

Commission of Inquiry on Hormone Receptor Testing

Applications for Standing and Funding

(Before the Honourable Justice Margaret A. Cameron - Commissioner)

Ms. Sandra R. Chaytor, Q.C., Co-Counsel
Mr. Bernard M. Coffey, Q.C., Co-Counsel

St. John's, NL
September 19th, 2007

Appearances:

- Mr. Rolf Pritchard Her Majesty in Right of Newfoundland and Labrador
- Mr. Daniel W. Simmons Eastern Regional Integrated Health Authority
- Mr. John V. B. O'Dea Central, Western and Labrador-Grenfell Regional
Integrated Health Authorities
- Mr. Peter N. Browne Drs. Kara Laing et al.
- Mr. Richard S. Rogers Firm Clients
- Ms. Gerry Rogers Self-Represented
- Mr. Daniel M. Boone Health Care Insurance Reciprocal of Canada

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1 asked to determine what went wrong in the past and
 2 how to avoid such errors in the future.
 3
 4 A word about what public inquiries do not do. The
 5 Commission may determine wrongdoing but it does not
 6 find anyone guilty of a crime. Nor does it establish
 7 civil responsibility for monetary damages. However,
 8 the fact that we may find, in the course of our
 9 deliberations, wrongdoing on behalf of an individual
 10 or a group, means that their reputations are at risk.
 11 Consequently, the principles of natural justice
 12 require that due process safeguards be in place.
 13 Those safeguards will be observed by this Commission.
 14
 15 The precise tasks of this Commission are set out
 16 in the Terms of Reference. Broadly speaking, its
 17 purpose is to find out why there were a high number
 18 of different results when certain hormone receptor
 19 tests done between 1997 and 2005 were retested in
 20 2005 and 2006, and to consider what could be done to
 21 avoid similar occurrences in the future. In that
 22 sense, the mandate of the Commission is directed, in
 23 part, to the past and, in part, to the future. I am
 24 to examine the response of authorities when the

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1 September 19, 2007
 2
 3 THE COMMISSIONER:
 4 For those of you I haven't met, my name is Margaret
 5 Cameron, and on July 3rd, 2007, I was appointed as
 6 Commissioner of the Inquiry on Hormone Receptor
 7 Testing. I am also a Justice of the Supreme Court of
 8 Newfoundland and Labrador, the Appeal Division. On
 9 this, the first of our public sessions, I wanted to
 10 tell you about what's been happening since the
 11 Commission was established, and to tell you about how
 12 I plan to proceed with the work of the Commission in
 13 the future. Let me begin by saying a little about
 14 the nature of the Commissions of Inquiry.
 15
 16 In this Province, Commissions of Inquiry are
 17 established by Orders-in-Council issued under the
 18 authority of the Public Inquiries Act, 2006. While
 19 the Government makes the decision to appoint a
 20 Commission of Inquiry, the Commission is independent
 21 of Government.
 22
 23 Public Inquiries are designed to expose certain
 24 events to public scrutiny. Usually, a commission is

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1 problems were discovered, including the
 2 communications with affected patients and others. I
 3 am also asked to examine the present practices
 4 related to estrogen and progesterone hormone receptor
 5 testing systems, a task which is no doubt designed to
 6 restore public confidence in the current testing. In
 7 addition, there is a policy development role for this
 8 Inquiry. I am asked to make recommendations as to
 9 how matters of this nature should be handled in the
 10 future.
 11
 12 The Order-in-Council which created the Commission
 13 provided its Terms of Reference. It is that document
 14 which states the parameters of the work which may be
 15 performed by the Commission. It also sets the time
 16 frame in which the work is to be done. Since the
 17 creation of the Commission, key members of the team
 18 have been put in place. Of the administrative side,
 19 they have been working to obtain and set up our
 20 offices. Commission Counsel have begun the task of
 21 gathering the evidence and identifying potential
 22 witnesses. Rules of procedure and practice have been
 23 developed and are published on our website. For
 24 those of you who haven't had the opportunity to visit

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1 it, it's www.cihrt.nl.ca. The rules of procedure and
2 practice, of course, are particularly relevant to
3 those who will receive standing to participate in the
4 hearings.

5
6 The Inquiry will be divided into two parts. In
7 Part I, the Commission will inquire into problems
8 with estrogen and progesterone hormone receptor tests
9 conducted between 1997 and 2005 in the Newfoundland
10 and Labrador health care system. This will include
11 inquiry into what happened to cause or contribute to
12 the problems, when the problems came to light and
13 whether they could have been detected earlier.
14 Part I will also examine any protocols in place
15 during the relevant time frame, and what steps, if
16 any, were taken by responsible authorities when they
17 became aware of the problems. In addition, there
18 will be evidence respecting the current systems and
19 processes and quality assurance systems.

20
21 Part II of the Inquiry will have a policy focus
22 and will include a review of both policy and legal
23 issues raised by the Terms of Reference. Part II is
24 expected to canvass the duties, if any, of the

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1 responsible authorities to patients, to other parties
2 within the health care system and to the public
3 respecting differences in the test results on
4 re-testing. Part II will also examine whether the
5 estrogen and progesterone hormone receptor testing
6 systems and process and quality assurance systems
7 currently in place are reflective of "best
8 practices".

9
10 Part I of the Inquiry will be conducted in the
11 traditional method of public inquiries. Witnesses
12 will be called, examined by Commission Counsel, and,
13 if necessary, cross-examined by the parties who have
14 standing. Part I hearings, which will commence early
15 in January 2008, will be held in this building at 50
16 Tiffany Lane in St. John's. The public is welcome
17 and indeed encouraged to attend. In addition, the
18 hearings will be webcast. So for those who cannot
19 attend in person what happens at the Inquiry will be
20 available in another forum. Prior to the
21 commencement of the hearings our website will provide
22 further information regarding the webcasting of the
23 hearings.

24

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1 Part II, on the other hand, will take a different
2 approach. The Commission is in the process of
3 engaging a number of experts who will be preparing
4 papers considering the legal and ethical issues
5 raised by the Terms of Reference. These papers will
6 be placed on our website in the spring of 2008. As
7 well, in April of 2008 there will be a symposium
8 which will include presentations by the persons who
9 have prepared papers and others on relevant topics.
10 There will also be an opportunity for Commission
11 Counsel and those with standing to ask questions of
12 the presenters.

13
14 While those who have standing for Part II will be
15 expected to make written submissions to the
16 Commission, the public is also invited to make
17 written submissions respecting the issues raised in
18 Part II. All submissions respecting Part II must be
19 made on or before May 15th, 2008.

20
21 Shortly after I was appointed I began to assemble
22 a team to assist me in the work of the Commission.
23 Ms. Virginia Connors who is seated at the back of the
24 room - Virginia, would you mind standing so those who

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1 are present can see you - is our Chief Administrative
2 Officer who oversees our staff of four. I'm sure in
3 the course of events you will -- those of you who
4 will be here on a regular basis will meet them all.

5
6 Co-counsel are Bernard Coffey, Q.C. and Sandra
7 Chaytor, Q.C. Both are experienced barristers and
8 are known to most of the people in this room. As I
9 have already said, they have begun the process of
10 meeting with persons who can provide us with
11 information and gathering documentation. Not with us
12 this morning is Timothy Caulfield who is our Director
13 of Research. Mr. Caulfield is the Research Director
14 of the Health Law Institute at the University of
15 Alberta. His work will primarily relate to Part II.
16 More detailed biographies of Mr. Coffey, Ms. Chaytor,
17 and Mr. Caulfield are available on our website. We
18 expect others to be added to our team as we move
19 through the various phases of the Inquiry.

