

COMMISSION OF INQUIRY  
ON HORMONE RECEPTOR TESTING

BEFORE THE HONOURABLE JUSTICE CAMERON - COMMISSIONER

APRIL 1, 2008

Appearances:

- Bernard Coffey, Q.C. . . . . . Commission Co-counsel
- Sandra Chaytor, Q.C. . . . . . Commission Co-counsel
- Peter Browne/Jane Hennebury . . . . . Drs. Kara Laing et al
- Rolf Pritchard/Jenny Chai . . . . . Her Majesty in Right of NL
- Daniel Simmons . . . . . Eastern Regional Integrated  
. . . . . Health Authority
- Pamela Taylor. . . . . Members of the Breast Cancer  
. . . . . Testing Class Action
- Jennifer Newbury . . . . . Canadian Cancer Society (NL Division)
- David Eaton. . . . . Central, Western and Labrador-Grenfell  
. . . . . Regional Integrated Health Authorities

1 April 1, 2008

2 COFFEY, Q.C.:

3 Q. Commissioner, just before midnight last night,

4 Sandra Chaytor and I received a series of e-

5 mails from Rolf Pritchard, counsel for Her

6 Majesty. Attached and accompanying those was

7 certain e-mails relating to July 2005 that we

8 had not earlier received. I'm going to just

9 simply ask this, because I have to consider

10 the matter with Ms. Chaytor, discuss it

11 further as to what, if any--the implications

12 of what has been communicated to us last night

13 is, so or are, so I'm going to ask that the

14 matter be adjourned for one hour, please, and

15 I'll be in a position at that point to advise

16 yourself as to our views as to where the

17 matter stands and where we should go from

18 here.

19 THE COMMISSIONER:

20 Q. All right. Have you briefed other counsel on

21 this issue?

22 COFFEY, Q.C.:

23 Q. I have, Madam Commissioner. We had a scrum

24 just before, our own little scrum before you

25 came in and they are aware of the nature of

26 the circumstances.

27 THE COMMISSIONER:

LIST OF EXHIBITS

APRIL 1, 2008

EXHIBIT ENTERED AND MARKED P-0162 . . . . . Pg. 9

1 Q. Okay, well I'm assuming other counsel don't

2 have an objection, but if you do, now is your

3 opportunity to say so. We'll adjourn for an

4 hour, Mr. Coffey.

5 COFFEY, Q.C.:

6 Q. Thank you.

7 (ADJOURNED)

8 THE COMMISSIONER:

9 Q. Mr. Coffey.

10 COFFEY, Q.C.:

11 Q. Thank you, Commissioner. Since earlier this

12 morning I've had a chance to consider the

13 matter further and discuss it with my co-

14 counsel, Sandra Chaytor, speak to Mr.

15 Pritchard, government lawyer, and the

16 situation I think I should let you know is as

17 follows. We're advised that--late last

18 night, late yesterday certain documents were

19 located and their e-mail traffic related to

20 July 19th, 2005. When that became apparent to

21 and it is Robert Thompson from the government.

22 When it became apparent to Mr. Thompson, he,

23 of course, communicated, I understand, with

24 Mr. Pritchard to ensure that that particular

25 e-mail traffic was provided to us and that

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1 occurred late last evening. But in the  
 2 meantime, he realized--that is Mr. Thompson  
 3 apparently realized that if he could find  
 4 those e-mails using a particular software  
 5 program that he had searched late yesterday,  
 6 then he realized that there were other names  
 7 that could also be searched, and I understand  
 8 that that has not been done. It is in the  
 9 process of being done but has not yet been  
 10 completed. Mr. Pritchard has advised myself  
 11 and Ms. Chaytor that efforts are being made,  
 12 but at the moment no actual estimate that can  
 13 be relied up is available as to how long it's  
 14 going to take to conclude the search or  
 15 searches that are required using this other  
 16 approach. What I'm going to ask, therefore,  
 17 is that we adjourn until 4:00 p.m. today.  
 18 That will enable Mr. Pritchard's client to  
 19 make further inquiries in terms of what length  
 20 of time might be required to complete the data  
 21 search, and to assure the Commission that  
 22 everything relevant to the Commission's  
 23 mandate has been provided, or it may be that  
 24 Mr. Pritchard will come back this afternoon  
 25 and say that we're not yet--"he", the

