

IN THE MATTER OF: Commission of Inquiry into the Circumstances Surrounding
the Death of Phoenix Sinclair

MOTION BRIEF OF COMMISSION COUNSEL

HEARING DATE: July 24, 2012

**COMMISSION OF INQUIRY INTO THE CIRCUMSTANCES
SURROUNDING THE DEATH OF PHOENIX SINCLAIR**

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MOTION BRIEF

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I. LIST OF DOCUMENTS AND AUTHORITIES TO BE RELIED UPON

- TAB 1** Ed Ratushny, *The Conduct of Public Inquiries: Law, Policy and Practice* (Toronto: Irwin Law Inc., 2009) P. 241 and 142
- TAB 2** Ed Ratushny, *The Conduct of Public Inquiries: Law, Policy and Practice* (Toronto: Irwin Law Inc., 2009) P 249
- TAB 3** Ed Ratushny, *The Conduct of Public Inquiries: Law, Policy and Practice* (Toronto: Irwin Law Inc., 2009) P 248
- TAB 4** Ed Ratushny, *The Conduct of Public Inquiries: Law, Policy and Practice* (Toronto: Irwin Law Inc., 2009) P 292
- TAB 5** Confidentiality Undertakings

II. INTRODUCTION

1. The Applicants have requested an Order:
 - a. Compelling Commission Counsel to disclose the transcripts of all pre-hearing interviews conducted of witnesses in preparation for this inquiry;
 - b. In the alternative, allowing witnesses to consent to the disclosure of their transcripts to counsel.
2. Reasons why Commission Counsel objects to this request:
 - a. The request is contrary to the Commission's Rules of Procedure and Practice;
 - b. The request is contrary to the principles of fairness and is not in the public interest; and
 - c. Granting the request would cause:
 - i. significant delays; and
 - ii. significant and unnecessary incurrence of costs.

III. MARSHALLING THE EVIDENCE: FAIRNESS AND THE OBLIGATION OF DISCLOSURE

3. One of the roles of Commission Counsel is to marshal the evidence.

4. Ratushny in his text *The Conduct of Public Inquiries, Law Policy and Practice*, under the subheading "Marshalling the Evidence" says as follows:

"While fairness requires the parties to know the case they have to meet, there is flexibility in how a commission or other tribunal may fulfill that obligation. The Ontario Divisional Court recently said,

'A tribunal is the master of its own procedure. It is not required to adopt the procedural rules of the civil court system in order to achieve fairness. Tribunals are not courts, and are fully entitled to streamline their disclosure procedures in keeping with their objective to provide a timely and cost-effective adjudication of the rights of the parties'."

Ed Ratushny, The Conduct of Public Inquiries: Law, Policy and Practice
(Toronto: Irwin Law Inc., 2009) P. 241 and 242, [Tab 1]

5. In this Inquiry fairness is achieved pursuant to the following rules regarding disclosure:

"C. Witness Interviews and Disclosure

21. Commission Counsel may interview persons believed to have information or documents bearing on the subject-matter of the Inquiry. The Commissioner may choose whether or not to attend an interview.

22. Persons interviewed by Commission Counsel may choose to have legal counsel present during the interview, but are not required to do so.

23. If Commission Counsel determines that a person who has been interviewed should be called as a witness in the public hearings referred to in paragraph 2, Commission Counsel will prepare a summary of the

witness' expected testimony, based on the interview ('Summary'). Commission Counsel will provide a copy of the Summary to the witness before he or she testifies in the hearing. After the Summary has been provided to the witness, copies shall be disclosed to the parties and intervenors having an interest in the subject matter of the witness' evidence, on their undertaking to use it only for the purposes of the Inquiry, and on the terms described in paragraphs 27 and 28 below.

24. The Summary of a witness' expected testimony cannot be used for the purpose of cross-examination on a prior inconsistent statement.

