CHAPTER 9

PREPARING FOR THE EVIDENTIARY HEARINGS: PART 1

9.1 Commission Counsel and Investigative Team

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

It was important that the investigators have no direct interest in the subject of the investigation. Investigators are typically drawn from police services, and although we hired the investigators before the hearings on standing took place, we took into consideration that the OPP was likely to apply for standing in the Inquiry. We therefore chose our investigators from the RCMP and the Toronto Police Service rather than the OPP. Once we had chosen our lead investigator, Inspector Rick Moss of the RCMP, he worked with my lead counsel in creating the rest of the investigative team.

9.2 Disclosure and Management of Documents

In its search for the truth, a public inquiry is afforded wide-ranging investigative powers. Among them is the power to require the collection and disclosure of documents. Gathering, reviewing, and analyzing documents and other evidence was perhaps the most laborious aspect of preparing for the fact-finding phase of the Inquiry. Parties with Part 1 standing were required to provide all relevant documents in their possession or to which they had access. We defined "documents" 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.[80] The Inquiry treated documents received from parties or other sources as confidential until they were made part of the public record.

On the whole, parties made their best efforts to produce relevant and helpful materials, both at the outset and as new materials were identified. Partly owing to the investigative and legal proceedings in the years since the death of Dudley

80 Rule 33, Appendix 2, Rules of Procedure and Practice.

George, there was a great volume of documentary evidence. Given the passage of time, it came in a wide range of formats and needed some processing. 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. The Inquiry reviewed more than 5,000 hours of OPP logger tapes, as well as videotapes which came to the Commission from a variety of sources. Counsel for the parties with standing were required to sign a confidentiality undertaking with respect to documents.[81]

The Inquiry purchased an enhanced software program, initially for commission counsel's use only, to enable searches of the entire database by keyword. However, in light of the very large volume of documents, and the pace of calling witnesses, it soon became apparent that counsel for Part 1 parties also required this software. The software reduced the costs associated with the time required to prepare to examine witnesses. No doubt, the time saved more than offset the additional cost to the Inquiry.

9.2.1 Issues of Privilege

During the hearings, the Inquiry dealt with documents that were ostensibly the subject of solicitor/client privilege, public interest immunity (also known as Cabinet privilege), informant privilege, sensitive police intelligence data pertaining to ongoing operations, deemed undertaking issues (arising from the *George v. Harris*[82] settled litigation), and privacy issues. The Rules included a protocol for handling documents that were the subject of any kind of privilege (or privacy) claim.[83]

In brief, where a party asserted privilege of any kind, I nonetheless 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 the subject documents took place in the presence of counsel for the party asserting privilege if the party so requested. On only a few occasions where a party asserted privilege, I issued a summons[84] to the party to produce documents.[85]

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81 Appendix 7(b), Confidentiality Undertaking (Counsel).

82 *Supra* note 28.

83 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.

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

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

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 Inquiry's mandate, 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). Madam Justice Bellamy's decision in the course of her inquiry,[86] my counsel's advice, and my own experience as Ontario's first Information and Privacy Commissioner[87] were helpful in establishing this procedure.

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. We outlined this procedure in an appendix to all document summonses issued. Fortunately, no disputes arose which required adjudication.

We dealt with potentially litigious matters arising from time to time regarding disclosure of unsevered documents by developing practical solutions to meet specific concerns. For example, in order to address the OPP's concerns regarding the release of certain intelligence data that could affect active police operations, commission counsel established a process with the OPP wherein one of our investigators, a police officer bound to professional police obligations, reviewed and summarized intelligence documents in the presence of OPP officers. Our investigator provided a written synopsis to commission counsel regarding the relevance (or lack thereof) and validity of the claim of privilege to form a basis for a determination. With respect to claims of public interest immunity over Cabinet documents, commission counsel reviewed all such documents in the presence of counsel for the Province of Ontario, and then made a determination, on relevance and then on privilege. Where the documents were determined to be relevant and helpful to the discharge of my mandate, commission counsel sought, and obtained, waiver of public interest immunity.

