



## **RULES OF PROCEDURE AND PRACTICE**

### **COMMISSION OF INQUIRY RESPECTING THE DEATH OF DONALD DUNPHY**

#### **Introduction**

A Commission of Inquiry respecting the death of Donald Dunphy has been established in accordance with Part I of the *Public Inquiries Act, 2006*. Pursuant to the Terms of Reference dated September 23, 2016, the Commission shall inquire as to the facts and circumstances regarding the death of Donald Dunphy.

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

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

1. Pursuant to s. 5(2) of the *Public Inquiries Act, 2006*, persons or groups may be granted standing by the Commissioner, 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, groups of similar interest are encouraged to seek joint standing.

4. The Commissioner will determine the extent to which a party granted standing might participate.
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.

**B. Applications for Standing**

7. Applications for standing should be made in writing via email, facsimile, or regular mail to the Commission and provide information as to how the applicant satisfies the criteria for standing set out in Rule 1.

**C. Applications for Funding**

8. The Commissioner may make recommendations to the Attorney General regarding funding to parties who have been granted standing.
9. Applications for funding should be made in writing via email, facsimile, or regular mail to the Commission and should provide the following information:
  - (a) An affidavit stating whether an applicant would not otherwise 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 to bring them into an amalgamated group, and the results of those 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 will be responsible for administering the funds, and a description of the financial controls put in place to ensure that the funds are disbursed for the purposes of the Inquiry.

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

### A. General

10. (a) Public hearings will be convened at 425 Topsail Road, St. John's, NL, (formerly the Newfoundland School for the Deaf) or such other locations as the Commissioner designates, to address issues related to 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 or teleconference.
11. All parties and their counsel shall be deemed to undertake to adhere to these Rules, which may be amended or dispensed with by the Commission as it sees fit to ensure fairness. Any party may raise any issue of non-compliance with the Commissioner.
12. The Commissioner shall deal with a breach of these Rules as he 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.
13. Insofar as it needs to gather evidence, the Commission is committed to a process of public hearings. However, applications on some aspects of its mandate 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).
14. Subject to the *Public Inquiries Act, 2006*, the conduct of and the procedure to be followed on the Inquiry is under the control and discretion of the Commissioner.
15. The Commissioner may extend or abridge any time prescribed by these Rules.

### B. Evidence

#### (i) General

16. 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.

17. 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.
18. The Commission may admit at the Inquiry documentary evidence not given under oath or affirmation.
19. Parties are encouraged to provide to Commission counsel the names and addresses of all witnesses they believe ought to be heard within fourteen (14) days of that party having been granted standing together with a brief statement of the relevance of the witness to the Inquiry.
20. Commission counsel have discretion to refuse to call or present evidence.
21. 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 believe 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*

22. 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. All interviews will be audio-recorded.
23. Witnesses will give their evidence at a hearing under oath or affirmation.
24. 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 or teleconference.
25. 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 ultimate discretion as to whether, and to what extent, such requests will be accommodated.
26. Witnesses may be interviewed by Commission counsel or called to give evidence more than once.

(iii) *Order of Examination*

27. The order of examination will be as follows:
- (a) Subject to Rule 16, Commission counsel will adduce the evidence from the witness. Except as otherwise directed by the Commissioner, Commission Counsel are entitled to adduce evidence by way of leading and non-leading questioning;
  - (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 if they are 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*

28. All evidence shall be categorized and marked P for public sittings and, if necessary, C for sittings *in camera*.
29. Prior to beginning of each day of the hearing, one hard copy of the anticipated P exhibits for that day will be available to be shared by the media.
30. A transcript and the P exhibits for each day of hearing will be posted to the Commission's website which will be fully accessible to the parties, the public and the media.
31. Only those persons authorized by the Commissioner, in writing, shall have access to C transcripts and exhibits.

(v) *Documents*

32. All relevant documents are to be produced to the Commission by any party with standing where the documents are in the possession, control or power of the party within fourteen (14) days of that party having been granted standing. Documents should be provided in paper and electronic format. The obligation to produce all relevant documentation is an ongoing and continuing one throughout the course of the Inquiry. Where a party discovers relevant documents subsequent to the initial disclosure, that party shall notify Commission counsel immediately of the

existence and nature of those documents and produce the documents to the Commission within three (3) days of discovery.

33. Where a party objects to the production of any document on the grounds of privilege, the document shall be produced in its original unedited form to Commission counsel who will review and determine the validity of the privilege claim. The party and/or that party's counsel may be present during the review process. Such review by Commission counsel shall not be deemed to be a waiver of the claim to privilege. In the event the party claiming privilege disagrees with Commission counsel's determination, the Commissioner, on application, may either inspect the impugned document(s) and make a ruling or may direct the issue to be resolved by the procedure established under s. 13 of the *Public Inquiries Act, 2006*.
34. The term "documents" is intended to have a broad meaning, and includes the following: written, electronic, text, cellular or social media messaging, audiotape, videotape, digital reproductions, photographs, films, slides, maps, graphs, microfiche and any data and information recorded or stored by means of any device.
35. Originals of relevant documents are to be provided to Commission counsel upon request.
36. Counsel to parties and witnesses will be provided with documents and information, including statements of anticipated evidence, only upon giving an undertaking that all such documents or information will be used solely for the purpose of the Inquiry and, where the Commission considers it appropriate, that its disclosure will be further restricted. The Commission may require that documents provided, and all copies made, be returned to the Commission if not tendered in evidence. Counsel are entitled to provide such documents 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 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 or other information, in whole or in part.
37. Subject to any requirement to disclose by law, documents 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 to a proposed witness prior to the witness giving his or her testimony or as part of the investigation being conducted.
38. Subject to Rule 36, Commission counsel will endeavour to provide in advance to both the witness and to the parties with standing documents that will likely be

referred to during the course of the testimony of that witness, and a brief written statement of anticipated evidence of that witness. Commission counsel will also endeavour to provide to the witness, and to any parties upon request, a copy of the audio recording of the witness' interview with Commission counsel.

39. Parties shall, at the earliest opportunity, provide to Commission counsel a copy of any documents that they intend to file as exhibits or otherwise refer to during the hearings, and in any event shall provide such documents no later than 48 hours prior to the day the document will be referred to or filed.
40. A party who believes that Commission counsel has not provided copies of relevant documents 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 that they have not had an opportunity to examine prior to their testimony. If Commission counsel decides the document is not relevant, it shall not be produced as a relevant document. This does not preclude the document from being used in cross-examination by any of the parties. Before such a document 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*

41. If the proceedings are televised, streamed through the internet, or broadcast by some other medium, applications may be made for an order that the evidence of a witness not be televised, streamed or broadcast.
42. Without limiting the application of s. 6 of the *Public Inquiries Act, 2006* the Commissioner may, in his discretion and in appropriate circumstances, exclude the public from a hearing or from part of it, where he 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.
43. Witnesses may apply to the Commissioner for measures aimed at protecting their 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 their 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 which the party may request and the Commissioner, in his 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.

44. 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.
45. 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.
46. 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.
47. 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.
48. 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*

49. The Commission will deliver notices pursuant to s. 5(4) of the *Public Inquiries Act, 2006* after 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.
50. 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. 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.

**C. Service**

51. Documents may be served on a party by:
- i. Email or facsimile to the party's legal counsel with acknowledgement of receipt;
  - ii. Personal service or an alternative to personal service in accordance with the *Rules of the Supreme Court, 1986*;
  - iii. Any other such method as mutually agreed between Commission counsel and the party or the party's legal counsel;
  - iv. Or as otherwise directed by the Commissioner.