25. Pursuant to section 9 of Order in Council 89/2011, if Commission Counsel determines that it is not necessary for a person who has been interviewed to be called as a witness, or if the person interviewed is not otherwise able to be called to testify at the public hearings referred to in paragraph 2, Commission Counsel may tender the Summary to the Commissioner at the hearing, and the Commissioner may consider the information in the Summary when making his final findings, conclusions and recommendations.

26. Unless the Commission orders otherwise, all relevant non-privileged documents in the possession of the Commission shall be disclosed to the parties and intervenors at a time reasonably in advance of the witness interviews and/or public hearings or within a reasonable time of the document becoming available to the Commission."

6. Pursuant to these Rules, documentary disclosure from the Commission began in December, 2011, and has continued on an ongoing basis as necessary.

7. Summaries of the evidence of every witness intended to be called to testify have been prepared and are in the process of being distributed first to the witness or their counsel and then to counsel for all parties and intervenors. By the end of July counsel will have received the summaries of all such witnesses with the exception of a few witnesses whose interviews will not take place until August. Those witnesses, however, are not scheduled to testify until the end of Phase I.

8. With respect to the argument that the transcriptions or notes of witness interviews are "documents" within the meaning of Rule 26, a plain reading of the rules does not support that interpretation.

9. The disclosure of information obtained through the pre-hearing interview process is specifically addressed at Rules 21 through 24. The reference to documentary disclosure is set out in a separate and subsequent rule thereby confirming that the information which is obtained from interviewing witnesses, however documented, is separate from and not intended to be what is referred to as "documents" in Rule 26.

10. A reading of the Commission's Rules in their entirety shows that "documents", as that term is used in Rule 26, refers to information received by the Commission rather than information created by the Commission for its own internal purposes.

11. The rules are clear, that with respect to pre-hearing witness interviews the only information to be disclosed will be summaries.

12. Further, the Rules provide that the summaries cannot be used for cross-examination at the hearings. The clear implication is that they are being provided to inform counsel so that no one is taken by surprise. They are not to be used to test the credibility of a witness. Similarly, even if we were to disclose the transcriptions or notes of interviews to counsel for the parties and intervenors, the information could not be used for the purpose of cross-examination.

13. As Ratushny outlines in his text, a variety of approaches have been taken to the recording of interviews and their use at public hearings. The systemic nature of the Goudge Inquiry, for example, deliberately followed a less adversarial approach to the recording of interviews.

Ratushny, supra, P 249 [Tab 2]

14. Commissioner Goudge identified the purpose of witness interviews in the context of a public inquiry as a process of gathering evidence, stating:

“Some interviews help to identify those who should be called as witnesses. Many interviews assist with fact finding and document production. Others are simply educational, assisting the commission staff in understanding the context or identifying issues. Interviews also allow individuals interested in the work of an inquiry to express their views and concerns.”

Ratushny, supra, P 248 [Tab 3]

15. In the Goudge Inquiry, rather than interviewing witnesses under oath and preparing transcripts, Commission lawyers kept notes during the interview and prepared a draft summary for the person interviewed, to review. After the person interviewed was satisfied with the summary it was circulated to parties with standing. Neither parties nor Commission Counsel were permitted to cross-examine a witness on any interview summary.

Ratushny, supra, P 249 [Tab 2]

16. This is essentially the process this Commission has chosen to follow as codified in its Rules.

17. The process can be contrasted with, for example, the process followed in the Taman Inquiry in which the pre-hearing interviews of witnesses were conducted under oath or affirmation with a reporter present. They were transcribed and used by Commission Counsel throughout the hearings in cross-examining the witnesses.

Ratushny, supra, P 249 [Tab 2]

18. The Rules for this Inquiry were circulated in draft form to all Applicants in advance of the Standing Hearings. At the conclusion of the Standing Hearings, on June 29, 2011, the Rules were formally agreed upon after all counsel whose clients received a grant of standing had had an opportunity to make submissions regarding the draft Rules. The Commissioner then made an Order confirming the Rules, before the proceedings closed that day.