I believe that all counsel made their best efforts to disclose relevant and helpful materials and that these efforts, coupled with commission counsel's ability to secure cooperation where required, laid the foundation for a relatively smooth document disclosure process.

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86 *Lyons vs. Toronto (Computer Leasing Inquiry – Bellamy Commission)* (2004), 70 O.R. (3d) (Div. Ct.).

87 1988 to 1990.

At the conclusion of the evidentiary hearing phase, 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.[88] Only those documents made exhibits or those referred to during the hearings (but not marked as exhibits) are public documents. The originals of all documents disclosed over the course of the Inquiry were returned to the parties. In keeping with the Province of Ontario's archiving requirements, the Inquiry retained copies in its electronic database, which was transferred to the Archives of Ontario at the conclusion of the Inquiry.

9.3 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 compel them to do so if necessary. Commission counsel and the investigators spent a number of months, before the hearings began, reviewing the documents in our database to compile preliminary witness lists. It took hundreds of hours to refine the list, thoroughly considering the likely relevance and helpfulness of the information each individual could provide. The principle of thoroughness informed the selection of witnesses. Given that commission counsel were not advocates for any one point of view, they endeavoured to identify all witnesses who might provide relevant and helpful information.

At the outset of an inquiry, it is difficult to estimate the number of people whose testimony may contribute meaningfully to the investigation. As the inquiry unfolds, additional witnesses are often identified who cannot be ignored if the principle of thoroughness is to be met. However, calling relevant and helpful witnesses does not mean calling all *possible* witnesses. The challenge throughout was to proceed efficiently, while ensuring that the investigation was thorough and fair.

Thoroughness and fairness are not competing objectives, yet achieving the right balance required constant attention and periodic adjustments to our approach. Commission counsel worked closely with counsel for the parties to ensure that all necessary witnesses, but only those necessary, were called to testify. Each witness's testimony added details or perspective to the investigation and enabled me to test and verify the evidence of others.

The process of interviewing potential witnesses continued throughout the hearing phase. Usually (but not always, depending on the witness and the demands

88 Appendix 10, Memorandum from Lead Commission Counsel to Counsel for Parties with Standing re Return of Documents/Databases, December 8, 2006.

of the hearing schedule), one or more counsel and one or more investigator interviewed each witness and a transcript of key witness interviews was made.

Given the passage of time since the events in question took place, witnesses were given copies of documents from the Inquiry database before the interviews, when possible, to help refresh their memories. Interviews could take a considerable amount of time, particularly where documents were not available to refresh memories and individuals had difficulty recalling events and conversations of many years earlier. 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.[89]

9.4 Summonses and Search Warrants

Pursuant to the Order-in-Council, the Inquiry was empowered to issue summonses[90] to witnesses in accordance with Part II of the *Public Inquiries Act*.[91] 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 Inquiry's powers 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 I had no power, as a provincially appointed commissioner, to compel a Minister of the Crown in Right of Canada, in his or her official capacity, to appear and produce documents.[92] The federal government did not apply for standing in the Inquiry and was not subject to the obligations set out in the Rules. Fortunately, the federal government cooperated in providing documents, and we were able to call witnesses to give evidence on matters relevant to the Inquiry involving Indian and

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

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

91 *Supra* note 5 at sec. 7(1).

92 *Keable, supra* note 3.

Northern Affairs Canada and the Department of National Defence. However, there may be merit, when considering a future public inquiry on a subject that spans federal and provincial matters, to obtain an accommodation to ensure that both jurisdictions attorn to the jurisdiction of the commission in terms of its power to summons witnesses to attend and to produce documents with respect to matters properly within the jurisdiction of a provincially appointed commission.

9.5 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 Inquiry's statutory obligation to issue Notices of Alleged Misconduct where warranted.[93] Commission counsel explained the purpose of the Notice, and what "alleged misconduct" means within the meaning of 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. Whenever possible, we issued Notices before an individual gave his or her testimony, either directly or through counsel if the witness was represented.