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1 government, is not yet in a position to give  
 2 such an estimate. I don't want to be taken to  
 3 be suggesting to you that Mr. Pritchard will  
 4 be in a position this afternoon at 4:00 to do  
 5 so, but I think 4:00 may allow him sufficient  
 6 time at least to get an estimate, or even to  
 7 tell us it's concluded and this is the  
 8 material, we just don't know at this point.  
 9 So that's the situation, Commissioner. If you  
 10 have any questions, I'll try to answer them.  
 11 In the meantime, I have communicated with Mr.  
 12 Pritchard, I've told Mr. Ottenheimer that I do  
 13 not see any need for him to come back this  
 14 afternoon because whatever is forthcoming  
 15 between now and 4:00 this afternoon, I will  
 16 not be in a position to continue my  
 17 examination of Mr. Ottenheimer until I've had  
 18 a chance to review and consider the  
 19 information that even 'til now has been  
 20 provided to us. That's the situation. I  
 21 understand we're not sitting tomorrow and I've  
 22 advised Mr. Pritchard and Mr. Ottenheimer that  
 23 at the earliest Mr. Ottenheimer would continue  
 24 is 9:30 on Thursday morning.  
 25 THE COMMISSIONER:

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1 Q. Thank you. Mr. Pritchard, is there anything  
 2 you want to add to the summary which has been  
 3 given to me?  
 4 MR. PRITCHARD:  
 5 Q. No, Madam Commissioner, Mr. Coffey has already  
 6 spoken to it.  
 7 THE COMMISSIONER:  
 8 Q. All right. Now, are there any counsel  
 9 opposing this delay to this afternoon? All  
 10 right. We'll adjourn to 4:00 this afternoon,  
 11 at which point, obviously, we'll have to  
 12 reassess the situation and for the witness,  
 13 I'm sure Mr. Pritchard will communicate  
 14 directly to you, Mr. Ottenheimer, when we're  
 15 in a position to know more precisely when  
 16 we'll need you again. Thank you.  
 17 (ADJOURNED)  
 18 THE COMMISSIONER:  
 19 Q. Please be seated. Mr. Coffey.  
 20 COFFEY, Q.C.:  
 21 Q. Thank you, Commissioner. Inquiries have been  
 22 made since we adjourned this morning. I am  
 23 going to ask, please, that Exhibit P-0162 be  
 24 entered. And I'll explain in a moment if it's  
 25 so entered what it is.

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1 THE COMMISSIONER:  
 2 Q. Have all other counsel received a copy of  
 3 this?  
 4 COFFEY, Q.C.:  
 5 Q. They have, Commissioner.  
 6 THE COMMISSIONER:  
 7 Q. All right, Exhibit P-0162 entered.  
 8 EXHIBIT ENTERED AND MARKED P-0162  
 9 COFFEY, Q.C.:  
 10 Q. And Commissioner, I'm going to, if I could,  
 11 because it might otherwise not be apparent,  
 12 I'm going to read the text of it. It's  
 13 printed from my e-mail system, that's why my  
 14 name is on it. It's from Rolf Pritchard, sent  
 15 Monday, March 31st, 2008 at 11:40 p.m., to  
 16 Bernard Coffey and Sandra Chaytor. The  
 17 subject is "Forward new e-mail discovery.  
 18 Bern and Sandy, Robert wrote me with the  
 19 attached advising that he had found three e-  
 20 mails. He subsequently found two more. I  
 21 will forward the five e-mails." Signed Rolf.  
 22 And then the text below is "Rolf, I have  
 23 provided you with copies of three e-mails  
 24 dated July 19th, 2005, which I discovered  
 25 today when conducting a search on my e-mail

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1 archive. The discovery of these e-mails which  
 2 had not previously come to light was a  
 3 significant surprise, so it is important for  
 4 me to outline how they were found. These e-  
 5 mails are one: Cake to Thompson summarizing a  
 6 discussion which Cake had with Chaplin; two,  
 7 Cake to Thompson conveying an e-mail from  
 8 Chaplin; and three, Chaplin to Cake, cc'd to  
 9 Abbott. All of these e-mails dealt with a  
 10 "health matter" at Eastern Health. My e-mail  
 11 archive was initially searched several months  
 12 ago and disclosed to the Commission. The  
 13 search was performed on the group-wise mail  
 14 system. To the best of my knowledge the  
 15 search was complete. Today when listening to  
 16 John Ottenheimer's testimony about Carolyn  
 17 Chaplin, it occurred to me to perform a new  
 18 search using her name as a search criterion.  
 19 Searching e-mail has now become much more  
 20 easier with the new Microsoft Outlook mail  
 21 system and the search was completed in  
 22 seconds. The search uncovered the three e-  
 23 mails identified above. They should now be  
 24 disclosed to the Commission. This discovery  
 25 was a surprise, not only because it was in my