20
21 Now to the task of today. Section 5(2) of the
22 Public Inquiries Act says, and I quote, "A commission
23 shall determine whether a person may participate in
24 an inquiry, and how he or she may participate, after

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1 considering: (a) whether the person's interest may
2 be adversely affected by the findings of the
3 Commission; (b) whether the person's participation
4 would further the conduct of the inquiry; and (c)
5 whether the person's participation would contribute
6 to the openness and fairness of the inquiry.
7

8 When I refer to persons who are granted standing,
9 I am, of course, referring to those who, after
10 consideration of these three factors enumerated in
11 the Act, are permitted to participate. Today is the
12 first of two days in which we will be hearing
13 applications for standing. It is through the
14 participation of other parties who are interested
15 that this Commission is able to get the benefit of
16 the different perspectives on the information which
17 we will be receiving over the course of the Inquiry.
18 I would add that the Commission is charged with
19 completing its work by July of 2008. It is,
20 therefore, desirable to avoid duplication where
21 possible.
22

23 It is possible that some of the decisions
24 respecting standing will be made immediately. Others

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1 will be reserved. It is also possible that an
2 applicant will be granted standing for only one part
3 of the Inquiry. Please do not read anything more
4 into it if I reserve a decision than my need to
5 consider the application further, perhaps in light
6 that the existence of other applications from other
7 groups or persons who might be expected to provide
8 similar assistance to the Commission and its work.
9

10 Three of the applications for standing also seek
11 funding. Under the Public Inquiries Act I do not
12 determine who receives funding. I may, however, for
13 persons or organizations which have been granted
14 standing make recommendations that fundings be
15 provided by the Government. The Government may or
16 may not accept the recommendation. On questions of
17 funding, I will not be making my recommendations
18 known today. Rather, these will be made in writing
19 and communicated to the parties and to Government.
20 Where decisions on either standing or funding are
21 reserved, the applicants will be notified in writing
22 of the decision or recommendation. This information
23 will also be posted on our website.
24

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1 Prior to the hearing for Part I Commission Counsel
2 and our advisers on technology in particular will be
3 meeting with those who have been granted standing to
4 discuss the Rules of Practice and Procedures, as well
5 as some of the practical measures we propose to take
6 (largely through the use of technology), and you'll
7 notice all these screens in front of you, to try to
8 have the hearings conducted as efficiently as
9 possible.
10

11 So, the preliminaries out of the way, we will move
12 now to the first of the standing applications. Would
13 you call the first matter, please?

14 THE CLERK:

15 Application No. 1, Her Majesty in Right of
16 Newfoundland and Labrador, please come forward.

17 THE COMMISSIONER:

18 Now I'm going to ask you, because we record our
19 proceedings, to first identify yourself,
20 Mr. Pritchard.

21 MR. PRITCHARD:

22 Good morning, Madam Commissioner, Rolf Pritchard for
23 Her Majesty in Right of Newfoundland and Labrador.
24

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1 THE COMMISSIONER:

2 Thank you. Now, you have an application for
3 standing, as I recall, for both Parts I and Part II?

4 MR. PRITCHARD:

5 That's correct.

6 THE COMMISSIONER:

7 Okay.

8 MR. PRITCHARD:

9 Madam Commissioner, it's probably an understatement
10 to say that the Province is involved in the
11 circumstances that gave rise to this Inquiry.
12 Speaking initially, very broadly, of course everyone
13 understands that the Province undertakes a range of
14 tasks through the various departments that it has,
15 and one such department, of course, is Health and
16 Community Services. Health and Community Services in
17 turn administers the Hospitals Act which in turn
18 creates the Regional Health Authorities - Eastern,
19 Central, Western and Labrador-Grenfell. So from one
20 perspective, beginning first with the patient and
21 moving backwards to the frontline treatment of
22 nurses, doctors and the labs we then have the
23 hospitals and in turn the hospital authority, then
24 Health and Community Services and then, of course,

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1 the Executive of Government. And I suspect as things
 2 move forward with this Inquiry that at some point we
 3 will hear evidence about the degree of involvement
 4 that these various steps have had in the events that
 5 unfolded and necessitated this Inquiry. I further
 6 suspect that that means that there will be
 7 representatives of Health and Community Services and
 8 the executive who may be called upon to testify as to
 9 what they knew, when they knew it, what they did
 10 about it and the relevant policies that they may have
 11 put in place before these events unfolded or in
 12 response to these events as they unfolded. How those
 13 policies have changed over time, whether or not those
 14 policies gave rise to systemic issues that may or may
 15 not be found to be at issue, and that may have
 16 emanated from Government decisions, I suspect will
 17 all be issues that will be of concern to this
 18 Inquiry.

19
 20 It follows then, if that is correct, if those
 21 assumptions are correct, that the Province is an
 22 integral part of the events as they unfolded and as
 23 they continue to develop, and, therefore, I would
 24 submit that it's appropriate that the Province should

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1 be entitled to participate and to have standing, and
 2 that in so doing this would contribute to the
 3 inquiries goals - openness and fairness.

4
 5 I think it further follows that the Inquiry
 6 ultimately may draw conclusions about the activities
 7 and the decisions and the policies that were made at
 8 various levels of Government, and perhaps some of
 9 those findings may be adverse in nature and have an
 10 adverse impact upon those players. I would suggest
 11 that that alone would satisfy another of the criteria
 12 that's laid both in the Act and also in the
 13 Commission rules. So because the province, through
 14 its department and ultimately through the regions,
 15 has been so integral to be involved in this event and
 16 continues to involved, it's submitted that it's
 17 appropriate for the Province to be involved in both
 18 Part I and II of the Inquiry.

19
 20 I haven't prepared lengthy this morning, Madam
 21 Commissioner, but certainly if you have any questions
 22 I'd be happy to answer them.

23 THE COMMISSIONER:

24 No. On the basis of the material that you have

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1 submitted and your comments, I am quite satisfied
 2 that Her Majesty in Right of Newfoundland and
 3 Labrador should and, indeed, is hereby granted
 4 standing in respects to both Parts I and Part II.
 5 Thank you, Mr. Pritchard.

6 MR. PRITCHARD:

7 Thank you.

8 THE COMMISSIONER:

9 Would you call the next matter please or the next
 10 person?

11 THE CLERK:

12 Application No. 2, Eastern Regional Health. Eastern
 13 Regional Integrated Health Authority, please come
 14 forward.

15 MR. SIMMONS:

16 Good morning, Madam Commissioner, I am Dan Simmons.
 17 I am with White Ottenheimer & Baker. Beth Whalen
 18 from our firm has also been involved with me in
 19 acting for the Eastern Regional Integrated Health
 20 Authority. She is not here today but assuming that
 21 standing becomes available for our client, I expect
 22 you will see her as the matter progresses.

23
 24 The application for standing from the Eastern

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1 Regional Integrated Health Authority, more commonly
 2 known as Eastern Health, is for standing in both
 3 Parts I and Parts II. Madam Commissioner, you've
 4 already referred to the Terms of Reference for this
 5 Inquiry which include an inquiry into the estrogen
 6 and progesterone receptor testing carried out in the
 7 Newfoundland and Labrador health care system between
 8 1997 and 2005, the Inquiry into the responses of
 9 responsible authorities and the communications by
 10 them, the inquiry into whether the ER and PR and
 11 quality assurance now in place for that testing is
 12 reflective of current best practices and the power to
 13 make recommendations. All these matters of inquiry
 14 are ones which will involve Eastern Health in all
 15 aspects. Eastern Health --

16 THE COMMISSIONER:

17 Mr. Simmons, just as a matter of clarification, if
 18 you would. Is it correct that the laboratory work
 19 for the tests under consideration between 1997 and
 20 2005 would have been conducted in a facility or
 21 facilities, I don't know which it is, under your
 22 client's auspices as it were?

