Commission of Inquiry on Hormone Receptor Testing
Public Inquiry

Opening Remarks
of
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Commission Counsel

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- Commissioner, on behalf of myself, Commission Counsel, Sandra Chaytor, and associate counsel, Mandy Woodland, I would like to welcome members of the public and counsel for the various parties who have been granted standing before the Inquiry.

- At the outset, I want to acknowledge that these public hearings are being electronically recorded and broadcast. Speaking for myself, and I expect for most other counsel here, this is a novel experience. Whatever idiosyncrasies we as individual lawyers may exhibit, I trust that the focus of all concerned will centre on the important subject matter at hand, namely the documentary exhibits entered as evidence and the oral testimony that individual witnesses will give.

- While this is the first day on which evidence will be presented at the Inquiry's public hearings, much work has already been done, both behind the scenes and also, in the instance of the Court proceedings before Judge Dymond, in the public eye. Commission Counsel acknowledges the cooperation of our legal colleagues in arranging for the production of documents and the scheduling of interviews. Counsel's cooperation will help to ensure that this Inquiry is as informative, probing and streamlined as possible. Bearing in mind that these public hearings are presently scheduled to run for approximately the next 16 or so weeks, continuation of the collegiality that my legal colleagues have exhibited to date will help to ensure that the hearings proceed in as efficient and thorough a manner as possible.

- Summons to Produce have been issued to persons thought to be in possession of potentially relevant documents and pursuant to those, the Commission has been provided with voluminous documents. The Commission's counsel has reviewed many thousands of pages of paper in

both electronic and paper formats. This has been done to identify those documents that are truly relevant and of potential importance to the work of the Inquiry. To date, thousands of pages have been scanned and entered into the Commission's database. That scanned database has been provided to counsel for parties with standing, subject to strict confidentiality protocols and agreements.

- The Commission's investigation is still ongoing and new relevant documentation will inevitably become available as the Inquiry proceeds. We do, however, expect that the number of such documents to be added to our database will gradually diminish.

- I want to say a word about privacy issues. Not surprisingly, documentation related to the mandate of this Inquiry, namely medical matters relating to hormone receptor testing, results over an eight-year period and raises many serious privacy and confidentiality issues. All documentation that will be tendered as exhibits during the Inquiry's public hearings has been reviewed and edited in order to redact information of a personal or confidential nature.

- As well, the Commission's rules contain provisions that allow a witness to ask the Commissioner to issue orders or directions to address confidentiality concerns. To date, in the course of interviewing 89 potential witnesses, the Commission's Counsel have conducted 111 interviews spanning approximately 270 hours. Statements of anticipated evidence are, on an ongoing basis, being provided to counsel for parties with standing. Although those statements will not be used for cross-examination, we believe that they will assist counsel in preparing their examinations and in identifying issues of importance to the Inquiry.

- Now, not all witnesses who have been interviewed will testify during the public hearings. In some cases, Commission Counsel have determined that any testimony a particular person would give or could give would either not address key issues or would merely duplicate the evidence of others who will be called to testify. The objective of Commission Counsel is here to present the evidence necessary for you, as the Commissioner, to address in as thorough and as streamlined a fashion as possible, the Terms of Reference you have been given.

- With that goal in mind, it is our intention to ensure an adequate evidentiary record is provided so that you may fully appreciate the context in which the events you are called upon to examine occurred. When a witness testifies, the goal of Commission Counsel will be to distil the significant facts. That process may occasionally require a degree of probing on our part. Our role as Commission Counsel requires us to be both even-handed and thorough.

- In Canada, public inquiries can play and have played an important role in the delivery of justice, broadly defined as that can be considered. It has been said, that the possible approaches to a public inquiry cover a spectrum. At one end, there are public inquiries that resemble the fact-finding processes most often seen in a trial court. There, witnesses are called to establish every detail and documents are formally entered as exhibits. Policy issues, if considered at all, are largely secondary. Such inquiries are primarily designed to determine what happened and what ought to be done about what happened in a very specific context.

- At the other end of the spectrum are policy-focused inquiries where facts are determined by a Commissioner without the hearing of viva voce evidence. In such inquiries, much of the debate develops in policy papers and not during the examination and cross-examination of witnesses. In this case, because of the dual nature of your Terms of Reference, the task of Commission Counsel has been and will continue to be to chart a course that utilizes aspects of both those approaches.

