



## **Rules of Procedure and Practice**

### **Commission of Inquiry on Hormone Receptor Testing**

#### **Introduction**

Commission proceedings will be divided into two parts. In Part I, the Commission will inquire into and report on problems with estrogen and progesterone hormone receptor tests conducted between 1997 and 2005 in the Newfoundland and Labrador health care system. This will include inquiry into what happened to cause or contribute to the problems, when the problems came to light and whether they could have been detected earlier. Part I will also examine any protocols in place during the relevant time frame and what steps, if any, were taken by responsible authorities upon becoming aware of the problems.

Part II of the Inquiry will have a policy focus and will include a review of both policy and legal issues raised by the terms of reference. This is expected to canvass the duties, if any, of the responsible authorities to patients, other parties within the health care system, and the public respecting differences in test results on re-testing. Part II will also examine whether the estrogen and progesterone hormone receptor testing systems and processes and quality assurance systems currently in place are reflective of “best practices.”

#### **I. Standing and Funding**

##### **A. General**

1. Pursuant to s. 5(2) of the *Public Inquiries Act, 2006*, the Commissioner may grant to persons or groups standing to participate as a party after considering:
  - (a) whether the person’s interest may be adversely affected by the findings of the Commission;

- (b) whether the person’s participation would further the conduct of the Inquiry; and
  - (c) whether the person’s participation would contribute to the openness and fairness of the Inquiry.
2. Commission counsel, who will assist the Commissioner throughout the Inquiry and are to ensure the orderly conduct of the Inquiry, have standing throughout the Inquiry. Commission counsel have the primary responsibility for representing the public interest at the Inquiry, including the responsibility to ensure that all interests that bear on the public interest are brought to the Commissioner’s attention.
  3. In order to avoid duplication, and thereby promote time and cost efficiencies, persons or groups of similar interest are encouraged to seek joint standing.
  4. The Commissioner will determine the extent to which a party granted standing may participate in Part I and/or Part II of the Inquiry.
  5. The term “party” is used to convey the grant of standing and is not intended to convey notions of an adversarial proceeding.
  6. Counsel representing any witness called to testify before the Commission may participate during the hearing of such evidence.
  7. Due to the different nature of the proceedings in the two Parts of the Inquiry, the nature and extent of a party’s participation may be different in Part II than in Part I.
  8. In addition to the ability of all members of the public to have access to Research and Policy Papers and to make public submissions pursuant to Rule 56, those persons or groups who have been granted standing in Part II shall be entitled to participate directly in any symposia and public meetings.
- B. Applications for Standing**
9. Applications for standing shall be made in writing via facsimile, e-mail or regular mail addressed to the Commission and provide the following information:
    - (a) whether standing is sought for Part I and/or Part II of the Inquiry; and

- (b) a statement as to how the applicant satisfies the criteria for standing set out in Rule 1.

### **C. Applications for Funding**

- 10. The Commissioner may make recommendations to the Government of Newfoundland and Labrador regarding funding for counsel and other expenses of parties who have been granted standing.
- 11. Applications for funding shall be made in writing via facsimile, e-mail or regular mail addressed to the Commission and shall contain the following:
  - (a) an affidavit stating whether an applicant would be able to participate without such funding, supported by relevant documentation, which may include financial information and, for organizations, financial statements, operating budgets, the number of members and membership fee structure. Applicants should also indicate whether they have contacted other groups or individuals with a view to forming an amalgamated group for the purpose of seeking standing and/or funding, and the results of any such contacts;
  - (b) a description of the purposes for which the funds are required, how the funds will be disbursed, and how they will be accounted for;
  - (c) a statement of the extent to which the applicant will contribute its own funds and personnel to participate in the Inquiry; and
  - (d) the name, address, telephone number and position of the individual who would be responsible for administering the funds, and a description of the financial controls that would be put in place to ensure that any funding provided is disbursed for the purposes of the Inquiry.

## **II. Rules Pertinent to Hearings and Production of Evidence**

### **A. General**

- 12. (a) Public hearings will be convened at 50 Tiffany Lane, St. John's, and such other locations as the Commissioner designates to address issues related to Part I of the Inquiry.
- (b) In the ordinary course, parties will participate in the public hearings by attendance in person by themselves and/or their

counsel. However, in appropriate circumstances, as determined by the Commissioner, a party may be permitted to participate in the public hearings by way of videoconference.