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1 archive, but similar documents had not been  
 2 found in the archives of Chaplin, Abbott and  
 3 Cake, all of which I understand had been  
 4 searched. It raises the question whether or  
 5 not additional e-mails exist in these archives  
 6 that should be searched again using Outlook  
 7 which we can begin ASAP." Signed Robert.  
 8 Commissioner, I understand that Mr. Pritchard,  
 9 counsel for Her Majesty has been making  
 10 inquiries during the day and he's in a  
 11 position to advise you as to the situation.  
 12 THE COMMISSIONER:  
 13 Q. All right. Mr. Pritchard?  
 14 MR. PRITCHARD:  
 15 Q. Good afternoon, Commissioner.  
 16 THE COMMISSIONER:  
 17 Q. Mr. Pritchard, would you perhaps come forward  
 18 to the mikes so we can get--make sure that  
 19 this is on the record.  
 20 MR. PRITCHARD:  
 21 Q. Commissioner, the people back at the  
 22 Confederation Building today have been working  
 23 on this issue and based on the progress they  
 24 have made today, which has been to go back and  
 25 review the e-mail archives using the different

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1 software that was spoken of in Mr. Thompson's  
 2 e-mail. And based on the progress they had  
 3 made today, they believe that they will finish  
 4 reviewing these e-mails probably later in the  
 5 day tomorrow, and at that point, I will report  
 6 back to Commission co-counsel whether or not  
 7 we have found more documents. We're  
 8 reasonably confident, I would say in the order  
 9 of 65 to 70 percent that that's how we can  
 10 proceed tomorrow.  
 11 THE COMMISSIONER:  
 12 Q. All right, so as I'm reading your message to  
 13 the best of your current ability to estimate,  
 14 you believe that the--you will be in a  
 15 position to indicate whether or not other  
 16 documents exist which have not yet been  
 17 disclosed by the end of the day tomorrow?  
 18 MR. PRITCHARD:  
 19 Q. That's our belief at this point. And I should  
 20 add that based on what's been reviewed today,  
 21 other than the documents that were disclosed  
 22 last night, we have not found anything yet  
 23 today that hasn't already been disclosed.  
 24 THE COMMISSIONER:  
 25 Q. All right, thank you.

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1 MR. PRITCHARD:  
 2 Q. Thank you.  
 3 COFFEY, Q.C.:  
 4 Q. Commissioner, earlier--since we adjourned  
 5 earlier today but before we reconvened just  
 6 now, Mr. Pritchard had provided further  
 7 disclosure to the Commission counsel. We are  
 8 in the process of replicating that and  
 9 distributing it to counsel, as there are other  
 10 counsel involved, as it is our practice. What  
 11 I'm going to suggest is the following, that we  
 12 reconvene on Thursday at 9:30 a.m. with a  
 13 planning, at that point in time, to continue  
 14 with the examination of Mr. Ottenheimer. I  
 15 make that request subject to the proviso that  
 16 there is not other material that is disclosed  
 17 to us either by way of volume or its import,  
 18 in the mean time, that might necessitate a  
 19 further request for an adjournment by myself.  
 20 Right now, I don't anticipate a further  
 21 request, but if there is--and I appreciate Mr.  
 22 Pritchard is not in a position to tell me what  
 23 might come.  
 24 THE COMMISSIONER:  
 25 Q. So what you're saying is on the basis of what

1 has been revealed to you today, you would be  
 2 in a position to proceed with the examination  
 3 of Mr. Ottenheimer on Thursday morning. If  
 4 there are other surprises, then you may be  
 5 making another application depending on what  
 6 is contained in other material which might or  
 7 might not be produced.

8 COFFEY, Q.C.

9 Q. That's correct, Commissioner. And as well, I  
 10 want to be--my fellow counsel here--Mr.  
 11 Pritchard knows what's in the other material,  
 12 but yet, my fellow counsel do not yet know.  
 13 So, again, if they feel any differently about  
 14 the reconvening on Thursday, presumably  
 15 they'll let me know by tomorrow when they've  
 16 had a chance to review the material.

17 THE COMMISSIONER:

18 Q. All right.

19 COFFEY, Q.C.

20 Q. But I don't anticipate--from my own  
 21 perspective, speaking for myself and Ms.  
 22 Chaytor, we anticipate being able to proceed  
 23 on Thursday morning at 9:30.

