Driskell Commission of Inquiry

Written Submissions of the RCMP

Systemic Issues

Introduction

On October 27, 2006, counsel for AIDWYC and Mr. Driskell filed with the Commission a joint submission and a series of proposed recommendations purportedly relating to systemic issues.

The following proposed recommendations are stated to relate to the RCMP Laboratory System:

6.1 An Independent Review of the RCMP *Forensic Laboratory Services*
An independent review Committee of interested parties should be established to examine and make recommendations for the improvement of the system of RCMP *Forensic Laboratory Services* across Canada. Its mandate should include both the scientific practices and the institutional culture of the *Laboratory*. The same Committee should consider whether it is in the public interest, and the interests of the administration of justice, for the *Laboratory* to move out of the jurisdiction of the RCMP.

6.2 A National Audit of Hair Microscopy Comparison Cases
A national audit of cases in which the accused was convicted of murder, and the prosecution rested, in whole or in part, on hair microscopy evidence presented by analysts employed by the *Forensic Laboratory Services*, should be conducted. A Committee should be established, nationally or province by province, to examine all cases of culpable homicide:

- prosecuted in Canada during the past 20 years
- in which the Crown tendered and relied upon microscopic hair comparison evidence
- where the accused pleaded not guilty at trial, asserting factual innocence, but was found guilty

to consider whether there is a reasonable basis to believe that, by virtue of this evidence, a miscarriage of justice has taken place.

6.3 The Elimination of Hair Microscopy Comparisons from the Criminal Trial
Hair microscopy comparison evidence does not have the necessary probative value to

be admissible at a criminal trial, and its value in the criminal justice system should be limited to its use as an investigative tool.

R.C.M.P Response – Recommendation 6.1

Factual Matters

In support of this proposed recommendation, the joint submission of AIDWYC and Mr. Driskell makes reference to a number factual issues canvassed during the course of the Inquiry. The position of the RCMP is that these factual references are, with respect, incomplete and, moreover, do not support a conclusion that there are cultural problems within the RCMP Laboratory system.

1. At paragraph 62 of his written submissions, Counsel for AIDWYC and Mr. Driskell raises factual issues pertaining to the language used by Mr. Christianson at Mr. Driskell's 1991 trial. Specifically, he states:

> "Mr. Christianson was recorded as telling Commission counsel in his interview: 'There was nothing particularly distinctive about the known hairs in this case, and Christianson considered the three comparisons referred to in his report to be 'Positive' comparisons, but not 'Strong Positive' comparisons within the meaning of [the Methods Manual guidelines]."

Mr. Driskell's counsel then goes on to quote at great length from his cross-examination of Mr. Christianson during the Inquiry. In essence, Mr. Driskell's counsel appears to be suggesting that Mr. Christianson somehow withheld important information from the jury. Again, at para. 62 (p. 47) of his written submissions, Mr. Driskell's counsel, quoting from his cross-examination of Mr. Christianson, states:

> "Q Don't you think, sir, that the jury trying Mr. Driskell for first degree murder was entitled to know that there was nothing particularly distinctive about the three hairs in the van, so the three comparisons were only positive, rather than strong positive, in your own discipline. Don't you think they were entitled to know that?"

The position of the RCMP is that the above quotations found in the written submissions of Mr. Driskell and AIDWYC are incomplete and, as such, do not provide a comprehensive view of Mr. Christianson's evidence on this point. Moreover, a proper reading of Mr. Christianson's evidence in its entirety provides, it is submitted, a complete answer to the suggestion that Mr. Christianson was in any way misleading to the jury. Specifically, during examination by his own counsel, Mr. Christianson offered the following explanation on these two points raised by Mr. Driskell's counsel:

"Q When you told Commission Counsel and/or Mr. Lucas that there was nothing particularly distinctive about the known hairs in this case, what does that mean?

A Well, I think it means to me that it was a typical known hair sample. There was nothing unusual about it.

Q What, for example, might have qualified it as being something that was unusual?

A Well, let's say that there was either some unusual characteristics, or they were unusually damaged, or there was something – - there was a problem, for example, if they had been burned or degraded in some way. It was fairly, a typical hair sample. I think I was trying to indicate that this was a typical case rather than - - a typical, or nothing distinctive about the hair, I think I was trying to indicate that it was a typical case from the point of view of the hair sample involved.

