

DECISION REGARDING RULE 43 ACCOMMODATION REQUESTS

May 24, 2022

INTRODUCTION

1. The Mass Casualty Commission has many tools to gather information. Similarly, there are many ways to share that information with the public. One of the ways to do this is through witness testimony. The Commission has heard from 26 witnesses in public proceedings so far and will hear from more in the coming weeks.
2. This decision relates to six requests for accommodation made by witnesses subpoenaed by the Commission.
3. It is important that we hear from witnesses in a way that allows them to share as much information as possible with the Commission and the public. It is for this reason that the Commission's Rules of Practice and Procedure allow witnesses to request accommodation.
4. Rule 43 says:

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.
5. Accommodations are intended to ensure that the Commission receives the best information possible from witnesses under subpoena. As public inquiries are focused on recommendations for the future and not on finding fault or blame or resolving private disputes between people and institutions, they are more flexible. One way they are more flexible is that they have more witness accommodation options available than criminal or civil law trials.

RULE 43 PROCESS

6. The Commission's process for addressing Rule 43 takes into account the privacy of those making such requests, the important role Participants play in the inquiry and the public interest in hearing from witness. Such requests almost always deal with physical or psychological health needs and this process relies on the role of Commission counsel to be objective and impartial and represent the public interest. It is the role of Commission counsel to ensure that all issues that bear on the public interest are brought to the attention of the Commissioners, therefore they are best placed to consider accommodation requests and make recommendations. However, we Commissioners retain the ultimate discretion as to whether witnesses will be accommodated and to what extent.
7. In order to determine a Rule 43 request, a witness or counsel for a witness submits a request in writing setting out the proposed accommodation and the reason. Commission counsel review the request and the supporting material. If, in the view of Commission counsel, the requested accommodation does not prevent the Commission from reliably obtaining the information it needs from this witness, Commission counsel recommend to the Commissioners that the request for accommodation be granted. If Commission counsel are of the view that the requested accommodation would prevent the Commission from reliably obtaining the information it needs from this witness, Commission counsel then explore other kinds of accommodation with the witness (or their counsel).
8. Accommodations may include the following, or a combination of the following:
 - Intermittent breaks during the testimony to accommodate the witness
 - A support person accompanying and sitting next to the witness throughout their oral testimony
 - A one-way screen so that the person giving testimony does not see others in the room while they are testifying
 - The witness testifying outside the hearing room in a small room by closed circuit television, so they do not see the people in the hearing room
 - The witness appearing virtually (for example, by Zoom)
 - Sworn affidavit (if questions remain or new questions arise as a result of the affidavit, the witness may be asked to attend proceedings and answer questions, but these will be focused on the remaining questions and should

minimize the amount of time the witness is questioned in the oral proceedings)

- Testifying in a witness panel
 - Evidence given by video.
9. After the Commissioners have received the recommendation of Commission counsel, this recommendation is shared on a confidential basis with the applicant witness and other Participants.
 10. If Participants wish to raise a concern that the accommodation being recommended does not meet the purpose for which the witness is being called, they can raise these concerns in writing. Participants who have concerns are asked to provide submissions about whether the accommodation interferes with achieving the Commission's objectives.

SIX RECENT REQUESTS FOR ACCOMMODATION

11. The Commission received requests for accommodation on behalf of six witnesses scheduled to be heard from in upcoming proceedings. The applications were made by the National Police Federation and the Attorney General Department of Justice (Canada). The requested accommodations ranged from provision of a sworn affidavit to appearing as part of a panel.
12. Commission counsel recommended that the request for accommodation for one witness not be granted and that two witnesses' request to appear in a panel be permitted. This recommendation was shared with all Participants and there was no objection. The Commissioners agreed with these recommendations and we determined that those witnesses would proceed on that basis. Since witness accommodation requests involve sensitive personal health information, the Commission will not share any specific individual private information about these requests.
13. The three remaining witness accommodation requests concern Sergeant (Sgt) Andy O'Brien, Staff Sergeant (S/Sgt) Brian Rehill and Staff Sergeant (S/Sgt) Al Carroll. Commission counsel provided Participants with their recommendations about these requests based on their assessment that, given the health information provided, allowing the witnesses to provide evidence in a way that reduces the stress and time pressure that arises from giving oral evidence in live proceedings would facilitate their testimony and therefore provide better evidence to the Commission. Participants advised that they had concerns about the

proposed accommodations. Participants were invited to make submissions, which we have now received and reviewed.

REQUESTS MADE ON BEHALF OF SERGEANT ANDY O'BRIEN, STAFF SERGEANT BRIAN REHILL AND STAFF SERGEANT AL CARROLL

14. The National Police Federation and the Attorney General Department of Justice (Canada) requested that Sgt. O'Brien and S/Sgt. Rehill provide their information by sworn affidavit and that S/Sgt. Carroll testify in person but that all questions be asked of him by Commission counsel only.

