

June 17, 2022

Decision regarding Participant requests to question witnesses

1. On May 14, 2022, we responded to requests for accommodation made for health-related reasons by two RCMP witnesses, Sgt. Andy O'Brien and S/Sgt. Brian Rehill. They had each requested that they be able to provide their evidence by sworn affidavit. We directed:
 - (a) that they testify by way of a virtual recording observed by us, Participants and accredited media, and promptly posted to the Commission website for the public; and
 - (b) that they be questioned solely by Commission counsel. Commission counsel represent the public interest; they do not advocate for a particular point of view, but rather they inquire into the matter at hand in an impartial and objective way.
2. In order to ensure that all relevant questions were asked, we invited Participants to provide questions they had for these witnesses to Commission counsel in advance of the testimony. There were also two virtual caucuses scheduled during the testimony to allow Participants to advise Commission counsel if they had any additional questions.
3. S/Sgt. Rehill testified on May 30 and Sgt. O'Brien testified on May 31, 2022. On May 31, 2022 and June 9, 2022, one Participant family applied to have these witnesses recalled for questioning by family Participant counsel directly. A second family Participant, in a submission dated June 9, 2022, asked us to amend the Commission's Rules of Practice and Procedure so that Participant counsel would have the automatic right to directly question all witnesses. This is despite the fact that, save for these two witnesses, the Participants have had the opportunity to question all the witnesses who have appeared to date. Indeed, on two occasions, they were content to have Commission counsel ask all of the questions posed to the witnesses. Having reviewed the Participants' submissions, we will now address each request in order.

THE RECALL APPLICATION

BACKGROUND

4. The April 2020, Nova Scotia mass casualty caused unimaginable pain to so many. The suffering continues to cascade from the families whose loved ones were killed, to many others who have been physically and emotionally injured, and then to friends, neighbours, fellow Nova Scotians, Canadians and beyond.
5. Our Orders in Council direct us to “inquire into and make findings on matters related to the tragedy...including the causes, context and circumstances giving rise to the tragedy...” This work includes subpoenaing witnesses to testify in public proceedings.
6. A small proportion of witnesses have requested accommodations in order for them to provide us with their evidence. Requests for accommodation are not at all surprising, given the horrific nature of the events giving rise to this inquiry. In fact, we forecasted this likelihood at the outset of our public proceedings back in February of this year:

Given the massive impact of this casualty, we expect that many witnesses who will come before us will be hurting – even broken. This has to be factored in determining when and how a witness will be questioned. If we can get to the truth in ways that do not cause more hurt, then we have a responsibility to do so. We will try to use the right methods to get to the truth, ensuring we are being attentive to the needs of those people who have information to share and attentive to the impacts of trauma on those who have been directly affected.

7. To respond to this reality, and in keeping with similar provisions in the rules of previous public inquiries, we anticipated the need for witness accommodation in our Rules of Practice and Procedure:

43. If special arrangements are desired by a witness in order to facilitate their testimony, a request for accommodation shall be made to the Commission sufficiently in advance of the witness' scheduled appearance to reasonably facilitate such requests. While the Commission will make reasonable efforts to accommodate such requests, the Commissioners retain the ultimate discretion as to whether, and to what extent, such requests will be accommodated.

8. We consider every request for accommodation with a view to ensuring our ability to gather the best evidence for determining the necessary facts.
9. On March 9, 2022 we issued a decision setting out a list of witnesses who would be subpoenaed to testify. Again, we acknowledged that accommodations might become necessary for some:

18. For some of the subpoenaed witnesses, we may have to consider applications for accommodation under Rule 43. If it becomes apparent that any of them are too unwell to appear, we will make every effort to offer accommodations and find a way to hear from them and have Participant and the Commission's questions answered.

10. Following this decision, we received seven requests for accommodation. S/Sgt. Rehill and Sgt. O'Brien requested that they be permitted to give their evidence by way of sworn affidavit as opposed to oral testimony. They presented medical evidence to support their requests. We rejected their requests to provide affidavits and instead directed that they provide sworn testimony as individual witnesses, but under conditions designed to elicit the best possible evidence from them given their respective medical issues and limitations:

26. Sgt. O'Brien and S/Sgt. Rehill will be heard from via Zoom as individual witnesses. They will be questioned by Commission counsel. The questioning and responses of the witnesses will be recorded and transcribed, but it will not be livecast. When the recordings are complete, as soon as practicable, the videos will be marked as an exhibit and posted to the website.