19. The significance of circulating draft Rules to counsel for parties at an inquiry was discussed by Ratushny as follows:

“As occurred in the Krever Inquiry, it has become common practice for commissions of inquiry to circulate draft rules for input from the parties. This participation could reduce any later complaints that legitimate expectations were created by implication since there was an opportunity to request they be specified. In *Krever*, the Court took such consultation into account in rejecting any objections to the process that had been adopted.”

Ratushny, supra, P 292 [Tab 4]

20. Fairness requires that the expectation of participants be respected. In this case, those expectations were that the notes or transcriptions of interviews would not be disclosed to counsel for parties and intervenors. Rather if a witness is to be called to testify, a summary of their interview will be provided to all counsel.

21. These expectations were created in the first instance by the Rules which clearly indicate that only summaries of witness interviews would be disclosed to all counsel. The expectations were further raised by the explicit assurance Commission Counsel gave to every witness before they were asked to provide any information, that the notes or transcriptions of interviews would be used only for internal purposes, and would not be disclosed and distributed to other counsel.

22. Counsel for the parties and intervenors heard this assurance repeatedly and made no objections.

23. Often the comments made by a witness related to matters of a personal nature. Witnesses spoke with Commission Counsel in the confidence that the things they said would not be shared except to the extent that they were relevant to the matters which form the subject of the Commission's mandate. The relevant information from those interviews is contained in the summaries which are being provided to all counsel, in accordance with the Commission's Rules.

24. The Commissioner will not be asked to consider any evidence which is not disclosed to the parties and intervenors.

IV. FAIRNESS AND THE PUBLIC INTEREST

25. The authorities are clear that public confidence is a key feature in the effectiveness of a Commission of Inquiry fulfilling its mandate.

26. If we did not uphold the assurance we gave to each and every witness, we would lose the public confidence and certainly the confidence of the witnesses with whom we have communicated.

V. DELAY AND COSTS

27. The task of reading the over 10,000 pages of notes and transcriptions in order to prepare the summaries, has been divided up among the five lawyers who act for the Commission. For counsel for each party and intervenor to take the time to review these 10,000 pages on their own would cause significant delay and incurrence of costs.

28. Further, because many of the interviews contain information which is confidential and not relevant to the subject matter of this inquiry, Commission Counsel would first be required to go back and redact the 10,000 pages of notes or transcriptions before they could be disclosed. This would also lead to significant delay and incurrence of costs.

VI. CASES REFERRED TO BY THE AUTHORITIES IN SUPPORT OF THEIR MOTION

29. The only case cited by the Authorities in their Motion Brief which touches upon an obligation to disclose pre-hearing transcripts is *Hudson Bay Mining and Smelting Co. v. Cummings*, 2006 MBCA 98 ("*Cummings*"). That case is distinguishable for the following reasons.

30. First, *Cummings* concerned an inquest held pursuant to *The Fatality Inquiries Act*. The differences between a public inquiry and an inquest are clear. For example, a Commissioner presiding over a public inquiry has the latitude and discretion to determine the process that his Commission will follow in furtherance of fulfilling his mandate.

31. The process to be followed at an inquest conducted pursuant to *The Fatality Inquiries Act* is narrowly prescribed by statute. The presiding judge who hears evidence in a formal courtroom does not have the discretion to formulate his or her own rules.

32. Next, the decision to order production of the transcripts in *Cummings* must be read in light of the fact that “will-say” statements were neither offered nor provided to counsel for parties with standing. Unlike *Cummings*, in this case, “will-says” or summaries are indeed being provided.

33. The Court in *Cummings* noted that “although counsel for WS&H indicated that she would be satisfied with “will says”, someone would have to review all the transcripts and prepare the “will says”, which the Court held would not be an expeditious way of proceeding.