24 THE COMMISSIONER:

25 Q. Okay. Anybody else want to weigh in on this

1 subject at the moment. So then, we'll adjourn  
 2 until Thursday at 9:30 at which point the plan  
 3 is to proceed with the evidence of Mr.  
 4 Ottenheimer.

5 COFFEY, Q.C.

6 Q. Thank you, Commissioner.

7 THE COMMISSIONER:

8 Q. Thank you all.

9 Upon conclusion.

1 CERTIFICATE

2 I, Judy Moss, hereby certify that the foregoing is  
 3 a true and correct transcript in the matter of the  
 4 Commission of Inquiry on Hormone Receptor Testing,  
 5 heard on the 1st day of April, A.D., 2008 before  
 6 the Honourable Justice Margaret A. Cameron,  
 7 Commissioner, at the Commission of Inquiry, St.  
 8 John's, Newfoundland and Labrador and was  
 9 transcribed by me to the best of my ability by  
 10 means of a sound apparatus.  
 11 Dated at St. John's, Newfoundland and Labrador  
 12 this 1st day of April, A.D., 2008  
 13 Judy Moss

<p>-?- 'til [1] 7:19  -1- 1 [3] 1:4 2:2 3:1 11:40 [1] 9:15 19th [2] 5:20 9:24 1st [2] 16:5,12  -2- 2005 [3] 3:7 5:20 9:24 2008 [6] 1:4 2:2 3:1 9:15 16:5,12  -3- 31st [1] 9:15  -4- 4:00 [5] 6:17 7:4,5,15 8:10  -6- 65 [1] 12:9  -7- 70 [1] 12:9  -9- 9 [1] 2:3 9:30 [4] 7:24 13:12 14:23 15:2  -A- A.D [2] 16:5,12 a.m [1] 13:12 Abbott [2] 10:9 11:2 ability [2] 12:13 16:9 able [1] 14:22 above [1] 10:23 accompanying [1] 3:6 Action [1] 1:13 actual [1] 6:12 add [2] 8:2 12:20 additional [1] 11:5 adjourn [4] 5:3 6:17 8:10 15:1 adjourned [5] 3:14 5:7 8:17,22 13:4 adjournment [1] 13:19 advise [2] 3:15 11:11 advised [3] 5:17 6:10 7:22 advising [1] 9:19 afternoon [7] 6:24 7:4 7:14,15 8:9,10 11:15 again [3] 8:16 11:6 14:13 ago [1] 10:12</p>	<p>al [1] 1:8 allow [1] 7:5 answer [1] 7:10 anticipate [3] 13:20 14:20,22 apparatus [1] 16:10 apparent [3] 5:20,22 9:11 Appearances [1] 1:5 application [1] 14:5 appreciate [1] 13:21 approach [1] 6:16 April [5] 1:4 2:2 3:1 16:5 16:12 archive [3] 10:1,11 11:1 archives [3] 11:2,5,25 ASAP [1] 11:7 assuming [1] 5:1 assure [1] 6:21 attached [2] 3:6 9:19 Authorities [1] 1:16 Authority [1] 1:11 available [1] 6:13 aware [1] 3:25  -B- based [3] 11:23 12:2,20 basis [1] 13:25 became [2] 5:20,22 become [1] 10:19 begin [1] 11:7 belief [1] 12:19 below [1] 9:22 Bern [1] 9:18 Bernard [2] 1:6 9:16 best [3] 10:14 12:13 16:9 between [1] 7:15 Breast [1] 1:12 briefed [1] 3:20 Browne/Jane [1] 1:8 Building [1] 11:22  -C- Cake [5] 10:5,6,7,8 11:3 Cameron [2] 1:3 16:6 Canadian [1] 1:14 Cancer [2] 1:12,14 Carolyn [1] 10:16 cc'd [1] 10:8 Central [1] 1:15 certain [2] 3:7 5:18 CERTIFICATE [1] 16:1 certify [1] 16:2 Chai [1] 1:9 chance [3] 5:12 7:18 14:16 Chaplin [5] 10:6,8,8,17 11:2</p>	<p>Chaytor [7] 1:7 3:4,10 5:14 6:11 9:16 14:22 circumstances [1] 3:26 Class [1] 1:13 client [1] 6:18 co [1] 5:13 co-counsel [3] 1:6,7 12:6 Coffey [17] 1:6 3:2,22 5:4,5,9,10 8:5,19,20 9:4 