

# **DRISKELL INQUIRY**

## **RULES OF PROCEDURE AND PRACTICE**

*[These rules were approved at the Standing Hearing before the Honourable Patrick J. LeSage, Q.C., Commissioner and came into force on April 4, 2006.]*

### **PART I: GENERAL**

1. The Commission's mandate, established by Order-in-Council #479/2005, is:
  - to examine the conduct of Crown counsel who conducted and managed the trial of James Driskell and the subsequent appeal and departmental reviews of his conviction, and consider whether that conduct fell below the professional and ethical standards expected of prosecutors at the time;
  - to inquire whether the Winnipeg Police failed to disclose material information to the Crown at any time and if any such non-disclosure contributed to a likely miscarriage of justice;
  - to give advice about whether the conduct of Crown counsel or the police should be referred to an appropriate body for further review or investigation;
  - to consider the role of the RCMP laboratory in the prosecution of James Driskell and to review any systemic issues that may arise out of its role;
  - to give advice about whether any aspect of this case should be further studied, reviewed or investigated and if so, by whom, and to make systemic recommendations arising out of the facts of the case that the Commissioner considers appropriate;
  - to consider whether and in what way a determination or declaration of wrongful conviction can be made in cases like this where a new trial is ordered by the Minister of Justice for Canada pursuant to s. 696.3(3)(a)(i) of the *Criminal Code* and Crown counsel subsequently directs a stay of proceedings under s. 579 of the *Code*.
  
2. The Commissioner is authorized by s. 4(b) of the Order-in-Council to hold public hearings “[i]f it appears necessary to ensure cooperation and public accountability or to assess important issues of credibility”. Public hearings will be convened in Winnipeg at the Winnipeg Convention Centre, 375 York Avenue, Winnipeg, Manitoba at a date and time to be set by the Commissioner.

3. In these Rules:

- (i) the term “documents” is intended to have a broad meaning, and includes the following forms: written, electronic, audiotape, videotape, digital reproductions, photographs, maps, graphs, microfiche and any data and information recorded or stored by means of any device.
- (ii) “party” means a person, group of persons or organization who has been granted standing by the Commissioner under Part II of these Rules.
- (iii) “Commission counsel” refers to the “special counsel” retained by the Commissioner pursuant to s. 4(c) of the Order in Council

4. All parties and their counsel shall be deemed to undertake to adhere to these Rules. Any party may raise any issue of non-compliance with the Commissioner. 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, and imposing restrictions on the further participation in or attendance at the hearings by any party, counsel, individual or member of the media.

5. The Commissioner may amend these Rules or dispense with compliance with them as he deems necessary to ensure that the hearing is thorough, fair and timely.

**PART II: STANDING**

6. The Commissioner has appointed counsel to represent him and the public interest during the Inquiry. Commission counsel will assist the Commissioner throughout the Inquiry and are responsible for ensuring that the Inquiry is conducted in an orderly fashion, and that all matters bearing on the public interest and falling within the scope of the Commissioner’s mandate are brought to the Commissioner’s attention. Commission counsel have standing throughout the Inquiry.

7. Persons, groups of persons or organizations who wish to participate in the Inquiry may seek standing before the Inquiry. The Commissioner may grant standing if he is satisfied that an

applicant has a substantial and direct interest in the subject-matter of the Inquiry or that the applicant's participation in the Inquiry may be helpful to the Commission in fulfilling its mandate. Persons, groups of persons or organizations that are granted standing are referred to in these Rules as "parties". An application for standing shall be made both in writing and orally pursuant to the terms set out in the Call for Applications for Standing issued by the Commission on March 15, 2006.

8. The Commissioner will determine on what terms a party may participate in the Inquiry, and the nature and extent of such participation.

9. As provided for in Part III (Evidence), counsel representing a witness who is called to testify before the Commission may participate during the hearing of that witness's evidence without the necessity of applying for standing.

**PART III: EVIDENCE**

**A. General**

10. The Commissioner may receive any evidence that he considers to be helpful in fulfilling his mandate whether or not such evidence would be admissible in a court of law.

**B. Preparation of Documentary Evidence**

11. All parties granted standing under Part II of these Rules shall, as soon as possible after being granted standing, produce to the Commission true copies of all documents in their possession or control having any bearing on the subject-matter of the Inquiry. Documents in the possession or control of a party that are already in the possession of the Commission shall be listed but need not be produced, unless specifically requested by Commission counsel. Upon the

request of Commission counsel, parties shall also provide originals of relevant documents in their possession or control for inspection.

