MISSING WOMEN COMMISSION OF INQUIRY

RULING ON THE APPLICATION FOR A VULNERABLE WITNESS PROTOCOL

THE HONOURABLE WALLY OPPAL, Q.C.

COMMISSIONER

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November 16, 2011

1. Introduction

Counsel for the Downtown Eastside, Mr. Gratl, seeks an order for protective measures to enable and encourage vulnerable witnesses, understood as current or former sex-trade workers in the DTES and victims of sexual assault, to provide evidence at the Commission's evidentiary hearings. He seeks the following remedies:

- An automatic publication ban preventing the publication of any information tending to reveal the identity of a vulnerable witness, requiring the anonymity of the name of witnesses (by analogy with s. 486.4(1) of the *Criminal Code*[1] which provides a mandatory ban on publication of information tending to identify complainants of sexual assault);

- Provisions allowing a witness to provide evidence by way of affidavit, without the potential for cross-examination, with objections going to the weight of the evidence on balance of the whole;

- Provisions allowing for a witness to provide evidence anonymously, with objections going to the weight of the evidence on the balance of the whole.

At the hearing of this application, Mr. Gratl withdrew his request regarding anonymous testimony.

I accepted Mr. Gratl's amended application at the hearing on November 3, 2011. These are my reasons for the ruling and directives as to how it is to be implemented.

2. Background

The Inquiry has heard much evidence relating to the vulnerability of witnesses, particularly those who are involved in the sex trade. The Inquiry has heard testimony from the families of missing and murdered women who were for the most part poor and marginalized. As well the Inquiry heard from Dr. Lowman and Dr. Shannon on the vulnerability of women, particularly

[1] R.S.C. 1985, c. C-46.

those who were involved in the sex trade. Both expert witnesses testified as to the high level of distrust of the criminal justice system in general and the police in particular.

It is said that the witnesses in question would be most reluctant to testify in an open hearing without the safeguards sought by Counsel.

Mr. Gratl has argued that it is in the public interest to adopt this protocol because it will encourage vulnerable witnesses to come forward and testify and therefore would make the Inquiry more inclusive.

Mr. Roberts and Ms. Gervais, both of whom represent the interests of Aboriginal women, support Mr. Gratl's position. Ms. Gervais requested that the category of vulnerable witnesses include Aboriginal women. Mr. Ward, counsel for many of the victims' families, and Ms. Basil a representative of VANDU also spoke in favour of the application.

Counsel have argued that it is this vulnerability and the general distrust of the system that will prevent much needed evidence from being called. It is said that if the witnesses are accommodated in the manner suggested in the protocol witnesses would attend.

Counsel for the VPD, VPB, Sgt. Fell and the RCMP do not oppose the order for a publication ban or the possibility of evidence being tendered through affidavits not subject to cross-examination. However, it is their position that a blanket order is inappropriate and that the issues need to be decided on a case-by-case, issue by issue basis having regard to the particular circumstances of each witness.

The Criminal Justice Branch took no position save that the vulnerable witness protection protocols should not be applied to Ms. Anderson, given the potential centrality of Ms. Anderson's evidence to the Commission's finding of fact regarding Term of Reference 4(b).

While the Participants took different positions on the best method for ensuring protections for vulnerable witnesses, all recognize the genuine concern of affording vulnerable witnesses procedural protection to enable them to provide evidence to the Inquiry without jeopardizing their personal safety. The divergence in the positions taken centers on two points: (1) whether these protections should be made available in advance on a presumptive basis or on a case-by-case basis; and (2) who should bear the onus of establishing whether the protective safeguards should be available to a given witness. As Mr. Roberts stated at the hearing: the differences in approach may be slight but this slight difference is significant.

3. Discussion of the Procedural Options and Legal Framework

a) *General Principles*

The Commission has the authority to determine its own procedure. However, that authority is limited by the procedural rights of participants, particularly those who may be subject to a finding of misconduct. It is also subject to the general presumption of the preference for open proceedings that can engage freedom of the press, which is protected by the *Canadian Charter of Rights and Freedoms*.[2]

Commissions of inquiry generally model their evidentiary hearings on trials. However, commissions can depart from the traditional trial process based on their authority to determine their own processes. There is a need for inquiries to be more flexible in order to accommodate the needs and interests of the public and to encourage greater public participation. Therefore, the rules of evidence and procedure are considerably less strict for an inquiry than for a court.[3] The essential open-ended nature of procedural possibilities available to an inquiry has been described in the following way:

> It is left to the discretion of the commissioner to decide whether he wishes to be bound by legal rules of evidence or to vary them. He is not bound as a matter of law. The practice is to hear opinion evidence from a broad range of witnesses, some of whom would be considered experts and others not. The reasons are not hard to find. ***From the public's point of view, it indicates a willingness to listen to a range of experiences. From the inquiry's perspective, these opinions may still be the best, or the only, sources of information available.*** [emphasis added][4]

