



Decision on Application Under Rule 56 (Benjamin Dichter)

1. On October 31, 2022, Benjamin Dichter served an application under Rule 56 of the Commission's Rules of Practice and Procedure ("Rules") seeking leave to have his evidence-in-chief led by his counsel, Jim Karahalios. This decision explains why I would dismiss the application.

Background to the Application and Applicable Rule

2. Mr. Dichter has been served with a summons under Rule 48 of the Commission's Rules. He is expected to testify on November 3, 2022.

3. On October 31, 2022, Mr. Dichter served an application under Rule 56 of the Commission's Rules. Rule 56 provides as follows:

The legal representative for a Party may apply to the Commissioner to lead a particular witness's evidence in-chief. If the representative is granted the right to do so, examination shall be confined to the normal rules governing the examination of one's own witness in court proceedings, unless otherwise directed by the Commissioner. In addition, prior to that witness's evidence in chief, the witness's legal representative shall provide the Parties and Commission counsel with reasonable notice of the areas to be covered in the witness's anticipated evidence in chief and a list of the documents associated with that evidence.

4. Mr. Dichter's counsel relied on three "specific factors related to the Commission's guiding principles" in support of his application to lead Mr. Dichter's evidence:

- a. First, Mr. Dichter's position as a non-party who has been in a prior working relationship with more than one party is "unique" and creates "an increased risk of legal and reputational exposure." In particular, the application points to the fact that Mr. Dichter is a defendant in the ongoing *Li et al. v. Barber et al.* class action, as well as the presence of parties to that proceeding as parties with standing before the Commission.



- b. Second, given the time allocated to Mr. Dichter's evidence in chief (two hours), he seeks to have his own counsel lead his evidence "[t]o ensure that all the evidence from Mr. Dichter is presented within this period," which would be accomplished "by providing for a more focused testimony in evidence in-chief." Mr. Dichter also states that "re-examination would not be required by Commission Counsel and Mr. Dichter's legal representative separately after his evidence in-chief is provided."
- c. Third, Mr. Dichter notes that his counsel would work with Commission Counsel to ensure that Mr. Karahalios leads evidence in-chief in "alignment with the Commission's mandate."

Analysis

5. I would dismiss the application.
6. Commission Counsel are impartial and lead evidence relevant to the Commission's mandate. Mr. Dichter and his counsel can coordinate with Commission Counsel to ensure that they canvass relevant issues and documents in their examination of Mr. Dichter.
7. Mr. Dichter faces similar reputational and legal exposure as other witnesses who will testify. With respect to his reputational interest, I note that there have been many witnesses called whose conduct has been the subject of critical examination. However, the focus of this Commission is not allegations of wrongdoing against a specific individual, but rather a broad and systemic inquiry into the conduct of a Government, designed to maintain public accountability and to make recommendations for the future.



8. With respect to legal exposure, Mr. Dichter is also not in a unique position. Several witnesses who are scheduled to testify are the subject of civil or criminal proceedings. Mr. Dichter has been summonsed under the *Inquiries Act* and, as such, enjoys the protections afforded to him under the *Charter of Rights and Freedoms* and the *Canada Evidence Act*. The fact that he is a defendant to a class action is not, in and of itself, sufficient to displace the presumption that Commission Counsel lead the evidence of the witnesses called to testify before the Commission.
9. I do not agree that it would be more efficient for Mr. Dichter's counsel to examine his client. I am of the view that, if anything, the opposite is true. Commission Counsel are also entitled to pose leading questions of Mr. Dichter, while his counsel would ordinarily be limited to non-leading questions. It may be more efficient to permit Commission Counsel to lead Mr. Dichter's evidence than to have Mr. Karahalios elicit it through non-leading questions.
10. Moreover, under Rule 58(c), Mr. Dichter's counsel will have an opportunity to examine Mr. Dichter at the conclusion of the parties' cross-examinations. Any evidence which he believes has not been sufficiently brought out can be elicited at that time.
11. Finally, Mr. Dichter can apply under Rule 59 if, at the end of Commission Counsel's examination in chief, Mr. Dichter still believes there are relevant issues upon which he ought to be examined by his own counsel.
12. In reaching these conclusions, I have considered the ruling by Commissioner Goudge on a similar request that arose in the Inquiry into Pediatric Forensic Pathology



in Ontario.¹ There, Dr. Charles Smith sought leave to be examined in chief by his own counsel. Dr. Smith was alleged to have been personally responsible for several miscarriages of justice through his work as a pediatric forensic pathologist, including a number of wrongful convictions for homicide. Commissioner Goudge, while noting the reputational risk Dr. Smith faced, dismissed the application. In doing so, Commissioner Goudge relied on the fact that the inquiry he led was a systemic one designed to make recommendations to government, and that given the role of Commission Counsel, their examination of Dr. Smith would be both fair and thorough. I believe that Commissioner Goudge's decision was well reasoned and reflects many of the same considerations that I have relied upon.

Disposition

13. I therefore dismiss the application, without prejudice to Mr. Dichter's counsel's right to seek leave under Rule 59 following Commission Counsel's examination.

Signed

The Honourable Paul S. Rouleau
Commissioner

November 2, 2022

¹ Commissioner Stephen T. Goudge, *Ruling on the Application by Dr. Charles Smith to be Examined by his Own Counsel*, November 20, 2007.