12. Upon the request of Commission counsel, any non-party shall produce to the Commission true copies of all documents in their possession or control having any bearing on the subject-matter of the Inquiry. Documents in the possession or control of a non-party that are already in the possession of the Commission shall be listed but need not be produced, unless specifically requested by Commission counsel. Upon the request of Commission counsel, such non-parties shall also provide originals of relevant documents in their possession or control for inspection.

13. All documents received by the Commission will be treated by the Commission as confidential, unless and until they are made part of the public record or the Commissioner otherwise directs. This does not preclude Commission counsel from producing a document to a potential witness prior to the witness giving her testimony, as part of Commission counsel's investigation.

14. Any party or non-party required to produce a document or documents pursuant to paras. 11 or 12 or pursuant to a subpoena or summons issued pursuant to s. 88(1) of the *Manitoba Evidence Act* (see para. 23) and who claims privilege over any such document shall produce a list of the documents over which privilege is claimed stating the basis and reasons for the claim of privilege.

15. If Commission counsel wishes to challenge a claim of privilege, Commission counsel shall apply as follows:

(i) to the Commissioner, or

(ii) to the Court of Queen’s Bench of Manitoba, in relation to a claim of solicitor-client privilege, if the party claiming the privilege requests that the issue be adjudicated by the Court.

During the argument of a privilege claim under para. 15(i) the Commissioner shall not disclose any disputed document to Commission counsel or to the other parties, but may, with the assistance of the party or non-party claiming privilege, prepare and produce a summary of the document. If the party or non-party claiming solicitor-client privilege requests that Commission Counsel apply for a ruling to the Manitoba Court of Queen’s Bench under para. 15(ii), the party or non-party shall make this request in an expeditious manner.

**C. Witness Interviews and Disclosure**

16. As provided in s. 4(b) of Order in Council #479/2005, Commission counsel may interview people believed to have information or documents bearing on the subject-matter of the Inquiry. The Commissioner may choose whether or not to attend an interview, and Commission counsel will provide the Commissioner with a transcript or report of all interviews conducted in his absence. Persons interviewed by Commission counsel may choose to have legal counsel present during the interview, but are not required to do so. Persons whose interview is requested by Commission counsel shall answer all relevant questions and produce any relevant document. A subpoena or summons may be issued pursuant to para. 23 if the person to be interviewed requests one.

17. If Commission counsel determines that a person who has been interviewed should be called as a witness in the public hearings referred to in Part I, Commission counsel will prepare a statement of the witness's anticipated evidence or a transcript of their interview, and will provide a copy of this statement or the interview transcript to the witness before he or she testifies in the hearing. After the statement or transcript has been reviewed by the witness, copies shall be disclosed to the parties on their undertaking to use it only for the purposes of the Inquiry.

18. If Commission counsel determines that it is not necessary for a person who has been interviewed to be called as a witness in the public hearings referred to in Part I, Commission Counsel may tender the witness statement or transcript to the Commissioner at the hearing, and the Commissioner may consider the information in the witness statement or transcript when making his final findings, conclusions and recommendations. If Commission counsel interviews a person and decides not to call that person to testify at the public hearings, Commission counsel will provide the parties with a transcript of the interview, if available, or a summary of the relevant information provided by that person. As provided in para. 27, a party may apply to the Commissioner for leave to call any person as a witness or for a direction that Commission counsel call that person as a witness.

19. Unless the Commission orders otherwise, all relevant non-privileged documents in the possession of the Commission shall be disclosed to the parties at a time reasonably in advance of the witness interviews and/or public hearings or within a reasonable time of the documents becoming available to the Commission.

**D. Witnesses**

20. Witnesses who testify will give their evidence under oath or upon affirmation.

21. Witnesses are entitled to have their own counsel present while they testify. A witness's counsel has standing in the Inquiry for the purposes of that witness's testimony, and may examine the witness as provided in paras. 24 and 25.
22. Witnesses may be called to give evidence in the Inquiry more than once.
23. Where he considers it advisable, the Commissioner may issue a summons or subpoena pursuant to s. 88(1) of the *Manitoba Evidence Act* requiring a witnesses to give evidence on oath or affirmation and/or to produce documents or other things. A summons or subpoena may be issued in relation to either the pre-hearing interviews conducted by Commission counsel, the pre-hearing requests for documents or the public hearings.