9:9,16 13:3 14:8,19 15:5 Commission [10] 1:1,6 1:7 6:21 10:12,24 12:6 13:7 16:4,7 Commission's [1] 6:22 Commissioner [32] 1:3 3:3,19,23,27 5:8,11 7:9 7:25 8:5,7,18,21 9:1,5,6 9:10 11:8,12,15,16,21 12:11,24 13:4,24 14:9 14:17,24 15:6,7 16:7 communicate [1] 8:13 communicated [3] 3:12 5:23 7:11 complete [2] 6:20 10:15 completed [2] 6:10 10:21 conclude [1] 6:14 concluded [1] 7:7 conclusion [1] 15:9 conducting [1] 9:25 Confederation [1] 11:22 confident [1] 12:8 consider [3] 3:9 5:12 7:18 contained [1] 14:6 continue [3] 7:16,23 13:13 conveying [1] 10:7 copies [1] 9:23 copy [1] 9:2 correct [2] 14:9 16:3 counsel [12] 3:5,20 5:1 5:14 8:8 9:2 11:9 13:7,9 13:10 14:10,12 course [1] 5:23 criterion [1] 10:18 current [1] 12:13  -D- Daniel [1] 1:10 data [1] 6:20 dated [2] 9:24 16:11 David [1] 1:15 dealt [1] 10:9 delay [1] 8:9 depending [1] 14:5 different [1] 11:25 differently [1] 14:13 directly [1] 8:14 disclosed [6] 10:12,24 12:17,21,23 13:16</p>	<p>disclosure [1] 13:7 discovered [1] 9:24 discovery [3] 9:17 10:1 10:24 discuss [2] 3:10 5:13 discussion [1] 10:6 distributing [1] 13:9 Division [1] 1:14 documents [5] 5:18 11:1 12:7,16,21 done [2] 6:8,9 Drs [1] 1:8 during [1] 11:10  -E- e [4] 3:4 9:19 10:4,22 e-mail [10] 5:19,25 9:13 9:17,25 10:7,10,19 11:25 12:2 e-mails [8] 3:7 6:4 9:21 9:23 10:1,9 11:5 12:4 earliest [1] 7:23 easier [1] 10:20 Eastern [2] 1:10 10:10 Eaton [1] 1:15 efforts [1] 6:11 either [1] 13:17 enable [1] 6:18 end [1] 12:17 ensure [1] 5:24 entered [5] 2:3 8:24,25 9:7,8 estimate [4] 6:12 7:2,6 12:13 et [1] 1:8 evening [1] 6:1 evidence [1] 15:3 examination [3] 7:17 13:14 14:2 Exhibit [4] 2:3 8:23 9:7 9:8 EXHIBITS [1] 2:1 exist [2] 11:5 12:16 explain [1] 8:24  -F- fellow [2] 14:10,12 finish [1] 12:3 five [1] 9:21 following [1] 13:11 follows [1] 5:17 foregoing [1] 16:2 forthcoming [1] 7:14 forward [3] 9:17,21 11:17 found [6] 9:19,20 10:4 11:2 12:7,22  -G- given [1] 8:3</p>	<p>Good [1] 11:15 government [3] 5:15,21 7:1 group-wise [1] 10:13  -H- health [4] 1:11,16 10:10 10:10 heard [1] 16:5 Hennebury [1] 1:8 hereby [1] 16:2 Honourable [2] 1:3 16:6 Hormone [2] 1:2 16:4 hour [2] 3:14 5:4  -I- identified [1] 10:23 implications [1] 3:11 import [1] 13:17 important [1] 10:3 indicate [1] 12:15 information [1] 7:19 inquiries [3] 6:19 8:21 11:10 Inquiry [3] 1:1 16:4,7 Integrated [2] 1:10,16 involved [1] 13:10 issue [2] 3:21 11:23  -J- Jennifer [1] 1:14 John [1] 10:16 John's [2] 16:8,11 Judy [2] 16:2,13 July [3] 3:7 5:20 9:24 Justice [2] 1:3 16:6  -K- Kara [1] 1:8 knowledge [1] 10:14 knows [1] 14:11  -L- Labrador [2] 16:8,11 Labrador-Grenfell [1] 1:15 Laing [1] 1:8 last [5] 3:3,12 5:17 6:1 12:22 late [4] 5:17,18 6:1,5 lawyer [1] 5:15 least [1] 7:6 length [1] 6:19 light [1] 10:2 LIST [1] 2:1 listening [1] 10:15 located [1] 5:19</p>
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