



Commission of Inquiry on Hormone Receptor Testing

Commissioner Cameron's Ruling on Standing and Funding

On July 3, 2007, I was appointed as Commissioner of the Inquiry on Hormone Receptor Testing. The Order-in-Council which established the Commission directs that I:

- (a) inquire into why the estrogen and progesterone hormone receptor tests done between 1997 and 2005 in the Newfoundland and Labrador health system resulted in a high rate of conversions when re-tested;*
- (b) inquire into why the problem with the estrogen and progesterone hormone receptor tests was not detected until 2005, whether it could have been detected at an earlier date, and whether testing protocols during that period between 1997 and 2005 were reasonable and appropriate;*
- (c) inquire into whether, once detected, the responsible authorities responded and communicated in a timely manner to those women and men who needed re-tests and those who were being tested for the first time;*
- (d) inquire into whether, once detected, the responsible authorities communicated in an appropriate and timely manner with the general public and internally within the health system about the issues and circumstances surrounding the change in test results and the new testing procedures;*
- (e) advise whether the estrogen and progesterone hormone receptor testing systems and processes and quality assurance systems currently in place are reflective of "best practice"; and*
- (f) make the recommendations that the commission of inquiry considers necessary and advisable relating directly to the matters of public concern referred to in paragraphs (a) to (e).*

The Inquiry will be conducted in two parts. In Part I, the Commission will inquire into and report on problems with estrogen and progesterone hormone receptor testing (ER/PR testing) conducted between 1997 and 2005 in the Newfoundland and Labrador health care system. This examination will include consideration of 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. Part II 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."

On August 11 and 15, 2007 in Newfoundland and Labrador and September 12, 2007 in St. Pierre, Notices were published inviting applications for standing and funding. The benefits of a grant of standing are outlined in the *Rules of Procedure and Practice*. These benefits include the opportunity to cross-examine witnesses and to make closing submissions following the hearing in Part I.

Ten applications for standing were submitted from Newfoundland and Labrador. One response was received from St. Pierre, but that person did not seek standing. Oral submissions were heard on September 19 and 24, 2007. Nine of the applications were for standing for Parts I and II. One applicant sought standing for Part II only. Three applicants also requested that I recommend to the Government of Newfoundland and Labrador that funding be provided to them.

Standing

Section 5(2) of the *Public Inquiries Act, 2006* says:

A commission shall determine whether a person may participate in an inquiry, and how he or she may participate, after considering

- (a) whether the person's interests 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.*

Standing is granted at the discretion of the Commissioner on consideration of the factors enumerated in s. 5(2) of the *Act*, the Terms of Reference, the *Rules of Procedure and Practice* of the Commission, and the rules of natural justice. There is a practical consideration as well. The Commission seeks to complete its task in a timely manner. To that end, the need to avoid duplication is also a consideration. As the reasons which follow demonstrate, complete avoidance of duplication is not possible. Where two parties having similar interests are granted standing, I am satisfied that there is sufficient divergence of interests that the perspectives of the two parties would assist the work of the Commission, or fairness demanded that both parties be present.

Standing Granted Immediately Following Oral Submissions

Some applicants were granted standing immediately following oral submissions. On September 19, 2007 these were: Her Majesty in right of Newfoundland and Labrador, Eastern Regional Integrated Health Authority, and Dr. Kara Laing *et al.* All three were granted standing for Part I and Part II of the Inquiry. On September

24, 2007, the Newfoundland and Labrador Medical Association was granted standing for Part II. My reasons for granting standing to those parties follow.

Her Majesty in right of Newfoundland and Labrador

The role of the Department of Health and Community Services in the creation of Regional Health Authorities and the administration of the *Hospitals Act*, as well as the direct interest of the Province in the subject matter of the Inquiry lead me to conclude that the applicant is in a position to offer information that will assist the Commission in performing its tasks in both Part I and Part II of the Inquiry. Further, because of the breadth of the role of Government officials in the subject matter of the Inquiry, it is possible that findings of fact made by the Commission may adversely affect the applicant. Standing was granted for these reasons.

