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Shielding top RCMP 'hit' to credibility

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If the Mass Casualty Commission expects Nova Scotians to trust that it will get to the bottom of what went wrong in April 2020, then it must allow lawyers for the victims' families to question key witnesses, including senior RCMP officers, says an Ontario law professor and Canada's foremost expert on public inquiries.

One of the lawyers representing the families of victims has asked the commission for the right to ask questions directly to witnesses they choose. The request came after the commission's controversial decision to allow two senior RCMP officers to testify last week without being cross-examined by lawyers of the family.

Ed Ratushny, professor emeritus at the University of Ottawa, said he supports the lawyer's push to cross-examine witnesses, particularly RCMP officers. Not allowing rigorous questioning of the most important witnesses, destroys the fundamental fact-finding purpose of a public inquiry, he said.

"It also ignores the trauma of the families of all those people who've been murdered," said Ratushny, author of the 2009 book *The Conduct of Public In-*

quiries.

"Those families have been waiting for two years to find out what exactly happened and how it happened. They are not getting that."

The commission's rationale for excusing the officers of cross-examination rests on its task of conducting a "trauma-informed" inquiry. The terms of reference of the joint public inquiry do state that the proceedings follow restorative justice and trauma-informed principles that aim at reducing further harm.

But Ratushny points out that this does not mean that witnesses should not testify in person and be cross-examined.

Sparing officers from questioning by lawyers of the families shows the three commissioners, including Chair Michael MacDonald, have misinterpreted the purpose of a trauma-informed inquiry.

"This does not require that witnesses not testify and be cross-examined," he said.

Last week, lawyers representing the majority of the 22 victims' families boycotted the commission proceedings at the direction of their clients. It came as

Andy O'Brien, operations non-commissioned officer in Colchester County, testifies at the Mass Casualty Commission on Tuesday, May 31, 2022. O'Brien's testimony was given under an embargo agreement, which has since been lifted. CONTRIBUTED

a result of the lawyers being unable to question the officers.

Ratushny said the spectacle resulted in a hit to the credibility of the inquiry. He pointed to Justice Peter Cory's emphasis that public inquiries must be open and transparent. Cory, who oversaw the inquiry into the Westray Mine Disaster, said that "open hearings function as a means of restoring the public confidence in the affected industry and in the regulations pertaining to it and their enforcement."

He also said they can serve as a type of healing therapy for a community shocked and angered by a tragedy.

Emily Hill, senior counsel for the Mass Casualty Commission, told reporters at a briefing on Friday that the commission is considering a request from one of the lawyers representing the families to change a rule that governs who can question witnesses.

Several key RCMP witnesses have yet to testify at the hearing. Hill also said it's possible the commission will grant further accommodations to witnesses that would allow them to avoid being cross-examined or testifying in person. But she said no further requests for accommodations have been made so far.

In the end, lawyers of the families are being denied fair participation in the inquiry, said the professor. He said the commission is subject to the legal principle of fairness established by the Supreme Court of Canada. Lawyers for the families are allowed to submit questions but the commissioners decide what if any are put to witnesses by commission lawyers.

The commission's decision that they can adequately replace cross-examination with their own questioning also is flawed, said the professor. Cross-examination requires adversity.

The commission's decision to relieve officers of cross-examination ignores the trauma that potentially flawed factfinding is having on families.

"The contrast of these approaches could destroy the fundamental purpose of confidence in the impartiality of the commission."

The commission's proper role is not to abolish direct testimony and cross-examination but to control it. "That is the basic," he said.

Beyond this, he said testifying and being cross-examined could be therapeutic for police officers.

Wayne MacKay, a Dalhousie University law professor, said the Mass Casualty Commission is facing a crisis of con-

fidence. One of its important roles is to establish a factual record that people feel accurately describes the tragic events of April 18 and 19.

"One of the tried and true ways to do that is to have testimony under oath and vigorous cross-examination," said MacKay.

"In order to survive the current crisis of confidence the commission needs to find a way to be trauma-informed and sensitive in a way that does not sacrifice vigorous cross-examination of key witnesses such as senior RCMP officers."

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