Q Did your conclusion, or did your observations in that regard give rise, in your view, to the need to offer any special explanation to the jury about the overall quality of the exhibits that you dealt with?

A Well, the question that I had was, with respect to the hairs, was the fact that they were recovered from a grave site. I was concerned about the quality of the known hair sample, because obviously they could have been degraded. But upon examining them, they were fine, they looked like a typical known hair sample.

Transcript: p. 5243, l. 4 – p. 5244, l. 10

Earlier in his examination by Counsel for the RCMP, Mr. Christianson described his practice in terms of the use of the terminology "positive" and "strong positive" in the following terms:

Q And specifically I direct your attention to the summary of the interview that you gave collectively to Commission Counsel and Mr. Lucas, and direct your attention to page 15, please? Around the middle of the page, the first full paragraph on page 15, there is a reference to the methods manual and the descriptors positive comparisons and strong positive comparisons. Do you see where I'm referring to, Mr. Christianson?

A Yes

Q What was your practice with respect to the use of that terminology?

A Well, I only gave one conclusion, either it was a match or a non-match. So I didn't use those - - I didn't use those layers of positive, strong positive, strong negative.

Q Can you tell us why you didn't use those layers, as you describe them?

A Well, by the time I was doing, I mean, this was in the manuals, but by the time I was doing the hair comparisons, the trend was to move away from doing that. The trend was to simply determine whether hairs were consistent or not. And I agree with that concept.

2. At paragraph 60 of his written submissions, Mr. Driskell's counsel offers the bald assertion that "[T]he history of hair microscopy comparison demonstrates the cultural problems that exist in the RCMP Laboratory system." The paragraph continues with the suggestion that hair microscopy is "little more than a masquerade for science", and then offers an extract of the presentation by Peter Neufeld during the Forensic Science Expert Panel to the effect that hair microscopy "never really was a science in the first place." In the following paragraph of his submissions , Mr. Driskell's counsel then invites the Commissioner to find "cultural problems" on the basis that Mr. Christianson's trial evidence was "overreaching", combined with the conclusion of the RCMP internal review that Mr. Christianson's evidence was "unremarkable".

Counsel for the RCMP would offer the following responses to this line of argument:

A) The question of whether or not Mr. Christianson overstated the probative value of his microscopic hair comparison analysis was fully addressed in oral argument presented to the Commissioner. (See Transcript: Oral Argument of David Gates, Tuesday, October 31, 2006 at p. 6508, l. 10 – p. 6523, l. 9). This argument finds no support whatsoever in the extensive report filed by Mr. Lucas pursuant to the mandate given to him in this Commission of Inquiry.

B) The position advanced by Mr. Driskell's counsel relative to the continuing value of hair microscopy evidence is, it is submitted, at odds with even the most critical members of the Forensic Science Expert Panel. It is submitted that all of the members of the panel, including Mr. Neufeld, agreed that hair microscopy continued to be of value for exclusion purposes. Messrs. Lucas [Transcript: p. 5575-5576] and DeForest [Transcript: p. 5588-5590] both expressed views supporting the continued value of this type of physical comparison evidence. In short, it is submitted that the position advanced by Mr. Driskell and AIDWYC on this point is not supported by the scientific evidence available at this time.

C) At p. 49 of their submissions, AIDWYC and Mr. Driskell appears to find fault with that portion of Mr. Christianson's Inquiry evidence that is at odds with the Morin Report's recommendation relating to suggested language to be employed in forensic scientific reports. Specifically, Mr. Christianson told the Inquiry that he did not agree that the Kaufman recommended language of "may or may not have originated from a particular person or object" [Transcript: p. 5145, l. 14 – p. 5146, l. 22]. It is submitted that the Commissioner should consider that Mr. Lucas, the expert hired by the Commission to "review and prepare a report on the forensic science aspects of the Commission's mandate" [Lucas Report, p. 1] shared Mr. Christianson's reservations in this regard. At p. 31 of his Report, Mr. Lucas stated:

> "I, and I suspect many other forensic scientists, are not among those who would use '*may or may not'* in a report. It is an absolutely meaningless expression that could be said by anyone without even making any examinations."

Moreover, a proper reading of the comments and observations of the various members of the Forensic Science Expert panel convened on September 21, 2006, reveals a broad range of views as to the challenges presented by the use of particular words or phrases to describe forensic science results.

