.121 of the Code. The net effect of the inquiry, although perhaps not intended by the Province, is that it acts as a substitute for a proper police investigation, and for a preliminary inquiry governed by part XVIII of the Code, into allegations of specific criminal acts by Starr and Tridel Corporation Inc. While public officials are involved within the scope of the inquiry, the investigation of them is defined in terms of whether they had dealings with Ms. Starr or Tridel Corporation Inc., and is therefore incidental to the main focus of the Commissioner's mandate. [page441]

[11] The Applicant submitted that in this case, the Commissioner's ruling would:

- a) put the Commissioner in the position where he will be making findings of fact as to whether a particular person committed a particular act as in *Nelles* and;
- b) have the effect of turning the Commission of Inquiry into a substitute police investigation as in *Starr*.

[12] With respect to the analogy to *Nelles*, as already indicated, the Commissioner was clear that his intention was not to make specific findings of wrongdoing as against the Applicant or any of the other alleged perpetrators of abuse. Such findings, if any, would be as against the members of the justice system or the other public institutions that received and dealt with the allegations. Secondly, even if in assessing the response of the justice system or other institution to a particular complaint, the Commissioner will be required to comment on how credible the complaint and the complainant appeared at the time, this is not the same thing as making a finding that a particular allegation by a particular complainant was true. Thirdly, unlike in *Starr* and in *Nelles*, it cannot be said that the Commissioner's Ruling will have the effect of turning the inquiry into an investigation of the Applicant's alleged criminal conduct. The Commissioner was clear that this was not his mandate or his purpose. Rather, his purpose was to investigate the response of the justice system and other public institutions to allegations of sexual abuse against young people in Cornwall. In some cases, investigating that response, may entail hearing from the young people themselves -- both as to what they said, when and to whom and as to the responses they say they received from the people they complained to. Assessing a particular official's response to their complaints may involve assessing how credible the complaints and the complainants appeared at the time. Hearing from and seeing a particular complainant may assist in this task. Whether this will be necessary in every case, given the

other material that is available, is not clear. That is why the Commissioner, quite appropriately, determined that he would decide, on a case by case basis, whether to receive such evidence, depending upon whether it is relevant to his mandate, and subject to appropriate restrictions having regard to the "serious concerns" expressed by the Applicant. [page442]

Will the Commissioner's Ruling Make It Necessary to Assess the Truth of the Allegations?

[13] The Commissioner noted that Commission Counsel had indicated to the Applicant and other parties that any statements by the alleged victims would not be tendered for the truth of their contents. However, the Applicant argued that in cases such as where the complainant made an allegation of abuse to the police, and the police investigated and determined that there was no basis to lay charges, the Commissioner will necessarily have to assess the validity of the complaint in order to assess the institutional response. This, in turn, will lead the Commissioner into making determinations concerning Father MacDonald's civil or criminal responsibility.

[14] We accept that part of the Commissioner's mandate may include assessing whether the information available to the police or other authorities should have warranted a different response. However, as already indicated, we disagree that making such an assessment will require the Commissioner to make a determination as to the truth of the complaint. Rather, the Commissioner will have to ask, "based on the information available, what should they have done"?

[15] As part of his mandate the Commissioner will be examining many decisions that were made in response to the allegations. These may include whether or not the police decided to lay criminal charges and whether or not the Crown decided that a prosecution should be conducted. In examining those decisions he will be required to do so from the point of view of whether they were justifiable on a reasonable basis, given the obligations of the particular authorities at the time. This will necessitate hearing evidence as to what was done and why. It may also include assessing whether, given what they knew at the time, the police or the Crown acted reasonably when they made decisions as to whether or not a particular allegation was credible enough to warrant the laying of a charge or the commencement of a criminal prosecution. Assessing the reasonableness of these decisions will not require the Commissioner to make findings that the allegations were true and will certainly not require him to make a determination that the Applicant was criminally or civilly responsible.

[16] The Applicant also expressed concern that while the Commissioner may appreciate the limits of his mandate, other counsel [page443] may not. However, it is not counsel who will decide what evidence will or will not be heard. It is the Commissioner. He has stated the purpose for which the evidence is to be heard and has a clear appreciation of his mandate.

Will the Prejudicial Effect of the Evidence Outweigh its Probative Value?

[17] The Terms of Reference of the Inquiry require the Commission to "ensure that the disclosure of evidence and other materials balance the public interest, the principle of open hearings, and the privacy interests of the person(s) affected, taking into account any legal requirement". These terms make express the balancing act required in any public inquiry. As noted by Binnie J. in *Consortium Developments (Clearwater) Ltd. v. Sarnia (City)*, 1998 CanLII 762, 165 D.L.R. (4th) 25 (S.C.C.), at para. 26:

The power to authorize a judicial inquiry is an important safeguard of the public interest, and should not be diminished by a restrictive or overly technical interpretation of the legislative requirements for its exercise. At the same time, of course, individuals who played a role in the events being investigated are also entitled to have their rights respected. The basic issue in this case is how a balance is to be struck between these two requirements.

[18] The Applicant argued that hearing evidence from the alleged victims would have an adverse effect on him and his reputation -- potentially leaving him factually guilty in the perception of the public. In his submission, the risk of this effect is out of proportion to the need for the Commission to hear the evidence, especially where the institutional response can be assessed through less prejudicial means.

[19] First, we agree with the Commissioner that the evidence of the alleged victims is essential to properly assess the response of the justice system and other public institutions to the allegations they made. Second, the Commissioner was clear that he was alive to the fact that in certain cases it may be possible to introduce that evidence without calling the alleged victims to testify. Requiring him to decide in advance how a class of clearly relevant evidence will be heard would be to unreasonably limit his discretion and to, in effect, require him to exercise that discretion in a vacuum. Third, the Applicant is not without any tools to safeguard his reputational interest. He has been granted standing and, as such, is entitled (among other things) to documentary disclosure, advance notice of documents proposed to be introduced in evidence, advance provision [page444] of statements of anticipated evidence of witnesses, the right to object to evidence, the right to make submissions with respect to relevance, the right to cross-examine witnesses on matters relevant to the basis upon which the standing was granted, the right to request that a portion of the hearing be conducted in private, the right to request orders prohibiting disclosure, public disclosure, publication or broadcast of any testimony, document or evidence, or the editing of documents to remove sensitive and/or unnecessary information and the right to make opening and closing submissions.

[20] As the following excerpt from the Commissioner's Ruling demonstrates, the Commissioner is aware of the Applicant's concerns and alive to his obligations to balance those concerns against the responsibilities he has to fulfill his mandate. Thus, we do not see it as either appropriate or necessary to fetter his discretion in that regard.

The concerns brought by the Applicants were serious ones, but as indicated, do not affect the jurisdiction of the Commission to call alleged victims for the purposes set out by Commission Counsel. The Applicants are entitled to a fair process and can avail themselves of the rights afforded to parties with standing. Any specific concerns of the Applicants will be dealt with on a case by case basis; applying the provisions of the Public Inquiries Act, the Order in Council and the Rules.

Conclusion

[21] For these reasons the application was dismissed. The parties agreed in advance that there would be no order as to costs.

Application dismissed.

Search Terms: [[2006] oj no. 3546](3)





Source:  [Dominion Law Reports]

View: Full Document

Sort: Relevance

Date/Time: Tuesday, March, 4, 2008, 10:03 MST

[Back to Top](#)

  1 of 3  



[About LexisNexis](#) · [Terms and Conditions](#) · [My ID](#)

Copyright © 2007 LexisNexis Canada Inc. All rights reserved.