Eastern Regional Integrated Health Authority

Eastern Regional Integrated Health Authority (Eastern Health) is a successor to the Health Care Corporation of St. John's. Health Care Corporation of St. John's and Eastern Health, during the years from 1997 to 2005, performed at least the laboratory portion of the estrogen and progesterone testing which is the subject of the Inquiry. For a number of patients the taking of specimens, preparation of slides, and reading of the slides was entirely performed in a facility run by the Health Care Corporation of St. John's or Eastern Health. I am satisfied that: the applicant's interests may be adversely affected by the findings of the Commission; the applicant's participation would further the conduct of the Inquiry; and the applicant's participation would contribute to the openness and fairness of the Inquiry. Standing was, therefore, granted.

Dr. Kara Laing et al.

Dr. Laing is the named representative of a group of physicians who have been identified by Commission Counsel as being persons who may be able to offer helpful information to the Commission. They are oncologists, pathologists and other specialists who either participated in the Tumor Review Board, which reviewed the results of the re-testing done in 2005 and 2006, or physicians who may have information regarding the operation of the immunohistochemistry laboratory at Eastern Health. It is more efficient to have these persons represented by one counsel. I am satisfied that these physicians are persons whose presence would further the conduct of the Inquiry and, consequently, standing was granted for Parts I and II. On September 19, 2007, I advised Mr. Browne, the solicitor for this group, that if, as other physicians are identified as being potential witnesses, they wish to be added to this group, he should write to the Commission indicating

who seeks to be added and the basis for that physician being granted standing. I will respond to any such application in writing.

Newfoundland and Labrador Medical Association

The Newfoundland and Labrador Medical Association (NLMA) is a non-profit organization comprised of practicing physicians, residents and students enrolled at the faculty of medicine, Memorial University.

Part II will examine, among other things, the duties of physicians to patients and other health care participants. The NLMA has a perspective which, I am confident, will be of assistance in the crafting of recommendations relating to Part II. Standing for Part II was therefore granted to the NLMA.

Reserved Applications for Standing Alone

Central Regional Integrated Health Authority, Western Regional Integrated Health Authority, and Labrador-Grenfell Regional Integrated Health Authority

These three Authorities apply for joint standing for Parts I and II of the Inquiry.

Some of the tissue specimens used to prepare slides for ER/PR testing in the period from 1997 to 2005 came from facilities operated by these Authorities or their predecessors. The specimens were sent to a laboratory operated by Eastern Health or its predecessor. After the slides were prepared, they were often returned to the Authorities from which the specimens originated, where pathologists examined the slides and provided opinions to the referring physicians. While these three Authorities have some common interests with those of Eastern Health, their interests are not identical. Indeed, there may be matters about which Eastern Health and the other Authorities have divergent interests. On considering the three factors specified in s. 5(2) of the *Public Inquiries Act, 2006*, I am satisfied that standing for Part I should be granted.

I am also satisfied that standing must be granted for Part II. Whether “best practices” are currently in place is a question that is equally important to these Authorities as it is to Eastern Health. It cannot be assumed that the views of the three Authorities and those of Eastern Health on that subject will be the same. There are other policy considerations to be examined in Part II upon which the views of those Authorities operating outside the major population centres must be heard. Standing is granted to Central Regional Integrated Health Authority,

Western Regional Integrated Health Authority, and Labrador-Grenfell Regional Integrated Health Authority for Parts I and II.

