Commission of Inquiry on Hormone Receptor Testing

Decision of Commissioner Cameron on the request of Healthcare Insurance Reciprocal of Canada

Background

In the fall of 2007, the Commission of Inquiry on Hormone Receptor Testing engaged six experts to prepare papers on legal, policy and ethical issues related to disclosure in the context of health care. As previously announced, the plan was to place the papers on the Commission's website in the spring of 2008. These experts, and others, are to participate in a symposium sponsored by the Commission on the 22nd and 23rd of April, 2008. The papers and the symposium are large components of Part II of the Inquiry. As the theme of the symposium, **Looking Forward**, signals, those aspects of the Inquiry are directed to the Commission's duty to make recommendations.

During a conference call with a number of the authors of the papers, the Commission was asked to prepare some background material so that the presenters could better understand the circumstances giving rise to the establishment of the Commission. Material was prepared, in January of 2008, and sent to the presenters. The same material was subsequently disclosed to parties with standing.

On March 10, 2008, I received from Mr. Daniel Boone, counsel for Healthcare Insurance Reciprocal of Canada (HIROC), a letter containing a request:

1. That no papers addressing legal standards or duties, even in general terms, be posted on the Inquiry website, discussed at the Symposium or released publicly in any manner.

2. Clarification of the intent of the Commissioner in respect of the standard against which conduct of public authorities and health care professional will be measured and evaluated.

The letter followed from questions raised by Mr. Boone during my meeting with all counsel on February 22, 2008. On that occasion, as my responses to the questions put by Mr. Boone did not seem to address his concerns, I invited him to put them in writing. After I received Mr. Boone's letter, all other counsel for parties with standing were invited to make written submissions on the request, if

they wished to do so, on or before the 19th day of March, 2008. Counsel for 5 other parties with standing and Commission counsel have made submissions.

My decision follows.

Position of HIROC

The crux of the submission of HIROC is that, as the Commission is prohibited from expressing any conclusion or making recommendations "regarding civil or criminal responsibility" of any person or organization, no consideration should be given to and, indeed, the Commission should not publish three papers entitled: *Legal Obligations*; *Legal and Ethical Obligations of Public Health Authorities*; and *Standard of Care*. In the request, counsel for HIROC states:

> As a result, if legal information provided by [Professor Robertson, Professor Dickens and Professor Gilmour] is used to inform a finding in the Commissioner's report, then that finding will be outside of the Commissioner's mandate. If the legal information is not used to inform a finding in the Commissioner's report, then we inquire as to the purpose of canvassing legal issues in the Inquiry.

On reading the whole of the request of HIROC, it appears that its concerns are based on the content of the background material and the fact that the subject matter of certain papers requires an examination of the law relating to disclosure. HIROC has been granted standing for Part II of the inquiry and I will, therefore, examine its request in that context.

Analysis

I agree entirely with the premise that the Commission cannot express any conclusion or recommendation regarding the civil or criminal responsibility of any person or organization. That is clearly stated in section 4 of the Order establishing the Commission (Order in Council 2007-300). I have, on two occasions (September 19, 2007 and March 19, 2008), publicly stated that limitation on the jurisdiction of the Commission. There are good reasons for this, as the request of HIROC notes by quoting from the decision of Cory J. in *Canada (Attorney General) v. Canada (Commission of Inquiry on the Blood System in Canada – Krever Commission)*, [1997] 3 S.C.R. 440, para.53:

> A public inquiry was never intended to be used as a means of finding criminal or civil liability. No matter how carefully the inquiry hearings are conducted they cannot provide the evidentiary or procedural safeguards which prevail at a trial. Indeed, the very relaxation of the evidentiary rules which is so common to inquiries makes it readily apparent that findings of criminal or civil liability not only should not be made, they cannot be made.

It does not follow, however, that any consideration of legal issues will be either irrelevant to the work of the Commission or outside of its jurisdiction.

I anticipate that, either during the hearing phase of the Inquiry or through the papers and the symposium, I will be informed about current policies, procedures, practices, and, where applicable, professional guidelines or ethical standards regarding disclosure. The position of HIROC suggests, however, that section 4 of the Order requires that I be ignorant of the law. In my view, the current state of the law of disclosure, whether arising out of the common law or legislation, is a consideration when determining what, if any, recommendations should be made. It would not be helpful to anyone if I were to recommend a method of dealing with disclosure which would conflict with existing legal standards, unless I was recommending that those standards be changed.