Hudson Bay Mining and Smelting Co. v. Cummings, 2006 MBCA
[Tab 3 – Authorities Brief], excerpt at para. 110

34. In this case the summaries for Phase I witnesses are nearly complete. Unlike the case in *Cummings*, production of transcriptions rather than “will say” statements would not expedite proceedings. Rather, ordering their production at this juncture would delay the onset of the hearings.

35. It is also worth noting that in *Cummings*, only 12 witnesses testified. Of those 12, only 6 were interviewed previously by Crown counsel and only five confirmed that they had reviewed the transcripts of their interview before testifying at the inquest. Accordingly, ordering the production of transcripts was not a massive undertaking, as it would be in this case where many more witnesses will be testifying.

36. Finally, the documentation of the witness interviews in this case cannot properly be characterized as “transcripts” in the way that term is usually used in legal proceedings. During the course of interviews, no court reporter was present to discern what was or was not said “officially on the record”. Witnesses did not provide information during the interviews under oath or affirmation and their information was provided on the explicit expectation and understanding that any transcription would only be used by Commission Counsel for internal purposes.

37. In this process, information provided by witnesses in their interviews was recorded either by a lawyer taking notes, a clerical assistant taking notes or by means of a recording sent out to a transcriber. The specific method of transcription was purely a matter of expedience in order to ensure that the best use of associate counsel's time was made.

VII. ALTERNATIVE REQUEST

38. With respect to the alternative request that a witness be allowed to consent to the disclosure of their transcription: in addition to repeating the matters set out above, Commission Counsel objects to this alternative request for the following reasons:

- a.
 - i. The transcriptions or notes of witness interviews are not the property of the witness and the witness is, therefore, not in a position to consent to their disclosure.
 - ii. That is, whether documented by notes or transcriptions, the information that was gathered by the Commission is for its own internal investigatory purposes.
 - iii. This fact is reflected and acknowledged in the Undertaking of Confidentiality which each witness and their counsel were required to sign prior to the witness either speaking with Commission Counsel or receiving any information from the Commission. By signing the Undertakings each witness undertook, among other things, that they would not disclose the information they learned through the interview process, to anyone other than Commission Counsel. Each counsel indicated that they would not disclose the information they learned, to anyone other than a person for whom they act.

- b. Even if a witness were to consent to the disclosure of their interview notes, Commission Counsel would still be required to redact the transcriptions and notes which would cause delay and incurrence of unnecessary costs.

VIII. CONCLUSION

39. The Commission's process for conducting pre-hearing interviews and disclosing the information obtained in those interviews was specifically created to ensure that witnesses would feel comfortable in speaking with the Commission about what were often sensitive and emotional issues. Witnesses spoke with Commission Counsel in the confidence that the things they said would not be shared except to the extent that they were relevant to the matters which form the subject of the Commission's mandate. The relevant matters are contained in the summaries which will be provided to all counsel.

40. This process is one which all counsel agreed to by agreeing to the Rules of Procedure and Practice. Following that agreement, the Commissioner made an Order confirming the Rules, on June 29, 2011.

41. Nothing in the Rules leads to an expectation that anything other than summaries of pre-hearing interviews will be disclosed. Further, having advised every witness that Commission Counsel was not sharing the transcription of their interview with anyone other than the witness or their counsel, to change that approach would constitute a betrayal of the public confidence which has been placed with this Commission.

42. For all of the above reasons Commission Counsel objects to the production and disclosure of the documentation of witness interviews in whatever form that documentation takes.

July 19, 2012
Date


SHERRI WALSH
COMMISSION COUNSEL

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...least at the outset, may have little to disclose) and relaxed rules of evi-
...dence. The hearings will frequently unfold in the glare of publicity. Often,
...of course, at least some of the participants will know far in advance of the
...commission counsel what the documents will show, what the key wit-
...nesses will say, and where "misunderstandings" may occur. The inquiry
...necessarily moves in a convoy carrying participants of widely different
...interests, motives, information, involvement, and exposure.⁴³

A commission of inquiry may not have the benefit of civil pre-trial proced-
...ures but it has the power to compel the production of documents and the
...testimony of witnesses. These powers are often persuasive in encouraging
...cooperation from parties and witnesses prior to the actual hearings.

