Missing Women Commission of Inquiry

Ruling on the Admissibility of the Murray Report

The Honourable Wally T. Oppal, Q.C.

Commissioner

MISSING WOMEN COMMISSION OF INQUIRY

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May 24, 2012

PART 1: INTRODUCTION

1. Counsel for the families of 25 missing and murdered women seeks to admit as an expert report a document prepared by Mr. Dennis Murray, Q.C. (the "Murray Report). The Murray Report relates to term 4(b) of this Commission's Terms of Reference. That term reads as follows:

> consistent with the *British Columbia (Attorney General) v. Davies*, 2009 BCCA 337, to inquire into and make findings of fact respecting the decision of the Criminal Justice Branch on January 27, 1998, to enter a stay of proceedings on charges against Robert William Pickton of attempted murder, assault with a weapon, forcible confinement and aggravated assault;

2. The admission of the Murray Report is objected to, generally, on the grounds that the contents go beyond the Commission's Terms of Reference and affect the constitutional principle of prosecutorial independence. It is also argued that the Murray Report does not comply with evidentiary rules relating to expert evidence. In reply, it is argued that the Murray Report ought to be admitted in any event, and that the offending parts be deleted or disregarded.

PART 2: BACKGROUND

3. Dennis Murray, Q.C., is a well known and highly qualified criminal lawyer who has represented the Crown and the Defence on many complex and difficult cases. His report deals with the stay of proceedings entered by the Crown against Robert William Pickton upon charges of attempted murder, assault with a weapon, forcible confinement and aggravated assault [the "Stay Decision"].

4. Mr. Murray describes his mandate as follows:

> ...to examine various materials associated with the Inquiry proceedings, with a view to commenting upon the circumstances giving rise to the March 1997 charges against Mr. Pickton (Pickton), through to the Stay of Proceedings entered on those charges in late January 1998.
>
> (Murray Report, para. 1)

5. He further states:

> I have also examined materials associated with developments in the investigation into the missing women, from January 1998 through to January 1999, with a view to providing relevant comment as to the issue of the potential justification to, during that one year period, recommence those proceedings (CCC S.279(2)) which were Stayed as noted above.
>
> (Murray Report, para. 2)

6. In his report, Mr. Murray provides his summary of the facts relating to the Stay Decision based on a review of hearing transcripts and an interview of Ms. Anderson conducted by Don Celle dated February 9, 2012, that is not in evidence. He then discusses the elements considered in the charge approval process, generally, and offers an opinion on how these principles may have been applied to this case. Mr. Murray discusses the supports available to vulnerable witnesses with drug addictions and comments on the steps taken by the Crown prosecutor in this respect. Mr. Murray offers an opinion on the stay and whether the rationale was reasonable. Mr. Murray considers whether the recommencement of the stay should have been considered in the course of the missing women investigations and whether he would have recommenced the proceeding with the new information after the stay was entered. Mr. Murray concludes by providing some general comments on the importance of protecting vulnerable witnesses in the criminal process.

PART 3: THE LAW

7. The law is not in dispute. A commission's terms of reference determine the mandate of the commission; they serve to empower the commissioner while at the same time restricts the scope of the commissioner's inquiry. Evidence that is irrelevant, unnecessary and outside the jurisdiction of a commission ought not to be admitted. As well, when the principle of prosecutorial independence is in issue the Terms of Reference must be construed narrowly (*Davies*, para. 59, referencing the approach in *Hoem v. Law Society of B.C.*, 63 BCLR 36, and *Krieger v. Law Society of Alberta*, 2002 SCC 65). In these circumstances, a Commissioner "must exercise caution" and "must be ever sensitive to the fine line he walks at this point in the inquiry" (*Davies*, paras. 58 and 90).