Gerry Rogers

Ms. Rogers is one of those persons whose “hormone receptor status” changed following re-testing. In her oral submissions, she raised a series of questions regarding the re-testing which she believes remain unanswered, and stated a desire that those questions be taken up by the Commission. At the end of her oral submissions, Ms. Rogers expressed some doubt about whether standing was the best way for her to participate in the Inquiry. On September 24, 2007 she communicated, in writing, her desire to withdraw her application for standing. On that same day, Chesley Crosbie, Q.C., class counsel for the Breast Cancer Testing Class Action, during submissions respecting standing for that group, stated that Ms. Rogers has agreed to be one of five persons representative of the Class who would give him instructions if the Class is granted standing for the Inquiry.

Healthcare Insurance Reciprocal of Canada

Healthcare Insurance Reciprocal of Canada (HIROC) is an insurance reciprocal exchange which operates on a subscription and not-for-profit basis. HIROC is the liability insurer for Eastern Health and its predecessor, the Health Care Corporation of St. John’s. HIROC is defending Eastern Health in the class action referred to above. Counsel for HIROC submits that the issues to be examined in the Inquiry are very similar to those in the class action, and that this goes beyond fact finding. For example, counsel for HIROC maintains that whether the practices of Eastern Health were, at the relevant time, reasonable and appropriate, which will be examined by this Commission, is essentially the same question as whether Eastern Health met the standard of care imposed by tort law, which will be examined in the class action. Counsel for HIROC submits that because of its exposure to potential liability in the civil action it has an interest which should warrant its inclusion as a party for Part I of the Inquiry.

The Order-in-Council which created the Commission specifies:

4. *The commission of inquiry shall not express any conclusion or recommendation regarding the civil or criminal responsibility of any person or organization.*

Consequently, HIROC’s financial interests could not be adversely affected by the findings or recommendations of this Commission. It is HIROC’s insured, Eastern Health, which has already been granted standing, whose interests may be adversely

affected. To grant standing to HIROC for Part I would result in unnecessary duplication. The application of HIROC for standing in Part I is denied.

HIROC is an insurer for hundreds of health care facilities and organizations in five provinces and one territory. It also delivers risk management programs and critical resources and research information. It has a demonstrated interest in patient safety issues. HIROC's staff includes experts in risk management, risk assessment, and disclosures. HIROC submits that its involvement in these issues and its wide experience make it a suitable party for Part II. I agree. I am satisfied that the presence of HIROC would further the conduct of Part II of the Inquiry. Standing for Part II is therefore granted.

Reserved Applications for Standing and Funding

Three of the applicants for standing also seek funding: Canadian Cancer Society, Newfoundland and Labrador Division; Members of the Breast Cancer Testing Class Action; and Rogers Bussey Lawyers.

Section 5 (5) and (6) of the *Public Inquiries Act, 2006* provides:

- (5) *A commission may recommend that the government of the province provide funding for counsel and other expenses of a person who is permitted to participate in an inquiry.*
- (6) *Where a commission makes a recommendation under subsection (5), the minister shall consider the recommendation and advise the person concerned of the decision of the government and the level of funding to be provided, if any.*

These provisions do not give any direction respecting the criteria for a recommendation for funding. Clearly a prerequisite to a recommendation for funding is a grant of standing. However, I do not interpret the legislation as suggesting that there should be a recommendation for funding for everyone who is granted standing. If that had been the intent, the legislation would have merely provided for funding to be given to all those receiving standing.

The Commission's *Rules of Procedure and Practice*, which were published on my instructions, direct that certain kinds of information be submitted by those seeking a recommendation for funding. Rule 11 states:

- 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.*

Rule 11 is directed to two aspects of funding. Firstly, for what is the funding required and how critical is funding to the participation of the party? Secondly, what safeguards will be in place to ensure that any funding provided is expended as intended?

Unlike similar legislation in Ontario, for example, in this Province there is no statutory requirement that an applicant for funding demonstrate that it does not have sufficient financial resources to enable it to adequately represent its interests. However, if an applicant who has been granted standing is in that position it would be a factor favouring a recommendation that funding be provided. This is reflected in the information required to be provided to the Commission under Rule 11.