In marshalling the evidence for presentation at the hearings, commis-
...sion counsel should strive to avoid them becoming a "multi-party exam-
...ination for discovery" by providing maximal pre-hearing disclosure. A
...commission of inquiry should be governed by the principle of complete
...and open disclosure in the absence of exceptional circumstances. In
...some circumstances, this may be not only desirable but required by the
...principle of fairness. This requirement was examined recently in rela-
...tion to a New Brunswick inquiry into allegations of sexual abuse in the
...Kingsclear Youth Training Centre. The applicant sought judicial review
...to quash findings against him and one of the grounds was a denial of
...procedural fairness because of inadequate pre-hearing disclosure.

There was no dispute that the applicant was entitled to some degree
...of procedural fairness but the issue was the extent required. Similar to the
...*Inquiries Act*, and other provincial and territorial Acts, the New Brunswick
...Act precludes any findings against an individual who has not received ad-
...equate notice and an opportunity to respond. It does not explicitly provide
...for disclosure of the related adverse evidence. Chief Justice Joseph Daigle
...concluded that the principle of fairness imposed such a duty of disclosure,
...one that went beyond the statutory requirement of notice.⁴⁴ This case is
...discussed further below in relation to interviewing witnesses.

While fairness requires the parties to know the case they have to
...meet, there is flexibility in how a commission or other tribunal may ful-
...fill that obligation. The Ontario Divisional Court recently said:

⁴³ *Consortium*, above note 14 at para. 41.

⁴⁴ *Richards v. New Brunswick (Commission of Inquiry into the Kingsclear Youth Training
...Centre (1996)*, 180 N.B.R. (2d) 1 at para. 24 (Q.B.) [*Kingsclear*].

A tribunal is the master of its own procedure. It is not required to adopt the procedural rules of the civil court system in order to achieve fairness. Tribunals are not courts, and are fully entitled to streamline their disclosure procedures in keeping with their objective to provide a timely and cost-effective adjudication of the rights of the parties.⁴⁵

In this case, the party sought full oral discovery of witnesses under oath prior to the hearing. This was not granted since the pre-hearing disclosure process of exchanging all relevant documents was found to be fair and reasonable in the circumstances.

In seeking judicial review of the Gomery Inquiry findings against him, former prime minister Chrétien alleged a deliberate attempt by commission counsel to ambush him by using a "document dump." The Memorandum of Fact and Law of the Applicant⁴⁶ stated that he had been provided with "two binders, each three and a half inches thick" of documents that might be raised during his testimony. He was then interviewed by commission counsel on 1 February 2005 and told that, if any new documents were to be produced, he would be advised prior to his testimony. On the day before he was to testify, one week later, his counsel received an additional four volumes, totalling 889 pages. The last twenty-five pages contained documents about political donations that were never disclosed previously nor drawn to his attention prior to this testimony. This allegation of a denial of fairness through inadequate disclosure was not addressed by the court since the findings were quashed on another ground.

a) Documents

The task of gathering and sorting through the documentation relevant to the terms of reference must be commenced as quickly as possible. This will establish most of the information base for the inquiry so it will influence planning and when the hearings may commence. Of course, the volume and importance of the documentary evidence will vary with the nature of the inquiry but often it will be massive. It will suggest the order in which the evidence should be called and will identify potential witnesses to be interviewed. Ideally, the gathering and analysis

⁴⁵ *Clifford v. Ontario (Attorney General)* (2008), 90 O.R. (3d) 742 at para. 10 (Div. Ct.) [Clifford], Molloy J. (Murray J. concurring, Pitt J. dissenting).