27. The session will be attended virtually by Commissioners, and any Participants and counsel who wish to attend. Virtual attendees, other than the Commissioners, will be off screen with microphones muted. Accredited media may also attend, under embargo. Once the video is posted to the website, media may report upon its contents.

28. In order to ensure that all relevant questions are asked, Participants will be requested to provide questions they have for Sgt. O'Brien and S/Sgt. Rehill by sending them by 4:00 p.m. on May 26 to Commission counsel. Commission counsel will then plan their questioning to cover the questions that fall within the scope set out above. Commission counsel will question the witnesses on May 30 and May 31, beginning with S/Sgt. Rehill. After Commission counsel has asked the initial round of questions, there will be a virtual caucus at which Participant counsel will advise of any new questions that have arisen or additional questions that could not

reasonably have been anticipated. Commission counsel will ask questions within scope that have not yet been answered. There will then be a final virtual caucus to address any further issues arising. We Commissioners will ask any questions we may have.

11. S/Sgt. Rehill and Sgt. O'Brien subsequently testified as we had directed. They were able to communicate extensive evidence about their perspectives and recollections regarding their involvement with the mass casualty. Commission counsel put to S/Sgt. Rehill and Sgt. O'Brien the questions obtained from Participant counsel in advance of testimony and through the two virtual caucus meetings. Unfortunately, some Participants declined to avail themselves of the opportunity to provide their questions for the witnesses, and directed their lawyers not to attend on May 30 and 31, 2022 in protest of our accommodation decision with respect to these two witnesses.
12. In the wake of S/Sgt. Rehill and Sgt. O'Brien's testimony, the family of Peter and Joy Bond, supported in writing by other (but not all) family Participants, applied to have these officers recalled so that they could be questioned by counsel for various family Participants directly. They rely on Rule 52 to make this request:

52. Participants may have an opportunity to question the witnesses, to the extent of their interest as determined by the Commissioners. Subject to direction from the Commissioners, Commission Counsel will determine the order of questioning. The Commissioners have the discretion to restrict the scope or manner of questioning.

The Rules do not refer to the cross-examination of witnesses, but rather permit Participants the opportunity to question witnesses to the extent of their interest, as determined by the Commissioners. However, the ability of Participant counsel to question directly is commonly understood as cross-examination.

ANALYSIS

The Issue

13. In order to determine the actual issue in this application, we will first identify what is not at issue.
14. There is no dispute that S/Sgt. Rehill and Sgt. O'Brien needed some accommodation in order to provide their best evidence. The submissions received from Participants opposing the accommodations do appear to indicate their acceptance of this need.

15. Nor can the Participants reasonably deny that they had the opportunity to have all their questions answered. A full day was set aside for each witness. Participants were given three distinct opportunities to provide questions. Specifically, Participants were invited to propose questions in advance of each witness' appearance. Then after each witness completed his testimony proper, Commission counsel paused to meet with Participant counsel to ensure that all their questions had been posed and that any new questions would be addressed. This resulted in several follow up questions for each witness. Then, out of an abundance of caution, Commission counsel paused a second time to canvass Participant counsel to see if the follow up questions were incomplete or unsatisfactory to the Participants, or if anything new arose in the responses provided by the witnesses. For each witness, Participants had no further questions following each second meeting.
16. Nor can our discretion to limit cross-examination in appropriate circumstances be reasonably disputed. A public inquiry is distinct from court proceedings, as was explained by the Supreme Court of Canada in *Canada (Attorney General) v. Canada (Commission of Inquiry on the Blood System in Canada)*, [1997] 3 S.C.R. 440, at paragraph 34:

A commission of inquiry is neither a criminal trial nor a civil action for the determination of liability. It cannot establish either criminal culpability or civil responsibility for damages. Rather, an inquiry is an investigation into an issue, event or series of events. The findings of a commissioner relating to that investigation are simply findings of fact and statements of opinion reached by the commissioner at the end of the inquiry. They are unconnected to normal legal criteria. They are based upon and flow from a procedure which is not bound by the evidentiary or procedural rules of a courtroom. There are no legal consequences attached to the determinations of a commissioner. They are not enforceable and do not bind courts considering the same subject matter. The nature of an inquiry and its limited consequences were correctly set out in *Beno v. Canada (Commissioner and Chairperson, Commission of Inquiry into the Deployment of Canadian Forces to Somalia)*, [1997] 2 F.C. 527, at para. 23: A public inquiry is not equivalent to a civil or criminal trial [...] In a trial, the judge sits as an adjudicator, and it is the responsibility of the parties alone to present the evidence. In an inquiry, the commissioners are endowed with wide-ranging investigative powers to fulfil their investigative mandate [...] The rules of evidence and procedure are therefore considerably less strict for an inquiry than for a court. Judges determine rights as between parties; the Commission can only "inquire" and "report" [...]; the only potential consequence of an adverse finding [...] is that reputations could be tarnished. Thus, although the findings of a

commissioner may affect public opinion, they cannot have either penal or civil consequences. To put it another way, even if a commissioner's findings could possibly be seen as determinations of responsibility by members of the public, they are not and cannot be findings of civil or criminal responsibility.