15. The Commission's Rules of Practice and Procedure outline that these are ways that the Commission can receive evidence.

16. Rule 31 says:

Commission Counsel and a witness or their lawyer may prepare an affidavit of the witness' evidence. At the Commissioners' discretion, the affidavit can be admitted into evidence in place of part or all of the individual's oral testimony.

17. Rules 50 – 52 say:

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 way of leading and non-leading questions.

51. Commission Counsel has the right to re-examine any witness at the conclusion of their evidence.

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.

18. The National Police Federation and the Attorney General Department of Justice (Canada) also provided health information to Commission counsel. Some of this information was shared on a confidential basis with Participants who are involved in Phase One of the Inquiry through their counsel, including counsel for the families whose loved ones died in the mass casualty. As noted above, since

witness accommodation requests involve sensitive personal health information, the Commission will not share specific individual private information in this decision.

19. Commission counsel reviewed the accommodation requests as well as the reason for which the witnesses were being called to share information with the Commission. That reason is:

Witnesses with respect to the Command Post, Operational Communications Centre and command decisions are being called to address material factual gaps and provide important context regarding their roles on April 18/19, 2020, and to provide information about decision making in areas including containment, scene management and use of resources; the organization of the command post and at-scene command posts; communications within the RCMP and with outside agencies; interoperability with other first responding agencies; policies, training and preparation for, and reviews of, critical incidents; and about the supervision and oversight of RCMP members under their command.

20. Based on this, Commission counsel determined that the purpose for which these witnesses are called requires that they be asked questions orally and that accommodations should be limited to those that facilitate their oral testimony.
21. The recommendation of Commission counsel was that Sgt. O'Brien and S/Sgt. Rehill provide their evidence through sworn videotaped statements. Participants' questions would be collected in advance and asked by Commission counsel. Participants would be provided with a copy of the video and invited to submit any new questions they have as a result of the evidence. Questioning of the witness statement would continue the next day and Commission counsel would ask the remaining questions, although repetitive or irrelevant questions would not be asked. Once complete, the video would be shared publicly as an exhibit and form part of the record.
22. With regard to S/Sgt. Carroll, Commission counsel recommended that the proceeding room be cleared while he is providing evidence. Participants and their counsel would watch on the webcast. S/Sgt. Carroll would be questioned as set out in Rules 50-52, following a caucus among counsel as has been the Commission's practice with other witnesses.

PARTICIPANTS' SUBMISSIONS

23. After Commission counsel shared their recommendations for accommodations with Participants, Participants were invited to make submissions about how, in their view, the recommended accommodations would interfere with achieving the Commission's objectives. Included with National Police Federation's submissions was information about the underlying basis for the accommodation requests that had previously been shared with Phase One Participants' counsel as well as some additional information not shared previously. Participants' submissions were distributed to other Participants.

DECISION

24. Having carefully considered all submissions received from Participants as well as the recommendations of Commission counsel, we direct that these witnesses provide their information to the Commission as follows:

S/Sgt. Al Carroll

25. S/Sgt. Carroll will be heard from on May 26 via Zoom, with breaks as needed, as part of proceedings. S/Sgt. Carroll will be questioned as set out in Rules 50 -52 following a caucus, as has been the Commission's practice with other witnesses.

Sgt. Andy O'Brien and S/Sgt. Brian Rehill

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.

CONCLUSION

29. In a decision we issued on March 9, we identified a number of witnesses who would be subpoenaed to give evidence in public proceedings. We acknowledged that for some of the subpoenaed witnesses, we may have to consider applications for accommodation under Rule 43. We added that if it becomes apparent that any of them are too unwell to appear, we would make every effort to offer accommodations while still finding a way to hear from them and have Participant and the Commission's questions answered.
30. In addressing these accommodation requests, we have settled on what we believe is the appropriate balance that allows the public to hear and understand this evidence in a meaningful way while minimizing potential harm to the witnesses.
31. A final note, to assist people with an understanding of the role of Commission counsel in a public inquiry. We rely on Commission counsel to examine the masses of document disclosure, interview witnesses and present the evidence in a fair and impartial manner to serve the public interest. In serving the public interest, Commission counsel are instructed to engage in an objective and tenacious pursuit of the truth. As we have stated many times, a public inquiry is inquisitorial and not adversarial. Therefore, Commission counsel are not opposing counsel to Participant counsel. They must be impartial and thorough in exploring all significant evidence relevant to the issues to be explored during the Inquiry. Their role is to represent the public interest and to support the Commission's forward-looking mandate.