The flexibility of the inquiry process, balanced by the need to protect procedural fairness, was commented on by the Hon. Associate Chief Justice Dennis R. O'Connor in "Some Observations on Public Inquiries" wherein he made the following comments:

> …[t]hat inquiries have, in my view, tended to overuse the evidentiary, adversarial type of hearing process suited for legal trials to gather information. I think that we have yet to take full advantage of all of the possibilities for different processes that can be tailored to meet the need of investigating and reporting on the various types of matters set out in inquiry mandates. I believe that

[2] Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.
[3] *Canada (Attorney General) v. Canada (Commission of Inquiry on the Blood System)*, [1997] 3 S.C.R. 440 at para. 34. [Krever]
[4] R. J. Anthony and A.R. Lucas, *A handbook on the Conduct of Public Inquiries in Canada* (Toronto: Butterworths, 1985) at p.90.

> greater creativity and flexibility in fact-determining processes will ultimately improve the inquiry process from the perspective of all participants, increasing responsiveness, decreasing cost, and ultimately improving the process and results of public inquiries. In my view, there is a real advantage to directly involving groups and individuals in the inquiry process, rather than having them participate only through lawyers. This is particularly the case where the participants have experience, expertise and an understanding of issues under consideration. From a cost perspective, minimizing the involvement of legal counsel, when not necessary, can result in a significant cost reduction.
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> Unlike criminal or civil trials, inquiries do not need to be conducted within the confines of the fixed rules of practice and procedures. ***Inquiries are not trials: they are investigations. They do not result in the determination of rights or liabilities; they result in findings of fact and/or recommendations.*** Subject to what I say below about the need for procedural fairness for those who may be affected by the report of an inquiry, a commissioner has a very broad discretion to craft the rules and procedures necessary to carry out his or her mandate. [emphasis added] [5]

In the context of this Inquiry, the following words of the Associate Chief Justice are relevant as well:

> My second observation about the inquiry process relates to the need to ensure procedural fairness to those who may be adversely affected by the information that emerges during the course of the inquiry or in the report. This is critically important. There is enormous potential for an inquiry, particularly a public inquiry, to seriously damage personal and professional reputations.[6]

Procedures available to protect vulnerable witnesses in giving testimony can be found in the *Criminal Code* and procedural measures in civil trials. Examples of the options available to the Commission can also be found in the work of prior commissions of inquiry. I have reviewed the various approaches taken in the criminal and civil trial context as well as approaches taken by the Cornwall Public Inquiry, the Nunn Commission and the Goudge Inquiry which all addressed issues of confidentiality.

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[5] Hon. Associate Chief Justice Dennis R. O'Connor, "Some Observations on Public Inquiries," (Canadian Institute for the Administration of Justice Annual Conference, delivered at Halifax, 10 October 2007), online: Court of Appeal for Ontario <http://www.ontariocourts.on.ca/coa/en/ps/speeches/publicinquiries.htm>.

[6] *Ibid.*

b) *Affidavit Evidence Not subject to Cross-Examination*

The *Public Inquiry Act*[7] allows the Commission to accept evidence by way of affidavit in three ways: by enabling commissions to accept evidence not admissible before a court;[8] by enabling a study commission to receive written and oral submissions;[9] and by enabling a hearing commission to receive submissions under oath and conduct written hearings.[10]

Reliance on evidence without cross-examination is commonplace in judicial processes in family, criminal and civil matters. In criminal law matters, oral statements of counsel are regularly relied upon in important matters including show cause hearings and sentencing hearings.[11] In civil matters, reliance on affidavits without cross-examination is commonplace in interlocutory matters, summary trials and applications to dismiss claims entirely. In summary trials under the Rules of Court, decisions are made entirely on affidavit evidence even when there is a conflict in the evidence, providing of course the conflict is not material.[12]

There is no question that the Commission may accept affidavit evidence at its evidentiary hearings. It is also clear that some restriction of the right to cross-examination will not amount to a denial of procedural fairness so long as the Participants have the ability to make their case fully to the Commission.[13] Absent a statutory right to cross-examination, restriction of cross-examination falls within the commissioner's discretion.[14] The Commission is thus entitled to accept affidavit evidence not subject to cross-examination with any concerns about the evidence only going to its probative value, that is the weight given to it in the Commission's ultimate findings. Participants retain the right to respond to prejudicial information by presenting their views in opposition either at the time the evidence is entered or later in the proceedings.