17. As public inquiries are inquisitorial in nature, the role of cross-examination at a public inquiry is different than in a court proceeding. See for example: *Gagliano v. Canada (Commission of Inquiry into the Sponsorship Program and Advertising Activities, Gomery Commission)* [2008 FC 981 (“*Krever*”)] at paras. 104-107 and particularly at para 106:

We saw in paragraph 34 of *Krever, supra*, that inquiry commissions are not the same as civil or criminal trials. In that excerpt, the Supreme Court quotes with approval the Federal Court of Appeal in [*Beno v. Canada (Commissioner and Chairperson, Commission of Inquiry into the Deployment of Canadian Forces to Somalia)*, [1997] 2 FC 527 (F.C.A.) [*“Beno (F.C.A.)”*], which corrected what our Court had said in *Brigadier General Ernest B. Beno v. The Honourable Gilles Létourneau*, [1997] 1 F.C. 911 (F.C.T.D.), at paragraph 74, Campbell J. [hereinafter *Beno (1997)*], to the effect that an inquiry commission had a “trial-like function.” The Federal Court of Appeal pointed out that, on the contrary, an inquiry commission was to be distinguished from a civil or criminal trial for a variety of reasons, including more flexible rules of procedure (*Beno (F.C.A.)*, at para. 23), and the Supreme Court affirmed that principle in *Krever*. Commissions of inquiry are inquisitorial in nature, and the commissioners who conduct them are in control of their procedure (*Beno (2002), supra*, at paras 113-114). Moreover, the right to cross-examination is not absolute. That principle was reiterated by this Court in several instances in the context of an inquiry commission, including *Boyle v. Canada (Commission of Inquiry into the Deployment of Canadian Forces in Somalia -- Létourneau Commission)*, [1997] A.C.F. no. 942, Dubé J., at paragraph 37, and in [*Beno v. Canada (Attorney General)*, 2002 FCTD 142], *supra*, [at para 113].

18. This is emphasized in *Public Inquiries: Law and Practice*, (Ronda Bessner and Susan Lightstone, 2017) by Kristjanson J, in Chapter 6, “Procedural Fairness and Public Inquiries”, at page 123:

The right to cross-examination in the context of a public inquiry is not absolute; the issue is governed by principles of fairness, as well as the Order in Council and commission rules.

19. The authority for us to control our process is enshrined in our Orders in Council, which:

(f) authorize the Commissioners to

(i) adopt any procedures and methods that they may consider expedient for the proper and efficient conduct of the Joint Public Inquiry....

20. Furthermore, our Rules of Practice and Procedure provide for the questioning of witnesses as follows:

50. In the ordinary course, Commission Counsel will call and question witnesses who give evidence at Commission hearings. Except as otherwise directed by the Commissioners, Commission Counsel may adduce evidence by leading and non-leading questions.

21. The opportunity for a Participant to question a witness remains within our discretion:

52. Participants **may** have an opportunity to question the witnesses, to the extent of their interest **as determined by the Commissioners**. Subject to direction from the Commissioners, Commission Counsel will determine the order of questioning. The Commissioners have the discretion to restrict the scope or manner of questioning.

[Emphasis added.]

22. Almost a year ago, our Rules of Practice and Procedure were distributed in draft form to all Participants, requesting their feedback, before being finalized. No Participants raised an objection that the provision did not provide for Participants having the opportunity to directly question each witness. We therefore proceeded on the basis that the Participants understood and expected that the Rules would be followed as written. The Commission has been unequivocal in making it known that the Rules would guide our proceedings.

23. In light of the above, the issue before us in this application can be distilled to this one question:

Would it be an appropriate exercise of our discretion to recall these two witnesses so that they may be questioned by Participant counsel directly?