23 MR. SIMMONS:

24 Yes. Eastern Health itself is an organization that's

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1 a successor to a number of other health authorities,
 2 including the Health Care Corporation of St. John's.
 3 The testing that is going to be the subject of the
 4 Inquiry, which I'm sure we'll come to refer to as the
 5 EP/PR testing --
 6 THE COMMISSIONER:
 7 It will be a lot shorter and I am sure I, for one,
 8 would be very happy if we very quickly move to ER/PR
 9 testing.
 10 MR. SIMMONS:
 11 It's really a process and it runs from the collection
 12 of tissue samples through to the making of treatment
 13 decisions by care givers. In that process there is a
 14 laboratory component. It is an example of something
 15 more generically called immuno-histochemical testing
 16 which was performed in the laboratory at the Health
 17 Science Center under the jurisdiction of first the
 18 Health Care Corporation of St. John's and now Eastern
 19 Health. Eastern Health, therefore, has played a role
 20 through that laboratory in all the ER/PR testing
 21 under the time period in review. For some of the
 22 testing, the beginning parts of the process,
 23 collection of tissue samples, the preservation of
 24 tissue samples and the concluding parts of the

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1 process, treatment decisions and communication of
 2 information, may have been carried out by -- under
 3 the authority of other health authorities in the
 4 province, but Eastern Health has a role in the
 5 laboratory testing for all the samples from that time
 6 period.
 7 THE COMMISSIONER:
 8 So there are really, there are no -- there were no
 9 tests performed during the operative time frame which
 10 your client does not have -- in which your client
 11 doesn't have a part to play as it were. It may be
 12 greater or lesser but there's a part?
 13 MR. SIMMONS:
 14 That's correct, my lady. The part played by Eastern
 15 Health will vary depending on the time, where the
 16 samples originated from and other circumstances, but
 17 there is a part played by Eastern Health in, as far
 18 as we're aware, all of the testing carried out in the
 19 time period. And that is obviously a matter that's
 20 of key importance and subject of inquiry in this
 21 Commission.
 22
 23 It was Eastern Health that also, in 2005,
 24 initiated the re-testing program to review the ER/PR

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1 tests done between 1997 and 2005 that had produced
 2 negative results. There had been several cases
 3 identified where a sample had originally been tested
 4 to be negative but on re-testing had produced a
 5 positive result which indicated that the patients
 6 might benefit from a change in their ongoing
 7 treatment. The re-testing program initiated within
 8 Eastern Health was for the purpose of identifying any
 9 other patients who might similarly benefit. Eastern
 10 Health personnel then also played a role in the
 11 communication of the results of that re-testing both
 12 to patients who had been treated within the Eastern
 13 Health system and its predecessor boards and also a
 14 role in working with three other health authorities
 15 in the province whose patient samples were retested
 16 as part of that program.
 17

18 The Terms of Reference mandate this Inquiry to
 19 look into all those activities and its Eastern
 20 Health's intention, should standing be granted, to
 21 provide, to continue to provide all the assistance
 22 that it can to ensure that this Commission has full,
 23 open and complete access to the information it needs
 24 to carry out its mandate.

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1 It's also Eastern Health that continues to be
 2 responsible for ER/PR testing in this province.
 3 Eastern Health is confident that the practices and
 4 procedures that are in place today are the best
 5 available and that the public can have complete
 6 confidence in that testing, but this Commission must
 7 inquire into the adequacy of those practices and
 8 whether improvement is still possible. It is in
 9 Eastern Health's interest and in the interest of all
 10 members of the public that it serves to help the
 11 Commission in any way it can to satisfy that mandate.
 12
 13 The final Term of Reference addresses the power of
 14 the Commission to make recommendations. In the
 15 complex and technological world of health care today
 16 no one has all the answers and no one is always
 17 right. Constant improvement is the name of the game
 18 and the goal is always to be better. Eastern Health,
 19 therefore, welcomes the opportunity to participate in
 20 this Inquiry and the constructive approach to be
 21 taken in Part II and looks forward to the learning
 22 opportunities that the coming months will present.
 23
 24 The Commission of Inquiry Rules of Practice and

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1 Procedures stress that that is not an adversarial
2 proceeding, and that interested parties are not
3 adversarial parties in the sense that lawyers are
4 used to.

5
6 Eastern Health is aware that, if given standing,
7 there are rights of participation in the Inquiry but
8 also important obligations to participate in a way
9 that gives priority to the objectives of the Inquiry
10 and not priority of those of interested parties.

11
12 Eastern Health understands that the extent of its
13 and other parties' participation may sometimes be
14 limited, and that the prerogative of the Commissioner
15 is to decide on those limits. In particular, there
16 are matters arising out of these events that are to
17 be examined elsewhere and Eastern Health and others
18 will have to respect that.

19
20 Finally, Madam Commissioner, there are important
21 positive aspects and opportunities in this story. In
22 many ways this re-testing program was an
23 unprecedented process. It began entirely within
24 Eastern Health driven by concerned and professional

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1 staff who saw an opportunity to do good by finding
2 patients who might benefit from a change in
3 treatment. Eastern Health hopes that in Part II, in
4 particular, this aspect can be explored for the
5 benefit of its organization and for others who might
6 in future have a similar opportunity. Thank you,
7 Madam Commissioner.

8 THE COMMISSIONER:

9 It's quite clear to me that the Eastern Health
10 Integrated Health Authority should be granted
11 standing in this case, and I grant standing in
12 respect to both Parts I and II. Thank you,
13 Mr. Simmons.

14 MR. SIMMONS:

15 Thank you.

16 THE COMMISSIONER:

17 Next matter or next person?

18 THE CLERK:

19 Application No. 3, Central, Western and
20 Labrador-Grenfell Regional Integrated Health
21 Authorities please come forward to the podium.

22 MR. O'DEA:

23 Good morning, Madam Commissioner, my name is John
24 O'Dea and I am here on behalf of David Eaton who is

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1 unable to be here. He is in court today. You will
2 note from the record that a letter was sent in on
3 September the 5th by Dan Simmons indicating that he
4 would be seeking, or that the Central Regional
5 Integrated Health Authority, the Western Regional
6 Integrated Health Authority and the Labrador-Grenfell
7 Regional Integrated Health Authority would be seeking
8 standing, and that separate legal counsel would be
9 representing them and seeking that standing. We were
10 contacted recently, and on September 14th Mr. Eaton
11 sent a letter of request to the Commission seeking
12 standing and I'm here this morning on his behalf.

13
14 Very briefly, I echo the remarks made by
15 Mr. Simmons with respect to the reasons for standing
16 with one exception, and that is that the Central,
17 Western and Labrador-Grenfell authorities were not
18 involved in the laboratory testing with respect to
19 those test samples that were gathered from the
20 respective health authorities. So the reason for
21 seeking standing is that each of these health
22 authorities collected samples for testing on behalf
23 of their respective patients and the samples
24 originating at their health authorities were sent to

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1 Eastern Health laboratories for testing. As I
2 understand it, the slides were then prepared by
3 Eastern Health's laboratories and sent back to the
4 Central, Western and Labrador-Grenfell authorities.
5 These slides were then read at the respective
6 authority and determinations were made at the sites
7 with respect to whether the samples were positive or
8 negative for, receptor positive or negative. So the
9 roles of Central, Western and Labrador-Grenfell
10 health authorities is somewhat similar to Eastern
11 except for the fact that they were not involved in
12 the laboratory testing.

13
14 So for that reason, there is -- the application is
15 being made very much on the same grounds as being
16 made by Eastern Health Authority.

17 THE COMMISSIONER:

18 Mr. O'Dea, how do you -- I have no difficulty seeing
19 the relationship into Part I. I'm just wondering how
20 you see your client's participation in Part II, that
21 is sort of the policy examination in the piece, as
22 being different from Eastern Health's, if at all?

23 MR. O'DEA:

24 I have not had an opportunity to discuss this with

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1 the clients involved but I do not see that that is
2 entirely different except for the issue around
3 testing. I would suspect that anything in that area
4 would not be within the purview of the Central,
5 Western or Labrador-Grenfell authorities. But I must
6 caution you that my instructions are not that
7 specific this morning because of the short time of
8 which we were given notice of appointment.

9 THE COMMISSIONER:

10 Okay. Anything else to add?

11 MR. O'DEA:

12 Not at this time.

13 THE COMMISSIONER:

14 Thank you, Mr. O'Dea.

15 MR. O'DEA:

16 Thank you.

17 THE COMMISSIONER:

18 Mr. O'Dea, I'll reserve on this application until I
19 have had an opportunity to consider the matter
20 further, particularly in respect of Part II.

21 MR. O'DEA:

22 Thank you.

23 THE COMMISSIONER:

24 You'll be notified in writing. Thank you. Next

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1 application.

2 THE CLERK:

3 Application No. 4, physicians Dr. Kara Laing et al.,
4 please come forward.

5 MR. BROWNE:

6 Good morning, Madam Commissioner, Peter Browne on
7 behalf of Drs. Kara Laing et al.

8 THE COMMISSIONER:

9 Mr. Browne, you walk faster than my little mouse
10 moves here, so could you just give me a moment to
11 pull up your application.