In addition to the factors specified in the *Rules of Procedure and Practice*, I have considered the impact on the Inquiry of the possible loss or limitation of the participation of the applicant seeking funding.

Canadian Cancer Society, Newfoundland and Labrador Division

The Canadian Cancer Society, Newfoundland and Labrador Division (Cancer Society) is a voluntary organization whose mission is stated to be the eradication of cancer and the enhancement of quality of life of people living with cancer. It seeks standing for Part I and Part II of the Inquiry in the belief that its participation would further the conduct of the Inquiry and contribute to its openness and fairness.

The Cancer Society maintains that because of its long interest in cancer, its partnership with others in research, its access to relevant expertise, as well as its trusted relationship with cancer patients and their families, it is in a unique position to aid the Commission in its work. The matters to be considered under Part II are a natural fit with the work of the Cancer Society. While the Cancer Society's submissions respecting their participation in Part I do not have the same resonance,

I am persuaded that the participation of this group whose own interests are unlikely to be affected by the findings of the Commission would further the conduct of Part I. I note the plan of the Cancer Society to avail of the assistance of experts available to them through the national organization in its participation in Part I. In summary, I am satisfied that the participation of this organization would bring valuable knowledge and experience to assist in the work of the Commission and that standing should be granted for Parts I and II.

In support of its application for funding, the Cancer Society submits its most recent financial statements. This is a charitable organization whose funds are derived from a number of sources including donations by the public, revenues from lotteries and fund raising events. Its expenditures are directed to research, support services for “people living with cancer,” cancer prevention projects, information and advocacy. For the operative period it has already committed most of its available funds to specified projects. The Cancer Society’s reserve is modest. Counsel for the Cancer Society advises that the reserve is less than that recommended for non-profit groups. To fully participate in the Inquiry without financial assistance would require that funds be diverted from other programs which have been announced or are long standing and have come to be relied upon by patients and their families. I would not expect the Cancer Society to do that. Nor, in my opinion, should the Cancer Society be required to sacrifice ongoing programs to participate in the Inquiry.

The Cancer Society has a long history of advocacy for cancer patients and access to expertise related to the Commission’s mandate. It has not identified any requirement for expenses for engaging experts. I recommend that government provide funding to the Cancer Society for one counsel and reasonable disbursements related to the work of counsel.

Members of the Breast Cancer Testing Class Action

This is an application by a group of persons who were directly affected by the re-testing.

The Certification Order for the class action describes the Class as follows:

- (a) Patients, including their estates, who underwent ER (estrogen) and PR (progesterone) receptor tests in which their breast tissue samples were tested at the [Eastern Regional Integrated Health Authority’s] hospital during the [period May 1, 1997 to August 8, 2005]; and*
 - (b) Persons who have a claim for loss of consortium and loss of guidance, care and companionship on account of a relationship with a person in paragraph (a).*
- The Class is restricted to residents of Newfoundland and Labrador.*

The law firm of Ches Crosbie Barristers has been appointed as Class Counsel.

In a letter submitted to the Commission, Mr. Colin D. Feltham, of Roebothan McKay & Marshall, solicitors for approximately two dozen persons who are also members of the Class, endorsed the application being presented by Mr. Crosbie on behalf of this group.

It is self-evident that the members of the Class have a substantial interest in the work of the Commission. While the Class does not include everyone whose ER/PR tests were re-tested, it is comprised of a large number of those persons or their families. These are persons whose views on the issues to be examined must be heard. In fairness, they must be granted standing.

The applicant also seeks funding for counsel and to engage experts to assist with “effective definition of issues, the effective examination of witnesses, or with meaningful contribution to policy analysis.” Crosbie Q.C. states that he has undertaken to represent the Class in the class action on the basis of a contingent arrangement for fees and disbursements. I am satisfied that this group is not in a position to fund its participation in a lengthy hearing without the assistance of government. I recognize that during the hearing information may become public which will be of assistance to this applicant or other parties in preparation for the ongoing litigation. However, that fact does not detract from the benefit to the Commission to be gained from the participation of a group of parties with divergent interests. From the perspective of the Commission, participation of parties with different interests creates an atmosphere where full disclosure of all relevant information becomes more likely.