Additional Context

24. The following additional context is also important to our analysis.
25. Our mandate directs us to unravel the complicated facts surrounding the perpetrator's horrendous 13-hour rampage. In doing so, we are not limited to the conventional adversarial process utilized in court proceedings. There, the parties find themselves pitted against each other, with each side attacking the other's position and with all witnesses subjected to cross-examination.
26. Public inquiries are inquisitorial as opposed to adversarial in nature. This allows commissioners the flexibility to establish the facts in a variety of creative ways. They engage in an inquisitorial process that serves to make recommendations for the formulation of sound public policy, rather than making determinations of civil or criminal liability among adversarial parties. Indeed, our Orders in Council explicitly require us to inquire with a view toward reporting lessons learned and generating recommendations to help prevent similar situations in the future.
27. This inquiry is mandated to use restorative principles to guide our process. This is defined in the key Commission terms section of our website as an approach that "seeks to bring people together to help determine what happened. Restorative principles are intended to create conditions to encourage people to cooperate and participate in efforts to establish the facts about what happened and how to keep communities safer in the future". This is clearly aligned with the inquisitorial process of a public inquiry and requires a broader understanding by Participant counsel and their clients regarding their participatory rights. We believe that a collaborative approach, as we have encouraged from the outset, is the best way to ensure that the focus remains on establishing the factual foundation necessary to create meaningful recommendations. We expect counsel to abide by the decisions made by this independent tribunal, especially in light of the fact that Participants and their counsel had meaningful input crafting the Commission's Rules.

Conclusion

28. As we noted at paragraph 38 of our March 9, 2022, decision:

[W]e do not need expert testimony to conclude that RCMP officers responding to this casualty may, to varying degrees, be suffering the effects of their experiences. Being trauma-informed does not mean not hearing from a person; it does mean thinking carefully about how we hear from a person. A trauma-informed approach does not automatically

excuse someone from testifying, but rather seeks to create conditions in which testifying will be less traumatic.

29. S/Sgt. Rehill and Sgt. O'Brien are witnesses who, based on the materials they provided in support of their applications under Rule 43, required accommodation as a result of their experiences endured during the mass casualty. Exposing them to cross-examination by various Participant counsel would have run the serious risk of damaging them even further and consequently thwarting our opportunity to receive their best evidence.
30. With these accommodations, both witnesses relayed their evidence in a responsive, clear and extensive fashion. In other words, our accommodations served the intended purpose of hearing their evidence.
31. To support their request to have these two witnesses recalled, the applicant highlights the fact that S/Sgt. Rehill and Sgt. O'Brien were each able to endure hours of questioning. For example, regarding S/Sgt. Rehill, counsel Josh Bryson, on behalf of the Bond family noted:

S/Sgt. Rehill testified on direct examination for roughly 5 hours on May 30, 2022. It is open to the Commission to consider whether continued accommodation that denies participants of those most affected the opportunity to participate and personally question S/Sgt. Rehill on issues relevant to the mandate is appropriate. It is unclear how a further limited examination by the families of those most affected would be viewed as unduly harsh in the circumstances. Granting participants the opportunity to personally ask questions is a substantive measure of meaningful participation and should not be set aside lightly.

32. In our view, these officers were able to endure their comprehensive and lengthy questioning because of the accommodations we had in place. We now have substantial evidence from these witnesses. It would be inappropriate to recall them for further oral testimony.
33. We regret that our accommodation decision for these two witnesses has been a source of anger and confusion for any of the Participant families. We in no way wish to add to their suffering. Instead, as we have said many times, we are committed to do our best to ensure that all this suffering and loss of life will not have been in vain. This includes seeking to secure the best possible evidence from all who testify. The accommodations we directed represent our best efforts to ensure just that.

34. The simple reality is that we faced a situation where our ability to obtain the best possible evidence from vulnerable witnesses was at risk. In our estimation, exposing them to cross-examination by various Participant counsel would not have provided the conditions for them to provide comprehensive testimony. The adversarial approach represented an added risk that would have been unwise to take. We calibrated a process whereby these witnesses were able to provide the comprehensive testimony we required, while ensuring that all Participant questions would be addressed. Then, in each instance, their virtual testimony was made public on our website within 24 hours. Mr. Bryson on behalf of the Bond family has now provided questions for these witnesses. The decision of Participant counsel to refuse to provide questions they sought to have asked is unfortunate, however, in their comprehensive questioning, we are satisfied that Commission counsel covered in detail all the topics appropriate to ask of these witnesses. As always, should material unanswered questions emerge, we would ensure that they are appropriately addressed.

THE REQUEST TO AMEND OUR RULES OF PRACTICE & PROCEDURE

35. Family Participant Bev Beaton has asked us through her counsel, Tara Miller, to amend Rule 52 (cited above) in order to grant Participants the automatic right to directly question all witnesses. In our view, the above analysis highlights our need to retain the discretion to limit witness questioning in appropriate circumstances. This request is, therefore, denied.