12 MR. BROWNE:

13 It's probably all that running I do, Madam Justice.

14 THE COMMISSIONER:

15 Yes, maybe I should have said you run faster than my
16 mouse moves, but I will be right with you, I think.
17 This is a learning process for me as well, so. Okay.

18 MR. BROWNE:

19 Madam Commissioner, on September 4th I sent
20 correspondence to the Commission outlining the basis
21 for our application this morning, and that followed
22 on the heels of a discussion with Commission
23 Counselor Mr. Coffey. At that time, Mr. Coffey
24 identified several physicians, Drs. Laing, McCarthy,

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1 Carter, Cook and Kwan. All of these physicians, I
2 think is fair to say, served on the tumor panel which
3 was the body that vetted the results from Mount Sinai
4 and compared them with the original results from
5 Eastern Health. Throughout the course of that
6 discussion and a previous meeting, it is apparent,
7 and I think it is obvious, that physicians play an
8 important facet in this Inquiry from the very
9 beginning of the program in 1997 forward, even to the
10 point of dissemination of information following the
11 review, and in that regard we believe, under the
12 provisions of the Terms of Reference, physicians have
13 an interest that needs to be addressed and can offer
14 information to the Inquiry that would be useful to
15 the Inquiry and to the public generally, and
16 accordingly, have asked for standing in both Part I
17 and Part II.

18 I would add some additional comments. As the
19 investigation moves forward is it likely that other
20 physicians will be identified? And I've had some
21 discussions with Commission Counsel in that regard,
22 and what I would propose is as those physicians are
23 identified that Commission Counsel notify me of the
24

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1 identities of those individuals, I will ensure that
2 those individuals are placed in my hand, and then I
3 would ask this morning, potentially, for the Inquiry
4 to grant me leave for additional additions of
5 physicians' names for standing as the matter moves
6 forward.

7
8 Finally, with regard to Part II, given the nature
9 of the focus being the policy aspect of it and the
10 important aspect of "best practice" and so on, I do
11 believe physicians, both pathologists and
12 oncologists, who have had a major role in this review
13 will have the ability to offer some information that
14 would be of some benefit to the Inquiry.

15 THE COMMISSIONER:

16 I agree, actually, in respect of the point you make
17 in respect to Part II. As to Part I, the persons who
18 are currently listed are certainly persons who the
19 Inquiry would be interested from hearing -- in
20 hearing from, and I'm satisfied that standing should
21 be granted for all of those who are currently on the
22 list. I recognize there may be a problem in the
23 event that others are identified along the way, and
24 the proposal that you've outlined for adding further

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1 physicians to the list is acceptable. So that on an
 2 ongoing basis if it becomes evident that other
 3 physicians need to be added to the list we can do
 4 that as that occurs.

5 MR. BROWNE:
 6 I would propose that we do that in writing, Madam
 7 Commissioner?

8 THE COMMISSIONER:
 9 Yes, thank you. You are writing to the Commission to
 10 confirm that you represent the particular person who
 11 would have been by then identified by the Commission.

12 MR. BROWNE:
 13 Correct.

14 THE COMMISSIONER:
 15 Would be sufficient, and I will respond in writing to
 16 indicate that you are in a position to represent that
 17 particular physician or physicians as the case may
 18 be. So standing is granted for both Parts I and II
 19 in respect of those persons you now represent, and we
 20 will deal with any other physicians whose names might
 21 arise in the future in the manner we just indicated.

22 MR. BROWNE:
 23 Thank you, Madam Commissioner.
 24

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1 THE COMMISSIONER:
 2 Thank you, Mr. Browne. Next?

3 THE CLERK:
 4 Application No. 5, Rogers Bussey Applicants on behalf
 5 of firm clients, please come forward.

6 THE COMMISSIONER:
 7 Now, for the record, Mr. Rogers, if you wouldn't mind
 8 identifying yourself.

9 MR. ROGERS:
 10 Good morning, Madam Justice. I suppose I'm the first
 11 applicant here who's speaking on behalf of patients
 12 who are clients. At present, my firm has eight of
 13 the people who have been affected by the subject
 14 matter of this Inquiry and the whole hope, of course,
 15 of my position here today is that I would be allowed
 16 on their behalf to ask questions of both Phase I and
 17 Phase II of the Inquiry. As a matter of coincidence,
 18 as well, I am the Newfoundland branch of the CBA
 19 representative for the Health Law subsection.

20
 21 If I'm granted standing, I can't say that I would
 22 be attending for the complete Inquiry. There may be
 23 a witness which may be of more importance to my
 24 clients than perhaps others. In addition, because I

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1 have a practice which is very litigation based, which
 2 means that I may be required to attend to outside
 3 court activities, I'd also ask that in my place I'd
 4 be allowed to have Kim Horwood, who is also with my
 5 firm. So we would try to keep our emphasis very
 6 narrow in the sense that our questions would be more
 7 specific.

8
 9 The other interesting part is that we've also
 10 asked for funding. If funding is not granted, it
 11 won't prevent us from coming. I mean I have to be
 12 honest. The funding would be helpful. Our clients
 13 are very limited in the sense of their monetary
 14 ability to pay for us to be here, but it wouldn't be
 15 critical.

16 THE COMMISSIONER:
 17 Mr. Rogers, you have not provided what I would call
 18 the customary detail about the funding application.
 19 You have merely indicated in your application that
 20 funding is being requested. Others who have applied
 21 for funding have given us much more information about
 22 the circumstances of their clients or their
 23 organization to enable one to really look at the
 24 issue of funding.

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1 MR. ROGERS:
 2 I could re-look at the issue, sure.

3 THE COMMISSIONER:
 4 You indicated that in your material filed that you
 5 wanted to do that. Do you still wish to do that or
 6 are you just relying on the submission that you're
 7 making now?

8 MR. ROGERS:
 9 It's sort of an interesting subject, my lady. Like I
 10 say, the funding issue wouldn't prevent me from being
 11 here or not attending. I guess the only question is,
 12 and all of us are trying to come to grapple with the
 13 idea of how long this might be. Obviously, if I'm
 14 here for a short --

15 THE COMMISSIONER:
 16 You're not the only one.

17 MR. ROGERS:
 18 Yeah.

19 THE COMMISSIONER:
 20 But may I say that we do anticipate that we're
 21 spending the winter in this room.

22 MR. ROGERS:
 23 Okay. In that case it might be prudent for me to
 24 consider putting forward some more information for

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1 your consideration on that subject.
 2
 3 THE COMMISSIONER:
 4 Our current estimate is that, you know, it will be at
 5 least January, February and a portion of March.
 6 MR. ROGERS:
 7 Okay, okay. The other interesting thing which is
 8 arising, one of my clients, who is also my sister,
 9 Ms. Gerry Rogers, is going to ask for standing. I
 10 would like to endorse her application, my lady. I do
 11 that because even though she is a client of mine, in
 12 some way or another she's become somewhat of a focal
 13 point for many of the victims or, I should say,
 14 patients of this Inquiry, and I think that she would
 15 be a very good voice and a force in the sense of
 16 acting on their behalf in some manner.
 17
 18 There was also question as to whether or not
 19 perhaps I should be making a joint application with
 20 other counsel who have similar clients and similar
 21 interests. I spoke with Mr. Crosbie on this matter
 22 last week and it was determined that the logistics
 23 would not make it possible from his standpoint. I
 24 mean I'm very flexible in that regard but he felt it

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1 wouldn't work from his standpoint. So if there's any
 2 question in that regard I suppose you can ask him for
 3 his further explanation. So I suppose that's all I
 4 have to say now, my lady, subject to any further
 5 questions.
 6 THE COMMISSIONER:
 7 On that point, do I take it that your clients are
 8 part of the group included in the class action which
 9 Mr. Crosbie is involved in? Because his application
 10 is on behalf of really the group that is involved in
 11 the class action. So do I take it your clients would
 12 be among that group as well?
 13 MR. ROGERS:
 14 Yeah. Well what happens, my lady, and the class
 15 action, my experience with them across the country
 16 for different subjects, is that although there might
 17 be a law firm which spearheads the class action in
 18 name, that other law firms will likewise have their
 19 own clientele, and that when the class action comes
 20 to a resolution point then what we do is we provide
 21 information to the law firm which is spearheading the
 22 class action but we still are completely representing
 23 our clientele in terms of giving advice, collecting
 24 information and so on. So the class action lawyer