Counsel for HIROC relies on the advice of Cory J. at para. 52 of the case noted above:

> ... commissioners should endeavour to avoid making evaluations of their findings of fact in terms that are the same as those used by courts to express findings of civil liability. As well, efforts should be made to avoid language that is so equivocal that it appears to be a finding of civil or criminal liability.

Immediately following the portion quoted above, Cory J. said:

> Despite these words of caution, however, commissioners should not be expected to perform linguistic contortions to avoid language that might conceivably be interpreted as importing a legal finding.

These suggestions are indeed helpful, designed to bring clarity to the reports of Commissions of Inquiry. They are not however, directives respecting what may be considered by an Inquiry.

I conclude that neither the Terms of Reference nor the general law prohibits the Commission from engaging persons to prepare papers respecting legal issues, publishing those papers or discussing relevant legal issues at the symposium.

The second of the requests of HIROC was that I "clarify the standard against which conduct of public authorities and health care professionals will be measured and evaluated." As noted above, in part the concern of HIROC and others arises out of the wording of the background material supplied to the authors of papers. That material included a list of questions. It is HIROC's position that all but three of these questions cause it concern that the authors are either assessing specific behavior of one of the parties with standing against a legal standard, or may cause an author to address "general legal standards of a health care institution which have the potential to be used to assess the actions of the Eastern Regional Integrated Health Authority." As an aside, most of the "questions" with which HIROC has concerns have no relation to Part II.

As to the materials provided to the authors, the questions related to 'legal, policy and ethical issues". There were words used that could have a legal meaning. However, words like "duty" might equally be used in the context of an ethical discussion. These were not public documents nor did they reflect conclusions of a Commissioner. Further, even if the background material addressed the legal standard, to the extent noted above that standard is relevant to the work of the Commission.

Part II deals not with past events but with the present and the future. The only aspect of Part II which requires the application of standards to facts is contained in Term (e) which requires the Commission "to advise whether the estrogen and progesterone hormone receptor testing systems and processes and quality assurance systems currently in place are reflective of best practice." The standard which is to be applied in that case is the one set by the Terms of Reference. I expect Commission counsel and counsel for parties with standing to assist the Commission in determining what best practice is. To define best practice at this stage is premature.

The undercurrent of the application of HIROC is that it is concerned that the Commission intends to exceed its jurisdiction by making findings of civil or criminal liability. As Commissioner I can only repeat, yet again, that that is not my intention to exceed the jurisdiction of the Commission. HIROC also states two other concerns:

> Whether the individuals retained for Part II have been specifically asked to address legal issues with respect to matters which must be determined in the civil action; and
>
> The potential for a gap in public confidence which will arise if legal experts retained by the Commission express their general opinions as to standards which fall to be determined by the Supreme Court in resolving the civil action.

Counsel for the parties with standing have been advised that the papers being prepared are general in nature and not intended to address the specifics of any litigation which might be ongoing. If, however, in the general words use or in the course of the symposium something is said, either generally or specifically, which may be interpreted as supporting the view of one or another of the parties to the ongoing litigation, that cannot be said to be the Commission making a finding or recommendation contrary to section 4 of the Order establishing the Commission. To limit discussion in the way implied by the request of HIROC would be to import into the Commission process the atmosphere of a criminal trial.

As for the second of these concerns, this concern assumes that the opinions of those preparing papers will not conflict and they will be accepted by the Commissioner and used in a way that offends section 4 of the Order. If any of the parties with standing have a contrary view to that expressed by a participant in the Inquiry the rules provide ample opportunities for the expression of these views. If the courts of this country can have different views of what the

law is or requires, as is often the case, without undermining the public's confidence, I do not accept that the expression of a particular view by one expert, which may not be accepted by a Court, will undermine public confidence.

Conclusion

For the reasons stated above, the papers which have been prepared at the request of the Commission will be posted to the website as planned and discussed at the symposium. As to the intent of the Commissioner in respect of the standard against which conduct of public authorities and health care professionals will be measured and evaluated, where that standard is specified in the Terms, that is the standard which must be applied. That does not limit, however, the parties from making submissions about what "reasonable and appropriate", "timely manner", "appropriate and timely manner" and "best practice" mean.

Margaret Cameron

Margaret A. Cameron
Commissioner

March 24, 2008