13. All parties and their counsel shall be deemed to undertake to adhere to these Rules, which may be amended or dispensed with by the Commissioner as she sees fit to ensure fairness. Any party may raise any issue of non-compliance with the Commissioner.
14. The Commissioner shall deal with a breach of these Rules as she sees fit including, but not restricted to, revoking the standing of a party or imposing restrictions on the further participation in or attendance at the hearings by any party, counsel, individual, or members of the media.
15. Insofar as it needs to gather evidence, the Commission is committed to a process of public hearings. However, applications may be made to proceed *in camera* in accordance with s. 6(2) of the *Public Inquiries Act, 2006*. Such applications should be made in writing at the earliest possible opportunity pursuant to the provisions of Section II (B) (vi) of these Rules.
16. Subject to the *Public Inquiries Act, 2006*, the conduct of and the procedure to be followed on the Inquiry are under the control and discretion of the Commissioner.
17. The Commissioner may extend or abridge any time prescribed by these Rules.

**B. Evidence**

(i) *General*

18. In the ordinary course, Commission counsel will call and question witnesses who testify at the Inquiry. Counsel for a party may apply to the Commissioner to lead a particular witness' evidence in chief. If counsel is granted the right to do so, examination shall be confined to the normal rules governing the examination of one's own witness.
19. The Commission is entitled to receive any relevant evidence at the Inquiry which might otherwise be inadmissible in a court of law. The strict rules of evidence will not apply to determine the admissibility of evidence.
20. Subject to Rule 25, the Commission may admit at the Inquiry evidence not given under oath or affirmation.
21. Parties are encouraged to provide, by October 12, 2007, Commission counsel with the names and addresses of all witnesses they believe ought

to be heard, together with a brief statement as to the relevance of the witness to the Inquiry.

22. Commission counsel have discretion to refuse to call or present evidence.
23. When Commission counsel indicate that they have called the witnesses whom they intend to call in relation to a particular issue, a party may then apply to the Commissioner for leave to call a witness whom the party believes has evidence relevant to that issue. If the Commissioner is satisfied that the evidence of the witness is necessary, Commission counsel shall call the witness to testify.

(ii) *Witnesses*

24. Anyone interviewed by or on behalf of Commission counsel is entitled, but not required, to have personal counsel present for the interview to represent his or her interests.
25. Witnesses shall give their evidence at a hearing under oath or affirmation.
26. In the ordinary course, witnesses will give their evidence at a hearing in person, but in appropriate circumstances, as determined by the Commissioner, a witness may be permitted to give testimony via videoconference.
27. If special arrangements are desired by a witness in order to facilitate the comfort of the witness in testifying, a request for accommodation shall be made to the Commission sufficiently in advance of the scheduled appearance of the witness to reasonably facilitate such a request. While the Commission will make reasonable efforts to accommodate such requests, the Commissioner retains the ultimate discretion as to whether, and to what extent, such requests will be accommodated.
28. (a) Witnesses may be called to give evidence more than once.  
(b) Witnesses who are summoned by the Commission are entitled to be paid the same personal allowances for their attendance at the hearing as are paid for the attendance of a witness summoned to attend before the Supreme Court of Newfoundland and Labrador Trial Division.

(iii) *Order of Examination*

29. The order of examination of any witness will be as follows:

- (a) subject to Rule 18, Commission counsel will adduce the evidence from the witness;
  - (b) parties granted standing to do so will then have an opportunity to cross-examine the witness to the extent of their interest. The order of cross-examination will be determined by the parties having standing, and should they be unable to reach agreement, by the Commissioner;
  - (c) counsel for a witness, regardless of whether or not counsel is also representing a party, will examine last, unless he or she has adduced the evidence of that witness in chief, in which case there will be a right to re-examine the witness; and
  - (d) Commission counsel will have the right to re-examine.
- (iv) *Access to Evidence*
- 30. All evidence shall be categorized and marked P for public sittings and, if necessary, C for sittings *in camera*.
  - 31. A transcript will be posted to the Commission's website which will be fully accessible to the parties, the public and the media.
  - 32. One copy of the P exhibits will be available to be shared by the media.
  - 33. Only those persons authorized by the Commissioner, in writing, shall have access to C transcripts and exhibits.
- (v) *Disclosure and Production of Evidence*
- 34. All relevant information shall be disclosed and all relevant records, documents or other things within the possession, control or power of a party shall be produced to the Commission by any party with standing within fourteen (14) days of that party having been granted standing. This obligation shall be ongoing and continuing throughout the course of the Inquiry.
  - 35. Where a party with standing objects to the disclosure of information or the production of any record, document or thing, it shall in any event be produced in its original unedited form to Commission counsel who will review and determine the validity of the objection. The party and/or that party's counsel may be present during the review process. In the event the party objecting disagrees with Commission counsel's determination, the party may cause an application to be brought to have the issue resolved by the procedure established under s. 13 of the *Public Inquiries Act, 2006*.