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1 actually is almost more like a representative but not
 2 the actual lawyer who represents my clients.
 3 THE COMMISSIONER:
 4 Well my next question was just in terms of what do
 5 you bring to the table that is not being brought to
 6 the table by the presence of Mr. Crosbie?
 7 MR. ROGERS:
 8 The difference?
 9 THE COMMISSIONER:
 10 In terms of the representation of persons who may
 11 have been affected.
 12 MR. ROGERS:
 13 Yeah. There is no doubt that I see that there might
 14 be some overlap; however, I think that you would be
 15 able to, if you felt that the question was becoming
 16 duplicitous, that you would be able to say, well,
 17 that question had already been asked and so on. And
 18 the other thing I find is that when I look around the
 19 room here, these are very good qualified counsel and
 20 I actually feel very good about that, and that leads
 21 me to believe that this Inquiry is going to be very
 22 successful in its goals. And I think the added bonus
 23 that I might be able to bring is my past experience
 24 with another large inquiry that happened here a

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1 number of years ago with the Mount Cashel Inquiry.
 2 So perhaps in some way one of the goals that the
 3 Inquiry is trying to do is be very successful and
 4 bring out information, and maybe my experience in
 5 that way might also be able to assist this Inquiry.
 6 THE COMMISSIONER:
 7 And the other point that raises from the application
 8 that you have filed, as I read it you seem to be
 9 applying really for your firm or yourself and in
 10 addition to applying for your clients. Do I have
 11 that wrong? Have I misinterpreted what you said?
 12 MR. ROGERS:
 13 Well ideally it's for myself, my lady. I would be
 14 the main person. I only say -- and I say Rogers
 15 Bussey simply because that is my firm, but I would be
 16 the counsel that would be attending. If I could not,
 17 due to court scheduling and other matters that I
 18 couldn't put to the wayside, I would only ask that
 19 Kim Horwood be able to attend in my place.
 20 THE COMMISSIONER:
 21 But my point being, Mr. Rogers, is that, as you've
 22 noted, counsel who are here are here representing a
 23 particular client. They are here on the behalf of
 24 their client. When I read your application I'm

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1 saying to myself is Mr. Rogers seeking to be here
 2 because of what he brings to the table or his own
 3 interests, or is he seeking to be here on behalf of
 4 those of his clients who have been affected by the
 5 testing?
 6 MR. ROGERS:

7 Most definitely, my main purpose is to represent my
 8 eight clients, without a doubt. I only suggest that
 9 my experience in other types of inquiries could be an
 10 added bonus, my lady.

11 THE COMMISSIONER:
 12 All right then. Anything else you want to add?

13 MR. ROGERS:
 14 I'm sorry?

15 THE COMMISSIONER:
 16 Anything else you wish to add?

17 MR. ROGERS:
 18 Nothing to add, my lady.

19 THE COMMISSIONER:
 20 And do I take it you do not wish to add anything,
 21 further information regarding the funding then?

22 MR. ROGERS:
 23 No, not at this point, my lady.
 24

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1 THE COMMISSIONER:
 2 Well, except I have to make the determination.
 3

4 MR. ROGERS:
 5 Okay.

6 THE COMMISSIONER:
 7 So it's either at this point or you submit it in
 8 writing in the next couple of days or not at all.

9 MR. ROGERS:
 10 No, I don't think I'll submit any further
 11 information. I can make that determination now.

12 THE COMMISSIONER:
 13 All right, thank you. I'm going to reserve on this
 14 application. I have several which are related you
 15 can appreciate. So I will reserve and make this
 16 determination which will be given in writing and
 17 communicated to you.

18 MR. ROGERS:
 19 Thank you, my lady.

20 THE COMMISSIONER:
 21 Thank you, Mr. Rogers. Next application?

22 THE CLERK:
 23 Application No. 6, Gerry Rogers. Please come
 24 forward.

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1 THE COMMISSIONER:
 2 Good morning, Ms. Rogers.
 3 MS. ROGERS:
 4 Good morning, Commissioner Cameron. My name is Gerry
 5 Rogers. First, I would like to thank the Province of
 6 Newfoundland and Labrador for establishing this
 7 Inquiry, and I would like to thank you, Madam Justice
 8 Cameron, for accepting the role of Commissioner for
 9 this very important task. And I also would like to
 10 thank the team who has agreed to work with Madam
 11 Justice Cameron on this Inquiry. Thank you.
 12

13 In July 19, 1999, I was diagnosed with
 14 Infiltrating Ductal Carcinoma of the left breast. My
 15 pathology indicated that the tumor was 2.5
 16 centimeters. That four of the 16 lymph nodes were
 17 taken had cancer in them, and that the hormone
 18 receptor status was estrogen negative and
 19 progesterone positive for 30 percent. I was staged
 20 at 2B. I underwent a mastectomy followed by six
 21 months of chemotherapy and five weeks of radiation
 22 therapy. Following this, I did not take Tamoxifen
 23 because I was told I was estrogen negative.
 24

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1 Throughout that year of treatment, I was treated
 2 with compassion, respect and professionalism and felt
 3 I had received the best care available. I was
 4 totally new to the health care system, having never
 5 been sick before. I was given information in a
 6 timely and accessible manner. Any tests or
 7 treatments were given in a timely manner. Although
 8 the current treatment for breast cancer may seem
 9 barbaric ten years from now, the treatment I received
 10 at the time was to my knowledge the best. I felt
 11 well taken care of and a full participant in my
 12 health care. For that, I am thankful. However,
 13 there was a nagging doubt in my mind. In a
 14 teleconference led by cancer research scientist here
 15 in St. John's, Dr. Jon Church, we were told that
 16 Newfoundland and Labrador had, if not the highest,
 17 pretty near the highest mortality rate for woman with
 18 breast cancer in Canada. I often wondered why. Was
 19 it our lifestyle? Probably not. We're probably not
 20 that different than anywhere in Canada except for
 21 maybe those in BC. Was it that our doctors were not
 22 well trained? I felt that my oncologist, Dr. Kara
 23 Laing, was the best anyone could have. Was it the
 24 equipment? I got pretty fried from radiation,

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1 probably more than was really acceptable at the time.
 2 So were our machines more state of the ark rather
 3 than state of the art? Were we less likely to live
 4 as -- why were we less likely to live as long as
 5 elsewhere in Canada if you were diagnosed with breast
 6 cancer in Newfoundland and Labrador?
 7

8 In 2005, there was an article in The Independent
 9 about the problems with the hormone receptor testing.
 10 I tried for months to get information through Eastern
 11 Health. I called every number that was publicized
 12 and even tried other numbers. No one ever returned
 13 my calls. My own family doctor asked me if I knew
 14 anything about what was going on, as even doctors
 15 hadn't been notified about what was happening. Their
 16 patients were worried, in some cases panicking and
 17 frightened. Many women I knew were confused and not
 18 sure what it meant for them; whether maybe they
 19 hadn't had breast cancer at all or whether they were
 20 going to die because they got wrong treatment.
 21 Rumors were abounding about the state of the
 22 pathology labs and how they were in chaos. I
 23 couldn't understand why no one was communicating
 24 directly to those of us affected, either in person or

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1 through a letter. I finally spoke with my oncologist
 2 several months later and then finally, when all the
 3 retests were in, I met with my oncologist again who
 4 told me that my pathology had changed and my hormone
 5 receptor status was now estrogen positive. That was
 6 almost seven years after my initial diagnosis. I am
 7 one of the lucky ones. I am well and I am healthy.
 8

9 I was somewhat philosophical about the whole issue
 10 for a while but became very alarmed after reading a
 11 number of memos from Dr. G. Ejeckam, a counseling
 12 pathologist engaged by Eastern Health in early 2003,
 13 to address some of the problems evident regarding the
 14 hormone receptor testing and, in particular,
 15 immuno-histochemistry and pathology labs in Eastern
 16 Health will include excerpts from some of his memos
 17 following.
 18