I emphasize that evidence that has not been subject to cross-examination cannot be used to substantiate findings of misconduct or contested or uncorroborated findings of fact. Evidence tendered for these purposes could be given with other testimonial aids or protection measures in place.

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[7] S.B.C. 2007, c. 9.
[8] Section 14 (1).
[9] Section 20 (2).
[10] Section 21 (1).
[11] *R. v. Gardiner*, [1982] 2 S.C.R. 368 at 414; *R. v. Woo*, (1994), 90 C.C.C. (3d) 404.
[12] *Cadboro Invt. Ltd. v. Can. West Ins. Co.*, 1987 Can LII 2502 (B.C.C.A.); *Gratsos v. Martin and Canada Trust*, 2005 BCSC 21.
[13] *Boyle v. Canada(Commission of Inquiry into the Deployment of Canadian Forces in Somalia – Létourneau Commission)*, [1997] F.C.J. No. 942. *Beno v. Canada (Attorney General)*, 2002 FCT 142 (T.D.); *Gagliano v. Canada (Attorney General)*, 2005 FC 576.
[14] Anthony and Lucas, *supra* at p. 94.

4. Conclusion

In allowing the application in general I am particularly persuaded by the submissions of Mr. Roberts wherein he cited the often quoted passage from Lord Hewart C.J.'s judgment in *R. v. Sussex Justices*: "[it] is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done." [15]

As well, I accept Ms. Gervais' argument that the Aboriginal women she represents are particularly vulnerable and they are not likely to testify at the Inquiry unless special considerations are given to them. It is necessary in the public interest for the Inquiry to hear from those persons who otherwise would be intimidated and distrustful of the system. The Inquiry needs to be inclusive.

In my view, nothing short of strong, clear proactive protection measures sought in this application will facilitate vulnerable witnesses to provide their evidence to the Commission. To paraphrase the Supreme Court, "a discretionary ban is not an option as it is not effective."[16] While the Commission must carefully tailor confidentiality measures, including publicity bans, it must not so in such a restricted manner that it nullifies the protection of the risk justifying their issuance. In the unique circumstances of this Commission, it would be futile to deal with these protection and confidentiality measures on an individual basis as is the common practice. Thus as a general proposition, protective measures will be available to all vulnerable witnesses subject to a Participant's application to limit access to these measures in a specific case.

I also accept the Criminal Justice Branch's position that the vulnerable witness protection protocol should not be applied to Ms. Anderson, given the potential centrality of Ms. Anderson's evidence to the Commission's finding of fact regarding Term of Reference 4(b).

The Commission's vulnerable witness protection protocol is:

a. The Commission defines "vulnerable witness" for the purpose of the Inquiry as current or former sex trade workers, victims of sexual assault and Aboriginal women;

b. Vulnerable witness status will be established through an affidavit or written submissions by counsel;

c. Participants will have the opportunity to make submissions in writing on whether the criteria have been met by each proposed vulnerable witness;

[15] [1924] 1 K.B. 256 at 259, [1923] All E.R. 233.
[16] *Canadian Newspaper Co. v. Canada (A.G.)*, [1988] 2 S.C.R. 122, at para. 19.

d. Once an individual is accepted to have met the criteria and designated a vulnerable witness, the following optional protections will be presumptively available to her or him:

(i) Testimonial aids such as having a support person close by, testifying behind a screen or in a separate room with the witness subject to cross-examination; AND/OR

(ii) Publication ban on her or his identity; AND/OR

(iii) Evidence submitted by way of affidavit and not subject to cross-examination, such evidence not to be used for findings of misconduct or uncontested and uncorroborated findings of fact;

e. Objections to affidavit evidence not subject to cross-examination will go to the weight of the evidence on the balance of the whole;

f. Participants can apply by way of written submissions or *in camera* for a ruling one or more of the protections set out in paragraph (d) should not apply in a particular case;

g. If a Participant establishes, by application, a right to cross-examine, the affiant has the right to withdraw and forego cross-examination; and

h. Testimonial aids such as having a support person close by, testifying behind a screen or in a separate room are available to any frightened or reluctant witness even if they do not meet the vulnerable witness criteria. Witnesses should make their request for testimonial aids known to Commission Counsel at the earliest opportunity.

It is also requested that the Commission state on the record that witnesses will have both use and derivative use immunity in respect of their evidence. This statement simply reflects the protections set out in the *Public Inquiry Act*, the *Evidence Act*[17] and s. 7 of the *Canadian Charter of Rights and Freedoms.* The Commission cannot provide any immunity beyond these statutory and constitutional protections. However, in the event that it may reassure some witnesses, I confirm the protections provided at law are in place and apply to evidence given at this Inquiry.

Wally T. Oppal, Q.C.
Commissioner

[17] R.S.B.C. 1996, c. 125.