- Each witness who is called to testify will first be examined by Commission Counsel. Other counsel will then, in turn, each be afforded an opportunity to question the witness in an order that permits counsel for the witnesses to go last. Commission Counsel may then, in re-examination, canvass with the witness any germane points that have arisen.

- I want to say something about the general order in which certain subject matters will be addressed in the viva voce evidence and the documentary evidence. Although there will inevitably be a degree of overlap, the witnesses who will testify here, can generally be characterized as falling into one of three categories. First and foremost, are the patients and the patients' relatives or at least representatives of those groups.

- The Inquiry's public hearings will begin by hearing from witnesses who are themselves breast cancer patients or people who are relatives of a deceased breast cancer patient. Each witness will testify as to the general course of his or her own illness or that of his or her relative. In particular, these witnesses will address what he or she was told from time to time about his or her tumors, estrogen receptors, and I'll hereafter refer to estrogen receptor as ER. About the estrogen receptor status and their progesterone receptor status, sand I will hereinafter be referring to progesterone receptor status as their PR status.

- Now issues involving disclosure to patients about the retesting process and issues related to communication by responsible authorities with patients about the ER and PR retesting process, which was conducted by

Eastern Health, will be addressed by individuals drawn from the group most impacted by the events being investigated by this Inquiry.

- Following those witnesses, the Inquiry will then hear from a group of witnesses who, in one form or another, generally represent certain responsible authorities, such as the four regional health authorities and the Government of Newfoundland and Labrador. These witnesses are generally politicians, administrators, civil servants or communications personnel. This group will include Cabinet Ministers, Government civil servants of various ranks, officers and employees of Eastern Health and the other three health boards or health authorities, and other witnesses who can speak to matters relating to the disclosure to and communication with the patients affected or their families.

- Although, and I emphasize this, not immutable, the order in which those witnesses will testify is based on their position in a descending corporate hierarchy. Therefore, the most senior person, in a corporate hierarchy sense, Joan Dawe, who was the Chair of the Board of Trustees of Eastern Health, will testify first in this group. She will be followed by her counterparts in Government, namely the three Ministers of Health and Community Services, Ministers Ottenheimer, Osborne and Wiseman. Then will come the CEO of Eastern Health, George Tilley. He is next, followed by the Deputy Minister of Health at the time, John Abbott, and we will then go back to Eastern Health and we will continue on accordingly, alternating, descending through the corporate hierarchy of the health authorities and of Government.

- The final grouping of witnesses to testify will address the medical and technological aspects of matters that the Terms of Reference require you to explore. These witnesses are, in the main, medical doctors whose clinical activities are to be examined and laboratory technologists who processed the tumor tissue and the IHC slides that are here being examined and the activities in relation to same are being examined by the Inquiry. Pathologists, oncologists, laboratory technologists, nurses and surgeons will, as appropriate, testify about such matters as needle biopsies, excision biopsies, mastectomies, tissue handling, tissue fixation, grossing of specimens, preparation of paraffin blocks, specimen selection, antigen retrieval, antibodies, clones, internal and external controls, slide interpretation and quality assurance and quality control. Clinical and technological reviewers external to Eastern Health will also testify during this phase of the public hearings.

- Also to be led during this phase of the public hearings, will be evidence relating to best practices. Now when you bear in mind the variety of clinical and technological matters that I just listed, Commission Counsel ask that members of the public, including patients and their family

members, be patient. The calling of viva voce evidence can at times be a tedious process. However, it is here necessary to the Inquiry's fact-finding efforts so that by the end of these public hearings all interested parties can feel assured that the circumstances that fairly relate to the Commission's mandate have been sufficiently explored. Experienced lawyers and judges understand that the evidentiary fact-finding process sometimes involves what I'll refer to as twists and turns. Occasionally, certain evidence, when initially heard, cannot be fully understood until subsequent testimony provides a different, if not a more appropriate context in which it can be viewed. The subject matters and issues this Inquiry will reveal are largely multi-faceted. Sometimes the Commission will be required to delve into events that unfolded in various facilities and involved a number of individuals over a time span of nearly a decade. Forming firm factual conclusions before all the evidence is heard would be unfair to the individuals and organizations involved.

- Now before closing my remarks, on behalf of all Commission Counsel, the three of us here, I want to thank the Commission employees who have worked tirelessly. I will say, and at times, what must to them have seemed endlessly, to enable Commission Counsel to now embark on the public hearing phase of this Inquiry.