19 As a citizen of Newfoundland and Labrador, and
 20 consequently Canada, I have a number of questions and
 21 issues that I would like to see addressed in this
 22 Inquiry. I am aware that this particular test is
 23 complex and some standards and interpretation
 24 guidelines may have changed even over the past seven

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1 years. However, in Part I these are some of the
 2 questions I would like to have answered. As a
 3 province in Canada we have the same right to
 4 excellence in health care. It is known how important
 5 accurate pathology is to successful treatment of
 6 cancer. Why is it that in Newfoundland and Labrador
 7 we had what appears to be substandard pathology for
 8 immuno-histochemical stains. Why did we have such a
 9 high rate of error when we, as a province, should
 10 have access to the same level of excellence as
 11 anywhere else in the country?
 12

13 Number two, April 4th, 2003, Dr. Ejeckam stated
 14 that, "The immuno-histochemical stains with the
 15 following antibodies," and there are a number,
 16 including ER and PR, "have remained unreliable
 17 erratic and therefore unhelpful for diagnostic
 18 purposes."
 19

20 In a memo dated June 19th, 2003, he states once
 21 again that the situation of the immuno stain at the
 22 General Hospital, Department of Laboratory Medicine
 23 and Pathology is still unsatisfactory. He states a
 24 number of reasons saying to not rectify it would

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1 spell disaster. Strong words for a scientist. He
 2 then goes on to say, "diagnosis based on
 3 inappropriate immuno stain will surely jeopardize
 4 patient care and may even expose the Health Sciences
 5 Corporation of St. John's to litigation".
 6

7 How was it that re-testing was not done at that
 8 time? Why were I and every other woman with breast
 9 cancer not notified then that there could be a
 10 problem with our pathology? Why was no action taken?
 11 That was an extra two years that women could have
 12 been put on the proper treatment. If action had been
 13 taken could lives then have been saved or prolonged?
 14 I have no technical expertise and perhaps it is not
 15 that simple. Perhaps it is not that simple. Perhaps
 16 it would not have made a difference. Perhaps there
 17 was no clear indication at that time that re-testing
 18 should have been done, but I need to know and the
 19 women of this province need to understand and know
 20 why the decision was made not to re-test at that
 21 time. Perhaps there is a valid reason but as a
 22 citizen and a patient I need to know and understand.
 23 Excuse me, could you get me a glass of water, please?
 24

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1 THE COMMISSIONER:
 2 Ma'am, would you like to take a few moments?
 3 MS. ROGERS:
 4 No, I'm fine. I didn't expect this, I'm sorry.
 5 THE COMMISSIONER:
 6 No, not at all.
 7 MS. ROGERS:
 8 Thank you.
 9 THE COMMISSIONER:
 10 Ms. Rogers, you're the one in the room with the
 11 direct experience. Don't apologize.
 12 MS. ROGERS:
 13 In Dr. Ejeckam's memo, he also states, "Finally, it
 14 is pertinent to mention that results of immuno stains
 15 are extremely important in histopathological
 16 diagnosis, especially where classifications of
 17 lymphomas and determination of benign or malignancies
 18 of certain lesions, for example, in the prostate
 19 biopsies depend on crisp, reliable and reproducible
 20 staining results. Diagnosis based on inappropriate
 21 immuno stain will surely jeopardize patient care and,
 22 again, even expose the Health Sciences Corporation of
 23 St. John's to litigation."
 24

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1 Is there, therefore, a need for re-testing for
 2 other cancers? Are some of the testings for prostate
 3 in question? Again, I have no idea. I would like
 4 the Inquiry to raise that question. Why did no one
 5 at any time pick up on the unusual number of high ER
 6 negatives in the breast cancer population in
 7 Newfoundland and Labrador? They were unusually high.
 8 Why was that not picked up on? How could so many of
 9 the same errors continue to recur over a seven- to
 10 nine-year period? Where were the checks and
 11 balances? What were and are the management
 12 structures that ensure the best use of science and
 13 technology in cancer treatment in the province?
 14
 15 Dr. Ejeckam states poor physical facilities, lack
 16 of training and experienced personnel and the
 17 particulars of immuno-histochemical stains, the
 18 physical location -- "The physical location of this
 19 facility is unsatisfactory." He also talked about
 20 overworking personnel in the pathology labs, and says
 21 that, "The staff arrangement as it stands now is
 22 grossly inadequate and unacceptable for problem free
 23 or minimal problem operations. There has to be a
 24 dedicated staff to take over this special procedure."

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1 This again was in 2003. He also states that, "The
 2 volume of immuno-histochemical procedures continues
 3 to increase" and these problems must be solved. And,
 4 he said, "The present staff performing this procedure
 5 are doing the best they can with myriads of other
 6 duties that take them away from the immuno stain
 7 fairly regularly. It is virtually impossible for
 8 them to devote the time required to master the
 9 intricacies of this procedure. The fairly good stain
 10 we have now is a credit to them but they do not have
 11 enough time to spare. It is my understanding, too,
 12 that some of them have less than two or three years
 13 in the establishment and their exit will create a
 14 vacuum and another period of uncertainty in
 15 immunochemistry", which calls into question all the
 16 testing that had been done prior to 2003.

17
 18 I just lost my place, I'll find it. He also
 19 states that, "The volume of immuno-histochemical
 20 procedures continues to increase" and that these
 21 problems must be solved. "To do less simply becomes
 22 a gamble where you may win or lose. This obviously
 23 will spell disaster." Why were the appropriate
 24 resources needed to meet their mandate not allocated

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1 to the pathology lab when it is so clear their role
 2 is so absolutely vital to the successful treatment of
 3 cancer? The way Eastern Health handled those of us
 4 who have been patients was cold, callous and
 5 disrespectful. There was no direct communication
 6 with us once the news broke through the media. It
 7 created a climate of confusion, fear and mistrust.
 8 Many women I spoke with felt betrayed and felt like
 9 they could no longer trust the medical system. When
 10 someone from Eastern Health finally did speak to me,
 11 after I called the Minister of Health, I asked why
 12 they hadn't communicated with us directly, and she
 13 said they didn't want to frighten woman
 14 unnecessarily. We are adults. Many who have
 15 undergone surgery, grueling chemotherapy and
 16 radiation, often with courage, grace and with
 17 gratitude for the wonderful health system we have and
 18 the fabulous medical personnel who have taken care of
 19 us. We are partners in our health care. Often we
 20 have had to make informed decisions about our health
 21 care in consultation with our doctors. Such
 22 difficult decisions as to lumpectomy or mastectomy;
 23 whether to do chemo or not; what kind; radiation or
 24 not. Because it's not always black and white in

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1 cancer treatment. And cancer treatment can sometimes
 2 be still a bit of a crap shoot. All women affected
 3 by this were adults and we needed to get clear,
 4 accessible, reliable information from Eastern Health
 5 about what was going on. In Part II these are some
 6 of the questions I would like answered: Why did we
 7 only find out about a health care problem directly
 8 affecting us through the media and not through our
 9 health care providers? Why and how was a decision
 10 made to not contact every patient individually to
 11 notify us about the problem once it was made public
 12 by the media? Why did a health care issue become a
 13 legal one? What is being done to establish a forward
 14 looking and responsive regulatory environment that
 15 will ensure best practices in this area? What is
 16 being done to ensure that the people of Newfoundland
 17 and Labrador will have the same access to the best
 18 care as citizens across the whole country? What will
 19 Eastern Health do to enhance transparency, openness
 20 and accountability to strengthen public trust? What
 21 will Eastern Health do to help the public feel
 22 confidence in our health care system once again?