36. The term “relevant” is intended to have a broad meaning and includes anything that touches or concerns the subject matter of the Inquiry or that may directly or indirectly lead to other information that touches or concerns the subject matter of the Inquiry.
37. The terms “documents” and “records” are intended to have a broad meaning, and include the following mediums: written, electronic, audiotape, videotape, digital reproductions, photographs, films, slides, maps, graphs, microfiche and any data and information recorded or stored by means of any device.
38. The originals of relevant documents, records or other things are to be provided to Commission counsel upon request.
39. Counsel to parties and witnesses will be provided with documents, records and information, including statements of anticipated evidence, only upon giving an undertaking that all such documents, records or information will be used solely for the purpose of the Inquiry, and where the Commission considers it appropriate an undertaking that its disclosure will be further restricted. The Commission may require that documents or records provided, and all copies made, be returned to the Commission if not tendered in evidence. Counsel are entitled to provide such documents, records or information to their respective clients only on terms consistent with the undertakings given, and upon the clients entering into written undertakings to the same effect. These undertakings will be of no force regarding any document, record or information once it has become part of the public record. The Commission may, upon application, exempt from the provisions of the undertaking any document, record or information, in whole or in part.
40. Documents, records or things received from a party, or any other organization or individual, shall be treated as confidential by the Commission unless and until they are made part of the public record or the Commissioner otherwise declares. This does not preclude the Commission from producing a document, record or other thing to a proposed witness prior to the witness giving his or her testimony or as part of the investigation being conducted.
41. Subject to Rule 39, Commission counsel will endeavour to provide in advance to both the witness and to the parties with standing relevant to matters in respect of which the witness is expected to testify, documents, records or other things that will likely be referred to during the course of the testimony of that witness, and a copy of any statement provided by that witness to the Commission.

42. Parties shall at the earliest opportunity provide to Commission counsel a copy of any documents, records or other things that they intend to file as exhibits or to otherwise refer to during the hearings, and in any event shall provide same no later than 48 hours prior to the day the intended exhibit will be referred to or filed at the hearings.
43. A party who believes that Commission counsel has not provided copies of relevant documents or records must bring this to the attention of Commission counsel at the earliest opportunity. The object of this rule is to prevent witnesses from being surprised with a relevant document or record that they have not had an opportunity to examine prior to their testimony. If Commission counsel decides the document or record is not relevant, it shall not be produced. This does not preclude the document or record from being used in cross-examination by any of the parties. Before such a document or record may be used for the purposes of cross-examination, a copy must be made available to all parties by counsel intending to use it not later than 48 hours prior to the testimony of that witness, subject to the discretion of the Commissioner.
- (vi) *Confidentiality*
44. If the proceedings are televised or broadcast by some other medium, applications may be made for an order that the evidence of a witness not be televised or broadcast.
45. Without limiting the application of s. 6 of the *Public Inquiries Act, 2006*, the Commissioner may in her discretion and in appropriate circumstances exclude the public from a hearing, or from part of it, where she decides that the public interest in holding the hearing, or a part of it, in public is outweighed by another consideration, including the consequences of possible disclosure of personal matters, public security, or the right of a person to a fair trial.
46. A witness may apply to the Commissioner for measures aimed at protecting his or her identity for a compelling reason as determined in the sole discretion of the Commissioner. Upon a successful application to the Commissioner the witness may be granted the status of “Confidentiality”. For the purposes of the Inquiry, Confidentiality may include the right to have his or her identity disclosed only by way of non-identifying initials, and, if the individual so wishes, the right to testify before the Commission in private, together with any other privacy measures that the party may request and the Commissioner, in her discretion, grants. Subject further to the discretion of the Commissioner, only the Commissioner, Commission staff and counsel, counsel for the parties with standing, counsel for the witness who has been granted Confidentiality, and media representatives may be present during testimony being heard in private.