In drafting these Notices, we were careful not to use language that might be confused with potential findings of civil or criminal liability. If any further potential grounds of alleged misconduct emerged subsequent to delivery of a Notice, we prepared and delivered a supplementary Notice.

In the interest of fairness, the Inquiry did not disclose publicly that an individual had been served with a Notice. The recipient was free to let it be known if they wished to do so.

Issuing these Notices was an important measure in preparing for the hearings, and they are an important element in the fair treatment of witnesses. Inquiry

93 Appendix 9, Sample Notices of Alleged Misconduct.

commissioners tend to use them liberally, issuing a Notice even where there is only a possibility that a finding of misconduct may follow. This must be the policy in the interest of fairness, even though the liberal issuing of Notices can work against efforts to contain the development of an adversarial posture among the parties — whether or not an actual finding of misconduct follows.

9.6 Hearing Room and Facilities

While commission counsel and the investigators worked to gather relevant documents and locate and interview relevant witnesses, our administrative team was busy transforming a community centre auditorium into an appropriate public inquiry hearing room. Creating a hearing room environment requires a suitable arrangement of tables and other furnishings and the addition of a coat of arms and flags, but it also requires the application of a certain level of decorum. Our registrar, George Reeve, and hearing room officer, Ron Hewitt, both of whom lived locally and had recently retired from the Court Services Division of the Ministry of the Attorney General, quietly and effectively established decorum in the right measure, somewhere between the formality of a courtroom and the openness of a public forum.

The potential existed for emotions to run high from time to time. The OPP was of the view that low-key security was prudent and arranged for a small team of plainclothes, retired officers to attend the hearings each day under the supervision of Acting Sergeant Debbie Hodgins. Her OPP car was situated nearby, but not on the community centre premises. Fortunately, they were never required to take action.

In addition to the hearing room, the Inquiry had a secure storage room for exhibits, and the hockey arena viewing room was made available for the use of media representatives when they could not all be accommodated in the hearing room.

One boardroom served several functions. It was the Inquiry's office space, the lunch room, and the administrative centre for everyone involved in the proceedings. Thus, throughout the long and intense hearing period, the many complex procedural and substantive issues to be addressed on any given day, and the great volume of administrative and other tasks to be performed daily, were all confined to one small room. After some months of hearings, we rented a portable trailer and parked it outside the community centre to provide a quiet space for commission counsel to work or to interview witnesses. However, none of us had a private office, and the confined quarters presented a considerable challenge. I believe that most observers would have been surprised to learn that the day-to-day

operations of a full-scale public inquiry were concentrated in a single room. Our cheerful and tireless on-site office administrator, Susan Beach, though supported by the Toronto office, bore the full weight of the daily demands and deserves much of the credit for making these arrangements work despite the challenges.

9.7 Records of the Proceedings

Arrangements were in place from the outset to videotape the proceedings, from first day to last. This "gavel to gavel" tape serves as an archival record. We expected that the Inquiry would receive requests for copies of portions of the video footage or documents and other materials filed as exhibits. (Given the volume and variety of materials, it was not practical to post all exhibits on our website.) Requests came from media seeking video footage of witness testimony for television broadcasts, students undertaking research, witnesses and/or their family members, and even a lawyer who wished to use video footage for examination/cross-examination training purposes. We dealt with these requests consistently and fairly through the protocol my staff developed in the early stages of the Inquiry.[94]

The Inquiry retained the services of a court reporting firm with considerable public inquiry experience. The location and facilities no doubt presented the court reporters with technical and personal challenges, but this was not apparent in the service they provided. They completed transcripts of the evidence in time to post them on our website the same evening, and counsel often used transcripts of the previous day's testimony in examining witnesses. The reliability, timeliness, and accuracy of the transcripts contributed considerably to the efficiency of the proceedings and they were of great assistance to all who relied on them.

94 Appendix 11(a), Access to and Use of Hearing Video Footage.