23
 24 In conclusion, as a citizen I value our health

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1 care system. It is a national and provincial
 2 treasure, and as citizens we have right to safe,
 3 accessible and universal health care and excellence.
 4 It is imperative that the appropriate resources be
 5 allocated to all aspects of health care so that our
 6 health care providers and healers can fulfill their
 7 mandated roles and responsibilities. The Canadian
 8 Strategy for Cancer Control states that by the year
 9 2015 one in three people in Canada will be diagnosed
 10 with cancer at some time in their life. That is a
 11 lot of strain on the system. It strikes me that one
 12 of the contributing factors in the problem we have
 13 faced has been the lack of adequate resources.
 14 Insufficient financial, the lack of enough qualified
 15 personnel, the lack of support for personnel who have
 16 been working with dedication and concern. We, as a
 17 society, cannot afford to allow our health care
 18 system to deteriorate. It is my hope that this
 19 Inquiry will look at all these contributing factors
 20 and take a forward-looking approach in its
 21 recommendations that goes simply beyond the issues of
 22 immuno-histochemical stains but rather speaks to the
 23 heart and soul of what makes our health care system
 24 the treasure it has been. Thank you, Madam

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1 Commissioner.

2
 3 THE COMMISSIONER:
 4 Now, Ms. Rogers, how do you see your role were you to
 5 be granted standing? This is going to be a long
 6 hearing. Of necessity, we have determined, just
 7 given the volume of people who must be asked
 8 questions, the volumes of documents that have to be
 9 examined, so as I've already indicated I think there
 10 are going to be a fair number of people in this room
 11 for the winter as it were. I'm just wondering if
 12 you --

13 MS. ROGERS:

14 My condolences to you.

15 THE COMMISSIONER:

16 But do you see, if you're granted standing, wanting
 17 to be here with that role, in the sort of traditional
 18 lawyer's role for two and a half months?

19 MS. ROGERS:

20 Absolutely not, Madam Commissioner.

21 THE COMMISSIONER:

22 I'm listening to you, I'm just wondering if you, what
 23 you really want to do is to ensure -- I recognize
 24 you're making a plea that certain things be examined.

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1 I think I've already indicated, there is a limit to
 2 what I can examine under the Terms of Reference and I
 3 have to be guided by that. But certainly mostly what
 4 you have referred to is within the frame of the kinds
 5 of things that people will be asking questions about
 6 during next winter. But it seems to me that in part
 7 you are saying the story of the people whose tests
 8 were -- whose test results were different following
 9 re-testing has to be examined or has to be told, and
 10 that a major concern is how the communication piece
 11 of -- I'm not to say that you're not concerned about
 12 the medicine end of it, but from the perspective of
 13 the patient, the communication of the problem when it
 14 became known that it had arisen, the test results,
 15 when those were received was handled in a manner that
 16 you felt was, let us say, lacking. So your primary
 17 interest seems to be on that aspect of the Inquiry.
 18 Am I right? I'm not suggesting that you're not
 19 interested in ensuring that the Inquiry examine fully
 20 the science end of it but your emphasis in your
 21 remarks on how patients were treated seems to me to
 22 indicate a more extensive interest in that aspect of
 23 it. Is that correct?
 24

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1 MS. ROGERS:
 2 No, I believe I have two primary -- I'm not so sure I
 3 even want standing, and God forbid, the last thing
 4 I'd want to do is to be stuck in this room all
 5 winter. I really -- you do really do have my
 6 condolences, and I know that that's going to be a
 7 real difficult job.

8 THE COMMISSIONER:
 9 Well that's what I'm trying to explore with you.

10 MS. ROGERS:
 11 Yes, yeah.

12 THE COMMISSIONER:
 13 Is whether you really want to be here all winter.

14 MS. ROGERS:
 15 No, I don't.

16 THE COMMISSIONER:
 17 But let me say, that, well, part of the role of
 18 counsel here is to be open to people like you and to
 19 hear from you as to what you think is important on
 20 terms of the questioning of the witnesses. So that
 21 I'm wondering if standing is what you really want or
 22 there's something, another way of participating. I'm
 23 not suggesting that you not participate, I'm just
 24 wondering if it's standing that you want.

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1 MS. ROGERS:
 2 Right. When I arrived this morning I spoke to some
 3 of your staff and said I'm not so sure that standing
 4 is what I want. There are a number of issues that I
 5 feel really need to be addressed, and I'm not sure if
 6 the inquiry, for instance, would address the issue of
 7 why is it that it seems that re-testing wasn't
 8 started in 2003 when Dr. Ejeckam's findings clearly
 9 indicated that there was a problem with the testing
 10 that had been done prior to 2003? And why is it that
 11 testing only began then in 2005? And then again, the
 12 issue of how decisions (a) are made. Why were there
 13 so few checks and balances in place? And then how
 14 Eastern Health then dealt with those of us who were
 15 affected by this issue of retesting.

16 THE COMMISSIONER:
 17 Yes, okay. And you understand that in respect of
 18 Part II, for example, there is an anticipation that
 19 those who are granted standing will make submissions
 20 in writing to the Commission on Part II because
 21 that's the policy end of the matter which will deal
 22 with going forward, which will deal with ethical and
 23 legal issues as to what responsibilities there are
 24 with various players in the piece, if you will. But

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1 the public also can make submissions in writing. So
 2 whether you have standing or not in respect of Part
 3 II you would be in a position to make submissions on
 4 the issues that relate to Part II. Those can --
 5 that's clearly indicated in our Rules of Procedure
 6 and Practice. So that's another avenue that's open
 7 to people who are not necessarily granted standing.

8 MS. ROGERS:
 9 And then for the issue of exploring what happened
 10 after Dr. Ejeckam's consultation and what happened,
 11 how can we get those kinds of questions answered?

12 THE COMMISSIONER:
 13 Well Commission Counsel's job is to place before the
 14 Commission the full picture of what is important to
 15 meet -- to enable me to and effectively deal with all
 16 of the Terms of Reference. So that not only a
 17 citizen but I would expect lawyers who have been
 18 granted standing for other parties may have
 19 conversations with our counsel about the nature of
 20 the evidence that can be brought out from a
 21 particular witness. The advantage of having standing
 22 is if at the end of the examination by Commission
 23 Counsel there are still questions which one or the
 24 other of the parties feel that ought to be put to a

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1 particular witness, then those who have standing have
 2 the opportunity to do that. But it's confined in the
 3 sense of what is relevant to the determination to be
 4 made given the Terms of Reference. So it's not a
 5 general, broad inquiry and because a particular
 6 witness might be on the stand who may have some
 7 information that somebody would like to get, my job
 8 is to ensure that we concentrate on the information
 9 which is relevant to the determination that I may
 10 make at the end of the day with respect to the Terms
 11 of Reference. Most of what you've raised, of course,
 12 would be within that broad parameters but not all.

13 MS. ROGERS:
 14 And the other issue that is of great concern to me is
 15 again that so much of the information that we got as
 16 women who were affected we got through the media, and
 17 sometimes -- and there was no chance to ask
 18 questions, and it is my hope that the Commission, as
 19 well, will either have a public meeting with women or
 20 families that have been affected so that there is a
 21 possibility for two-way communication. And again, I
 22 think the rupture in the trust that so many people
 23 felt in the health care system has somehow have to be
 24 healed, and I think that that can only happen with

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1 direct communication rather than just simply through
 2 third party communication.
 3 THE COMMISSIONER:
 4 Yes, okay, thank you.
 5 MS. ROGERS:
 6 Thank you.
 7 THE COMMISSIONER:
 8 Anything else you wish to add?
 9 MS. ROGERS:
 10 Thank you, and good luck.
 11 THE COMMISSIONER:
 12 Thank you very much now. I'm going to reserve on
 13 your application.
 14 MS. ROGERS:
 15 I even wonder if I should withdraw my application for
 16 standing so that you don't have to deny me?
 17 THE COMMISSIONER:
 18 Well why don't you think about that for the next
 19 couple of days?
 20 MS. ROGERS:
 21 Okay.
 22 THE COMMISSIONER:
 23 There is another day which we're dealing with
 24 applications, that's on Monday. And if by Monday you