**E. Oral Examinations**

24. The order of examination of a witness will ordinarily be as follows, subject to para. 25, below:
- (a) Commission counsel will examine the witness. Except as otherwise directed by the Commissioner, Commission counsel may adduce evidence from a witness by way of both leading and non-leading questions;
  - (b) The parties who have been granted standing to do so will then have an opportunity to cross-examine the witness to the extent of their interest. If these parties are unable to agree on the order of cross-examination, this will be determined by the Commissioner;
  - (c) Subject to para. 25, counsel for the witness will examine the witness last, regardless of whether or not counsel is also representing another party;
  - (d) Commission counsel will then have the right to re-examine the witness.
25. A witness's counsel may apply to the Commissioner for permission to lead that witness's evidence-in-chief. If permission is granted, the witness will be examined in the following order:
- (a) counsel will examine the witness in accordance with the normal rules governing the examination of one's own witness in court proceedings, unless otherwise directed by the Commissioner;

- (b) Commission counsel will then be entitled to examine the witness
- (c) The other parties with standing will be in entitled to cross-examine the witness, as provided for in para. 24(b);
- (d) Counsel for the witness will then be entitled to re-examine the witness;
- (d) Commission counsel will then be entitled to conduct a final re-examination of the witness.

26. After a witness has been sworn or affirmed at the commencement of his or her testimony, no counsel other than Commission counsel may speak to that witness about the evidence he or she has given until the witness has completed his or her evidence, except with the permission of the Commissioner. Commission counsel may not speak to the witness about his or her evidence while the witness is being cross-examined by other counsel, except with the permission of the Commissioner.

27. Once Commission counsel has indicated that they will not be calling a particular witness to testify at the public hearings referred to in para. 2, a party may apply to the Commissioner and request that the witness be called to give evidence. If the Commissioner is satisfied that the witness's testimony is needed, the Commissioner may direct Commission counsel to call the witness (in which case para. 24 applies) or may allow the requesting party to call the witness and adduce his or her evidence in chief (in which case para. 25 applies, with suitable modifications).

**F. Use of Documents at Hearings**

28. Before a witness testifies at the Inquiry, Commission counsel may, where practicable and appropriate, provide the witness and the parties with a binder or a list of those documents that are likely to be referred to during that witness's testimony. Before these documents will be provided to a party or the witness, he or she must undertake to use these documents only for the purposes of the Inquiry and to abide by such other restrictions on disclosure and dissemination that the

Commission considers appropriate. The Commission may require that documents provided, and all copies made, be returned to the Commission if not tendered in evidence.

29. The undertakings given pursuant to paras. 17, 18 and 28 are of no force in relation to any document or information that has been entered into the public record. The Commission may, upon application, release any party or counsel in whole or in part from the provisions of an undertaking regarding the use or disclosure of documents or information.

30. Without leave of the Commissioner, no document shall be used in cross-examination or otherwise unless copies of the documents have been provided to Commission counsel in a timely manner pursuant to paras. 11 and 12.

**G. Access to Hearings and to the Evidence**

31. Subject to para. 32, the hearings referred to in para. 2 will ordinarily be open to the public. The use of fixed camera(s) in the hearing room will be permitted on terms and conditions to be determined by the Commissioner after hearing submissions from interested parties.

32. Where the Commissioner is of the opinion that it is necessary in the interests of the maintenance of order or the proper administration of justice to exclude all or any members of the public from the hearing room, he may, after hearing submissions from interested parties, direct that portions of the hearing be held in the absence of the public or on such terms and conditions as he may direct.

33. Applications from witnesses or parties to hold any part of the hearing in the absence of all or any members of the public should be made in writing to the Commission at the earliest possible opportunity.

34. The transcripts and exhibits from the hearings will be made available as soon as practicable for public viewing. Transcripts will be posted on the Commission's web site as soon as is reasonably practical and will be available to both the parties and the public. Transcripts of any portions of the hearing that are held in the absence of the public pursuant to para. 32 will be made available for public viewing on such terms as the Commissioner may direct if, after hearing the evidence and any submissions, the Commissioner concludes that it is in the public interest to release these transcripts.

**PART IV: NOTICES REGARDING ALLEGED MISCONDUCT**

35. The Commissioner will not make a finding of misconduct on the part of any person unless the person or, if the person is deceased, his estate has had reasonable notice of the substance of the alleged misconduct and has been allowed full opportunity during the inquiry to be heard in person or by counsel.

36. Any notices of alleged misconduct will be delivered on a confidential basis to the person to whom the allegations of misconduct refer.

**PART V: AMENDMENTS TO THE RULES**

37. These Rules may be amended and new Rules may be added if the Commissioner considers it advisable to do so in order to fulfil his mandate and ensure that the process is fair and thorough.