⁴⁶ *Chrétien v. Canada (Commission of Inquiry into the Sponsorship Program and Advertising Activities, Gomery Commission)*, Federal Court File: T-2118-05.

of documentation was. But there are bound to be some omissions. The commissioner usually makes a list of witnesses for the hearings, even though it is likely to be complete.

Normally, the first list of witnesses that is potentially relevant is as long as one million. In these, some 200,000 documents, some 3,000 entered the record.

The Somalia Inquiry Commission provided as "fragmentary and verifiable evidence." Many of the documents were not provided to the commissioner to provide "reached or not at all." These documents, the shuttling of the commissioner not on the witness lists to testify as to the efforts made to provide the evidence is usually not practical. The approach is to encourage requests, and persistence.

The Walkerton Inquiry Commission by defining and organizing the evidence, generally, has been "gathered" but it is not relevant. The relevant

⁴⁷ See Chapter 3, Section 4.

⁴⁸ The Somalia Inquiry Commission was not receiving national cooperation and our left the commission.

⁴⁹ Walkerton Inquiry, "The Scope of the Inquiry," The Scope

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cing the hearings, the large legal staff, and the systemic nature of the
 issues suggest an intense but less frenetic pace.

A variety of approaches have been taken to the recording of inter-
 views and their use at the public hearings. The systemic nature of the
 Goudge Inquiry also allowed a less adversarial approach to the record-
 ing of interviews:

The interviews were neither transcribed nor recorded. My counsel re-
 jected this procedure for at least three reasons: a concern that tran-
 scribing the interviews would add a level of formality to the interviews
 which might make witnesses uncomfortable; a concern that it might
 even create an adversarial atmosphere; and a concern that generat-
 ing transcripts would be costly and lead to delay. Instead, one of the
 Commission lawyers kept notes during the interview and prepared a
 draft summary for the person interviewed to review. After the person
 interviewed was satisfied with the summary, it was circulated for par-
 ties with standing . . . Neither parties nor Commission counsel were
 permitted to cross-examine a witness on any interview summary.

In contrast, in the Taman Inquiry the witnesses were examined under
 oath or affirmation with a reporter present. The interviews were tran-
 scribed and used by commission counsel throughout the hearings in
 cross-examining the witnesses.

The manner of interviewing witnesses by commission counsel or in-
 vestigators became a focus of the *Kingsclear* case, referred to at the be-
 ginning of this section. At issue was whether the witness had sufficient
 notice of the allegations and evidence against him and a full opportunity
 to respond to them.

The commission investigators were given written guidelines and
 instructions for conducting interviews. Potential witnesses were con-
 tacted and informed they were not required to give interviews. If they
 did so voluntarily, they could be given in writing or taken down in writ-
 ing or by means of a taped recording. The witness was entitled to receive
 any written or electronic recording of the interview and a transcript of
 any taped interview. In this case, the witness, Richards, was interviewed
 three times by two different investigators over a three-week period.

Throughout the three interviews, the investigators repeatedly informed
 Mr. Richards what other witnesses had told them and pointed out that

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Advisory counsel, in contrast to hearings counsel, would be in the same position as the commissioner in not seeing any privileged documents.

b) Witnesses

~~Commissioner Goudge identified the purpose of witness interviews during the process of gathering and marshalling the evidence:~~

~~Some interviews help to identify those who should be called as witnesses. Many interviews assist with fact finding and document production. Others are simply educational, assisting the Commission staff in understanding the context or identifying issues. Interviews also allow individuals interested in the work of an inquiry to express their views and concerns.~~

Commissioner O'Connor described the role of commission counsel in interviewing witnesses:

[T]here is a huge advantage to having commission counsel thoroughly interview the witnesses and prepare very detailed witness statements for two reasons. First, there should be no surprises to others who are involved in the process. The proceeding is entirely investigatory and not adversarial. Nothing is gained by surprise, and there is a danger of unfairness if witnesses are examined on areas in the evidence for the first time in the midst of the public hearing. Because of the media attention that often accompanies a public inquiry, the potential for unfairly damaging a witness's reputation must always be kept in mind.