47. A witness who is granted Confidentiality shall be identified in the public records, transcripts of the hearing and any reports of the Commission by non-identifying initials.
48. Media reports relating to the evidence of a witness granted Confidentiality shall avoid references that might reveal the identity of the witness. No photographic, audio, visual or other reproduction of the witness shall be made either during the witness' testimony or upon his or her entering and leaving the site of the Inquiry.
49. Any witness who is granted Confidentiality will reveal his or her name to the Commission and counsel participating in the Inquiry in order that the Commission and counsel can prepare to question the witness. The Commission and counsel shall maintain confidentiality of the names revealed to them. Such information shall not be used for any other purpose either during or after the completion of the Commission's mandate.
50. Any witness who is granted Confidentiality may either swear an oath or affirm to tell the truth using the non-identifying initials given for the purpose of the testimony of the witness.
51. All parties, their counsel, Commission staff and contracted service providers, and media representatives shall be deemed to undertake to adhere to the rules respecting Confidentiality.

(vii) *Section 5(4) Notices*

52. The Commission will deliver notices pursuant to s. 5(4) of the *Public Inquiries Act, 2006* after any information about alleged misconduct has come to the attention of the Commission that may give rise to findings of misconduct. These will be delivered on a confidential basis to the persons or parties to whom they relate or to their counsel if such counsel has been identified to Commission counsel. Supplementary notices may be delivered from time to time by the Commission as warranted by the information before it.
53. If any party believes that it is necessary to adduce documentary evidence or to call evidence to respond to allegations of possible misconduct for which a notice under s. 5(4) of the *Public Inquiries Act, 2006* has been received, then that party may apply for leave to call that evidence or may request that Commission counsel call such evidence. If relevant and responsive to issues raised in the s. 5(4) notice, leave will be given by the Commissioner. Cross-examination in respect of such evidence shall be

limited to matters adduced in evidence during the examination in chief of the witness, except with leave of the Commissioner.

### **III. Research, Submissions, Public Meetings and Symposia**

#### **A. General**

54. Due to the policy nature of the issues in Part II, the Commission will utilize a range of research and policy development processes. The objectives of Part II are to promote an informed discussion and analysis of the policy issues raised by the Inquiry, and to ensure that parties with standing and the public have a meaningful and ongoing opportunity to participate. Amongst the various initiatives which may be adopted under Part II, the Commission may:
- (a) commission a range of research and policy papers (the “Research and Policy Papers”) from recognized experts on a broad range of relevant topics. The structure and format of the Research and Policy Papers will vary, but will generally include a description of current practices, historical developments, an analysis of relevant issues, potential options (if applicable) and a bibliography;
  - (b) invite written and/or oral submissions from parties with standing and the public about any matter relevant to Part II, including the Research and Policy Papers;
  - (c) convene meetings or symposia (the format of which may vary) to discuss issues raised by the Inquiry; and
  - (d) post the Research and Policy Papers and other relevant research materials and submissions on its website.
55. The Commission may call evidence during its hearings on matters relevant to Part II.

#### **B. Public Submissions**

56. Any interested person may make a public submission in writing to the Commission dealing with any matter related to Part II of the Inquiry, and in doing so may include a response to any matter raised in the Research and Policy Papers.

57. The Commission will set and publish a deadline by which all public submissions related to Part II must be received. All public submissions will be made available for public review either on the Commission's website or at the Commission's offices.

**C. Public Meetings and Symposia**

58. The Commission may convene one or more symposia and/or public meetings to discuss issues raised in Part II of the Inquiry. The format of the public meetings will be tailored to the topics discussed and may vary. The public meetings may include the Commissioner, Commission counsel, authors of relevant Research and Policy Papers, parties granted standing in relation to Part II and their counsel or representative if identified to Commission counsel, and any other persons invited by the Commission whom the Commissioner concludes would contribute to the discussion.
59. The public meetings and symposia shall be recorded unless, on application of a party or other invited persons, the Commissioner in her discretion determines otherwise.
60. In the ordinary course, persons or parties will attend the public meetings and symposia in person unless the Commissioner orders otherwise.

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