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1 conclude that there are other ways to participate and
 2 you'd prefer to do it that way, then you can let our
 3 staff now and they'll communicate that to me. All
 4 right?
 5 MS. ROGERS:
 6 Thank you.
 7 THE COMMISSIONER:
 8 Thank you very much. Now, the next applicant.
 9 THE CLERK:
 10 Application No. 7, Health Care Insurance Reciprocal
 11 of Canada, please come forward.
 12 THE COMMISSIONER:
 13 Good morning, would you just once again give me a
 14 moment to catch up with you. You didn't have far
 15 enough to walk obviously. I'm obviously trying my
 16 very best to become proficient with dealing with
 17 these things via the computer. This is practice for
 18 next January but I'm not quick enough yet. Here we
 19 go. Now, I do have your application before me.
 20 Thank you. Yes, could you for the record please
 21 identify yourself, Mr. Boone?
 22 MR. BOONE:
 23 Yes, good morning, Madam Commissioner, I'm Dan Boone
 24 and I represent the Health Care Insurance Reciprocal

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1 of Canada. And for the sake of brevity, if it please
 2 the Commission I will refer to it by its acronym by
 3 which it's normally is referred to is HIROC,
 4 H-I-R-O-C.
 5 THE COMMISSIONER:
 6 Yes.
 7 MR. BOONE:
 8 HIROC, Madam Commissioner, is an insurance reciprocal
 9 exchange. It operates on a subscription and a
 10 not-for-profit basis. It has, at present it has
 11 about 500 health care facilities as members and
 12 subscribers in provinces across Canada. Through its
 13 programs it provides, among other things, a program
 14 of liability insurance. At the material times under
 15 which -- for which the issues that the Commission
 16 will be examined has developed, HIROC was the
 17 liability insurance provider both for the Health Care
 18 Corporation of St. John's and its successor Eastern
 19 Health. As a consequence, HIROC is responsible to
 20 defend and indemnify both the Health Care Corporation
 21 of St. John's and now Eastern Health in respect of
 22 civil actions for damages that have been brought and
 23 are brought now before the courts of Newfoundland
 24 with respect to the issues which are also under

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1 consideration in the Inquiry. The issues which are
 2 in consideration in the civil actions put in issue by
 3 the pleadings are very much the same issues which
 4 will be considered pursuant to the Terms of Reference
 5 of the Inquiry. And as a consequence, HIROC takes
 6 the position that with respect to Part I it is a
 7 person whose interest may be affected, adversely
 8 affected by the findings of the Commission.
 9 THE COMMISSIONER:
 10 Well surely it's the findings of the judge that
 11 adversely affects your (inaudible).
 12 MR. BOONE:
 13 That could be. That could be, my lady, but if we
 14 look at the issues they're largely coincident with
 15 the issues in the civil action. A lot of what will
 16 happen here will -- just by nature of what will
 17 happen in this proceeding will find its way into the
 18 civil action. A lot of the evidence that we have
 19 brought here will also be evidence in the civil
 20 action. The issues are very much similar because the
 21 issues here go beyond, for instance, according to the
 22 Terms of Reference of the Commission, beyond findings
 23 of fact. They get into questions such as whether or
 24 not the practices of Eastern Health at the relevant

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1 time were reasonable and appropriate, which is very
 2 much coincident with the question as to whether or
 3 not Eastern Health met the standard of care which
 4 will be at issue in the civil proceeding. As a
 5 consequence, the thing, the findings of fact in the
 6 conclusions and the inference from those facts that
 7 the Commission will draw pursuant to its Terms of
 8 Reference will very much be the issues which will be
 9 always in play in the civil actions.

11 Now with all that said, and I think it's in our
 12 submission, at least, it is clear that our interest
 13 may be adversely affected by the findings of fact
 14 made here. Eastern -- or sorry, HIROC recognizes
 15 that the Commission has to control its own process.
 16 It is going to be very interested in the efficiency
 17 of its process and is not going to want any kind of
 18 duplication of effort or anything of that nature.

19 Our interest --

20 THE COMMISSIONER:

21 Well that's my concern. When I'm reading the
 22 material which you've filed, frankly it seems to me
 23 that in respect of Part II your client plays a role
 24 and can very much contribute to the work of the

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1 Commission. In respect of Part I that's what
 2 concerns me as to whether or not there's a
 3 duplication between what you would propose to do and
 4 what would be done by Eastern Health in any event.

5 MR. BOONE:

6 I think that's so, Madam Commissioner, and we
 7 recognize that in our application. And in fact we
 8 have been instructed to give assurances to the
 9 Commission that we would not take any effort to
 10 engage in what we would consider to be unnecessary
 11 duplication. However, as Madame Commissioner will
 12 remember, especially from your time as a trial judge,
 13 one can't always anticipate where things will go and
 14 what positions each of the parties will take with
 15 respect to some of the issues.

16 THE COMMISSIONER:

17 No, but our days would be so much duller if we --

18 MR. BOONE:

19 Wouldn't they be? I agree. And for that purpose, in
 20 terms of expanding upon the role that we anticipate
 21 playing, at the end of it all it would be our hope if
 22 we sat here and never asked a question. It would be
 23 our hope if we sat here and never presented any
 24 evidence. On the other hand, I'm deterred by the

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1 specter of having to come in and seek standing
 2 because something has occurred within the Commission
 3 which could adversely affect our interest and nobody
 4 is seeking to protect those interests in a way that
 5 we would think would be coincident with what we would
 6 want to do. And as a consequence we will be willing
 7 to take whatever restrictions or limitations that the
 8 Commission wished to put on us, either in advance or
 9 ad hoc, in terms of what evidence we're able to
 10 present, what questions we're able to ask. And we
 11 also will commit that we will work in cooperation
 12 with Mr. Simmons to the greatest degree possible to
 13 ensure that there is no duplication. And we won't
 14 ask questions that nibble or quibble about things
 15 that perhaps are not particularly important to the
 16 Terms of Reference of the Commission but may be
 17 important to us.

19 So although in fact at this particular time I
 20 can't anticipate and my client can't anticipate where
 21 its interest might diverge with the interest of
 22 others before the Commission already, that could
 23 occur, and because it could occur we would seek to
 24 have standing and with the commitment that we will

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1 not duplicate and that we will cooperate with others
 2 to avoid that. And that we will only speak when
 3 necessary.

4 THE COMMISSIONER:

5 All right. Anything else you wish to add, Mr. Boone?

6 MR. BOONE:

7 No, Madam Commissioner, except with respect to Part
 8 II, of course. Just for the record, and our
 9 application just covered this, is that HIROC, as well
 10 as providing liability insurance programs to its
 11 members and subscribers across the country, is also a
 12 well-known advocate and promoter of health care
 13 interest within the country. It is one of the
 14 earlier members of the Canadian Patient Safety
 15 Institute. It has provided educational programs to
 16 its subscribers and to others within the health care
 17 community from the time of its inception in the early
 18 1990s or late 1980s, and it has on staff risk
 19 management experts. It has available to it experts
 20 in risk assessment and in issues such as disclosure
 21 and those kinds of things which will be under
 22 consideration in Part II and, therefore, we are, on
 23 behalf of HIROC, seeking standing for both Part I and
 24 Part II.

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1 THE COMMISSIONER:
 2 Yes. Well I think, as I've already indicated, I am
 3 quite convinced that there is a benefit to having
 4 your organization here in respect of Part II, but I'm
 5 going to reserve on the issue because I want to think
 6 a little further about the duplication problem. So I
 7 reserve in respect of standing for your client. You
 8 will hear from us in writing.

9 MR. BOONE:
 10 Well thank you, Madam Commissioner. Thank you.

11 THE COMMISSIONER:
 12 Thank you, Mr. Boone. That's it?

13 THE CLERK:
 14 That's it.

15 THE COMMISSIONER:
 16 Those are the applications for today. We will
 17 continue with, I think, three other applications on
 18 Monday of next week. And for those where there have
 19 been a reservation of the question, you will hear
 20 from us in writing in due course. Thank you.

21
 22 (Adjourned to September 24, 2007)

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 8 CERTIFICATE
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 13
 14 I, Beverly Guest, of Elite Transcription, of
 15 Goulds in the Province of Newfoundland and
 16 Labrador, hereby certify that the foregoing
 17 pages, numbered 1 to 64, dated September 19,
 18 2007, are a true and correct transcript of the
 19 proceedings which has been transcribed by me to
 20 the best of my knowledge, skill and ability.

21
 22
 23
 24

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