The second reason that witnesses should be thoroughly interviewed and detailed witness statements prepared is that doing so will likely significantly shorten the time taken in the actual hearings. When it is understood in advance what a witness's evidence is likely to be, the examinations of commission counsel and the cross-examiners tend to get to the point much more quickly.⁵³

The need to commence the Walkerton hearings as quickly as possible resulted in the three commission counsel acting as a "tag team" by leading evidence sequentially. While one was doing that in the hearing room, the other two were interviewing the witnesses they would each call in turn. The Goudge Inquiry's interviews also continued after the public hearings began but the increased period of preparation before commen-

53 Above note 1 at 10.

cing the hearings, the issues suggest an inter-

A variety of approaches and their use in the Goudge Inquiry also including interviews:

The interviews were conducted in a way that subjected this proceeding to a process of describing the interview which might make even create an audio recording transcripts with Commission lawyer draft summary for interviewed was permitted with standing permitted to cross

In contrast, in the 1990s oath or affirmation was prescribed and used by cross-examining the

The manner of interviewing investigators became beginning of this section notice of the allegations to respond to them.

The commission instructions for contacting and informing did so voluntarily, either by phone or by means of any written or electronic any taped interview three times by two

Throughout the 1990s Mr. Richards was

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all parties had the right to receive copies of all documents entered into evidence and the right to introduce their own documentary evidence; all hearings would be held in public unless application was made to preserve the confidentiality of information; and

although evidence could be received by the Commissioner that might not be admissible in a court of law, the Commissioner would be mindful of the dangers of such evidence and, in particular, its possible effect on reputation.

These rules were made pursuant to the terms of reference authorizing the commissioner to adopt such procedures "as he may consider expedient for the proper conduct of the inquiry." Where such authorization is not contained in the terms of reference, it can be found in the wide latitude given by some inquiries Acts, the *Interpretation Act*, and judicial precedents.⁶⁶

As occurred in the Krever Inquiry, it has become common practice for commissions of inquiry to circulate draft rules for input from the parties.⁶⁷ This participation could reduce any later complaints that legitimate expectations were created by implication since there was an opportunity to request they be specified. In *Krever*, the Court took such consultation into account in rejecting any objections to the process that had been adopted.⁶⁸ In the Arar Inquiry, Commissioner O'Connor noted that he had incorporated "many of the suggested changes" into the rules which he adopted. But he also drew a line: "A number of intervenors made submissions requesting very detailed Rules to address what they see as a possibility of unfairness arising from circumstances that may or may not occur. For the most part I have not revised the rules to reflect these types of concerns." Instead, they could be addressed if and when they arose under his overriding discretion to conduct the inquiry in a fair and expeditious manner. Such an overriding discretion is often explicitly included in the rules to authorize a departure from them, or their amendment, when fairness and expedition require. Of course, Commis-

sioner O'Connor also r him altering or expandi

These rules now fri parties such as these p:

All parties, witnesses adhere to these Rules the Commissioner.

The Commissione Rules as may be app party or imposing res hearing.

In imposing any such : any statutory rights of vides that

the conduct of and th the control and direc

However, this authorit tial and direct interest witnesses personally : would have to take int principle of fairness as

Commissioner Co: counsel often begin tl developed by precedin appropriate for their c spent our first weeks." cedure adopted by pre of past precedents. Th expeditious approach that could be usefully included in the rules c counsel commenting

⁶⁶ Discussed in Section B(1), above in this chapter and Chapter 8, Section A.

⁶⁷ See Chapter 5, Section C(4).

⁶⁸ Above note 44.

⁶⁹ Ruling (15 June 2004).