8. It is trite law that an expert is not allowed to review evidence and make his or her own inferences and findings of fact. Only the Commissioner or judges can make findings of fact and weigh the evidence (*Quinette Coal Ltd. v. Bow Valley Resource Services Ltd.*, 29 BCLR (2d) 127, para. 4; *Neudorf v. Nettwerk Productions Ltd.*, 1998 CanLII 6643 (BC SC), paras. 5-7). Further, an expert must offer an expert opinion that assists the Commissioner. Where a report cannot provide assistance to the Commissioner it ought not to be admitted into evidence.

9. It is clear that my mandate on this issue is narrow. I cannot substitute my view for that of the Crown counsel who entered the stay of proceedings. The Court of Appeal approved the following comments of Melnick J. in *Davies*:

> [68] ... [I]t may be, at the discretion of the Commissioner, that he deems it unnecessary to have every single individual involved provide testimony before him in order to be in a position to provide a full and complete report on the response of the CJB. But that is for him to decide.
>
> [69] I also consider it beyond the scope of the Inquiry to require any individual who made a decision not to charge anyone with respect to the death of Mr. Paul to second guess his or her decision or to justify it. The Commissioner is entitled to look at the facts that were before the individuals who made those decisions, get the facts related to the decisions, but not challenge or debate with those individuals the propriety of their decisions. In that way, the Commissioner may open the doors he wishes to open but, at the same time, minimize any transgression into the lawful independence of the CJB.

PART 4: APPLICATION TO THE FACTS

10. I accept the argument advanced by counsel for Judge Romano that this issue needs to be resolved at the evidentiary stage as opposed to the report stage for reasons of fairness and, more specifically, the right to reply.

11. The following parts of the report are of particular concern:

    a. "It is necessary, if my work is to be of any value, to point out what I perceive to be shortcomings when viewed in hindsight" (para. 5).

    b. "[A]s to the public interest element, the reasons to charge were compelling" (para. 50).

    c. "What follows is a list of what I assume would have been some of [the] deeply disturbing and aggravating factors at play in the approving prosecutor's mind while they were considering the charge approval principles ..." (para. 52).

    d. "[I]t was not unreasonable for [the prosecutor] to conclude ..." (para. 66).

    e. "These circumstances ... would reasonably lead an approving prosecutor to conclude ..." (para. 52).

    f. "They must have, properly in my view, concluded...the totality of the circumstances must have led (and I agree) the approving prosecutor to conclude ... (I agree)..." (para. 53).

    g. "I question why the prosecutor did not ..." (para. 67).

h. "[H]ad this been done ... it would have provided ammunition to put before the Court in requesting an adjournment of the trial, showing that all efforts were being made to stabilize the witness" (para. 68).

i. "[N]o reasonable effort was made by the prosecutor ..." (para. 69(b)).

j. "[T]his was a failure to recognize the needs ... or a failure to attend to them ..." (para. 69(c)).

k. "[The bloody medical material was] not necessary for the proof of the case ..." (para. 70(a); or "[if it was necessary, it was] not central by any means ..." (para. 70(b)).

l. "I am of the view that the failure to act ... was the catalyst for the dilemma at the last minute" (para. 73).

m. "Even at the last minute there were options not ... explored ..." (para. 73).

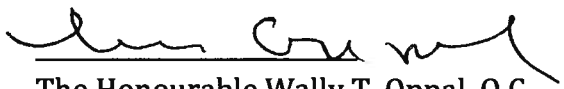
n. "One should plan to argue [delay] when the day comes rather than concede it in a serious case such as this" (para. 73).

12. There is no doubt that Mr. Murray with the greatest of conceivable respect placed himself in the shoes of the Crown. Based on the law that cannot be done.

PART 5: CONCLUSION

13. After having reviewed the report as a whole, I must conclude that, while the Murray Report is helpful as a discussion of policy recommendations, it is not admissible and it cannot be saved by simply deleting or setting aside those parts that offend the rule in *Davies*.

14. While I will not admit the Murray Report into evidence for the purpose of fact finding, the Murray Report may be helpful to me in my development of recommendations around the treatment of vulnerable and marginalized women. As a result, I will accept the Murray Report as commentary only to the extent it assists me with my study commission mandate.



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