I note that Crosbie Q.C. has undertaken “to disclose funding for fees and disbursements received from the Commission’s funding authority, on any approval hearing in relation to the Class Action, with the object of avoiding duplication of payment.”

The applicant has proposed certain specific amounts for engaging of specialists in pathology and oncology, and has made submissions respecting the approach to be taken to funding for counsel fees. Counsel advises that he will be assisted by a junior counsel during the hearings. I take that to mean that on those occasions when Mr. Crosbie is unable to attend, another counsel will represent the Class.

I am satisfied that the proposal to engage experts in oncology and pathology is a reasonable one and I recommend that government pay a reasonable amount for such expenses. I also recommend that government provide funding for one counsel and reasonable disbursements related to work of that counsel. I do not interpret s. 5 of *the Public Inquiries Act, 2006* as directing that I recommend rates to be paid. Under s. 5(6), that is a question for the Minister.

Rogers Bussey Lawyers

This law firm currently represents eight people affected by ER/PR testing. The firm seeks standing and a recommendation that funding be provided for participation in Parts I and II of the Inquiry. During oral submissions, Mr. Rogers clarified that the main purpose of the application is to represent his clients, but also expressed the view that his prior experience with an earlier commission of inquiry might be useful to this Commission. The application for funding was not supported by the documentation required under the *Rules of Procedure and Practice*.

The eight persons represented by Rogers Bussey Lawyers are also members of the Class in the Breast Cancer Testing Class Action. The eight includes Ms. Gerry Rogers who initially applied for standing herself. Though he agrees that there may be some overlap between this application and that of the Class, Mr. Rogers maintains that his firm's clients, who are vitally interested in the work of the Commission, are entitled to be represented by Rogers Bussey Lawyers before this Inquiry.

If I were to grant standing to and recommend funding for both the members of the Breast Cancer Testing Class Action and to Rogers Bussey Lawyers, this could result in those eight persons being represented by two solicitors at the Inquiry, both of whom would be funded by the government. Nothing has been placed before me which suggests that the group of persons represented by Rogers Bussey Lawyers have some interest which is distinct from other members of the Class.

While these persons are, of course, entitled to consult their own counsel in relation to matters having to do with the class action, I see no benefit to the Inquiry in having separate representation for them before the Inquiry. As the whole of the Class is represented by the application on behalf of the members of the Breast Cancer Testing Class Action, efficacy directs that members of the Breast Cancer Testing Class Action should be the group which receives standing. The application of Rogers Bussey Lawyers for standing and funding is therefore denied.

Summary:

The following persons or organizations are granted standing for Parts I and II of the Inquiry:

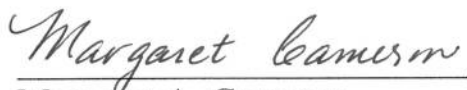
1. Her Majesty in right of Newfoundland and Labrador;
2. Eastern Regional Integrated Health Authority;
3. Dr. Kara Laing *et al.*,
4. Central Regional Integrated Health Authority, Western Regional Integrated Health Authority, and Labrador-Grenfell Regional Integrated Health Authority;
5. Canadian Cancer Society, Newfoundland and Labrador Division;
6. Members of the Breast Cancer Testing Class Action.

The following are granted standing for Part II of the Inquiry:

1. Newfoundland and Labrador Medical Association;
2. Healthcare Insurance Reciprocal of Canada.

I recommend funding be provided by the Government of Newfoundland and Labrador to the Canadian Cancer Society, Newfoundland and Labrador Division, and to Members of the Breast Cancer Testing Class Action as set out above.

Released: October 1, 2007



Margaret A. Cameron
Commissioner