⁷⁰ See Chapter 6, Section

⁷¹ See Chapter 5, Section

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COMMISSION OF INQUIRY INTO THE CIRCUMSTANCES
SURROUNDING THE DEATH OF PHOENIX SINCLAIR

Commissioner: E.N. (Ted) Hughes, O.C., Q.C., LL.D (Hon)

Commission Counsel: Sherri Walsh

CONFIDENTIALITY UNDERTAKING
(Counsel to Parties, Intervenors and Witnesses)

I am counsel of record to: _____

I UNDERTAKE to the Commission of Inquiry into the Circumstances Surrounding the Death of Phoenix Sinclair (the "Commission") that I will use any and all documents or information that are produced to me in connection with the Commission's proceedings (collectively, "Commission Documents") exclusively for duties performed in respect of those proceedings. I will keep under my control at all times all Commission Documents that have been provided to me, except for disclosure to persons as provided for herein.

I FURTHER UNDERTAKE that I will not disclose any Commission Documents or information to anyone for whom I do not act, and will only disclose Commission Documents to a person for whom I act upon the person giving the written undertaking annexed hereto.

IN THIS UNDERTAKING, "documents" is intended to have a broad meaning, and includes the following formats: written, electronic, audiotape, videotape, digital reproductions, photographs, maps, graphs, microfiche and any data and information recorded or stored by means of any device.

I UNDERSTAND that this Undertaking will have no force or effect with respect to any Commission Document that becomes part of the public proceedings of the Commission, or to the extent that the Commissioner may release me from the Undertaking contained herein with respect to any Commission Document or information. For greater certainty, a Commission Document shall become part of the public proceedings only upon it being made an exhibit at a public session of the Inquiry.



COMMISSION OF INQUIRY INTO THE CIRCUMSTANCES
SURROUNDING THE DEATH OF PHOENIX SINCLAIR

Commissioner: L.N. (Ted) Hughes, O.C., Q.C., LL.D (Hon)

Commission Counsel: Sherri Walsh

CONFIDENTIALITY UNDERTAKING
(Parties, Intervenors and Witnesses Represented by Counsel)

I UNDERTAKE to the Commission of Inquiry into the Circumstances Surrounding the Death of Phoenix Sinclair (the "Commission") that any and all documents or information that are produced to me in connection with the Commission's proceedings (collectively, "Commission Documents") will not be used by me for any purpose other than those proceedings. I further undertake that I will not disclose any Commission Documents or information to anyone. In this undertaking, "documents" is intended to have a broad meaning, and includes the following formats: written, electronic, audiotape, videotape, digital reproductions, photographs, maps, graphs, microfiche and any data and information recorded or stored by means of any device. I will keep under my control at all times all Commission Documents that have been disclosed to me.

I UNDERSTAND that this Undertaking will have no force or effect with respect to any Commission Document that becomes part of the public proceedings of the Commission, or to the extent that the Commissioner may release me from the Undertaking contained herein with respect to any Commission Document. For greater certainty, a Commission Document shall become part of the public proceedings only upon it being made an exhibit at a public session of the Inquiry.

With respect to those Commission Documents that remain subject to this Undertaking at the end of the Inquiry, I further understand that all such Commission Documents will be collected from me by the lawyer acting as my counsel who disclosed them to me and I agree to surrender forthwith upon request by my counsel all such Commission Documents to him or her.

Date of Execution

Signature of Party, Intervenor or Witness

Signature of person witnessing the execution of
this Undertaking

Print name of Party, Intervenor or Witness

Print name of person witnessing the execution of
this Undertaking

I FURTHER UNDERTAKE that following the conclusion of the public hearings, I will collect for return to the Commission, all Commission Documents from anyone to whom I have produced any Commission Documents. If for any reason I am unable to collect such Commission Documents, I will forthwith advise the Commission in writing.

With respect to Commission Documents that remain subject to this Undertaking at the end of the Inquiry, I undertake that I will, within seven days after the delivery of the Commissioner's final report to the Minister of Justice and Attorney General, return all such Commission Documents to the Commission.

Date of Execution

Print Name of Counsel

Signature of Counsel