3. As noted above, Mr. Douglas M. Lucas, former Director of the Centre for Forensic Science, was retained by the Commission to address paragraph 1(d) of the Order-in-Council creating the Driskell Commission of Inquiry, namely "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." [See Mr. Lucas' Letter of Retainer]

It is submitted that it is critical to note that Mr. Lucas found no systemic issues related to the role of the RCMP Laboratory in relation to its work on the Driskell prosecution. At p. 24 of his Report, Mr. Lucas states:

> "Although I have described in the body of the report a few practices or procedures which I believe were not generally accepted in the forensic science community in 1990/91 (and certainly not in 2006), <u>none of them in my opinion, rise to the level of being considered '*systemic issues*.'</u> (emphasis added)

The RCMP respectfully submits that Mr. Lucas' conclusion in this regard is definitive on this particular issue. There is no other evidence before the Commission to lead to any other conclusion than the one reached by the very expert retained to examine this very issue.

4. At paragraph 66 of their written submissions, AIDWYC and Mr. Driskell suggest that the continued affiliation of the RCMP Forensic Laboratory Services with the R.C.M.P. requires further consideration. The position of the R.C.M.P. is that this issue was fully canvassed by Mr. Lucas in his report to the Commission. As such, he concluded (at page 34):

> "There is nothing apparent in any of the material reviewed to suggest that the forensic examinations, conclusions or testimony in the Harder case were influenced in any way by the fact that they were performed in a laboratory that is part of a law enforcement agency."

The Forensic Sciences Expert Panel members offered a range of views on this issue. Mr. Bromwich, for example, stated:

> "In practice I think you will find that you have some good labs affiliated with law enforcement agencies, and the same is true of labs not affiliated with law enforcement agencies, some bad labs affiliated with law enforcement agencies, and the same is true of labs not affiliated with law enforcement agencies, both good and bad. I think what is important to understand is that the mere institutional position of the lab, whether it is part of a law enforcement agency or not, is not really what creates the bias. It is the relationships that get developed, the clients that the lab serves, that's the source of the potential bias. Even if you strip out a crime lab from a law enforcement agency and set it up separately, independently, or affiliated with some other agency, they are going to still have to deal, forensic scientists, on a day-in-day-out basis, with the same law enforcement personnel who have the same interests and motivations for making the cases as ever." [Transcript – p. 5712, l. 8 – p. 5713, l. 3]

Other panel members suggested that the existence of an independent oversight body and the existence of strong scientific leadership within the lab were important safeguards of institutional independence. In this regard, it is submitted that Mr. Lucas specifically acknowledged the strong scientific leadership that has existed with the RCMP laboratory system over the years. [Transcript: p. 5717, l. 21-24]. Similarly, the RCMP states that material submitted to Mr. Driskell's counsel on October 24, 2006, confirmed the existence of an independent oversight body relative to the R.C.M.P. Forensic Laboratory Services. [See Book of Documents to Accompany the Systemic Submissions of Counsel for Mr. Driskell and Counsel for AIDWYC, at p. 56-59]

5. The R.C.M.P. position relative to the mitochondrial DNA test results has, it is submitted, been clearly articulated to the Commission. As such, the R.C.M.P. repeats that it accepts that the results of the mitochondrial DNA testing are correct and that the 3 hairs came from someone other than Perry Harder. Moreover, the R.C.M.P. states that the suggestion at paragraph 58 that this is a "new position" is completely without foundation.

R.C.M.P. Response – Recommendation 6.1

The RCMP respectfully submits that this proposed recommendation should not be accepted for two reasons. First of all, it is submitted that no proper evidentiary foundation was established during the course of this Inquiry to support the need or utility for such an independent review. Second, and more important, it is submitted that the very broad reach and scope of this recommendation falls outside the mandate of this Commission of Inquiry.

The terms of reference given to this Inquiry are, it is submitted, narrow in scope and very much focused on events directly related to the investigation and prosecution of James Driskell. As such, a proper reading of the various elements of the Order-in-Council reveals a focus on the actions and conduct of individuals relative to this specific prosecution.

> 1(a) "To inquire into the conduct of Crown Counsel who conducted and managed the trial of James Driskell…" (emphasis added)
>
> 1(b) "To inquire into whether the Winnipeg Police Service failed to disclose material information to the Crown before, during or after James Driskell's trial…" (emphasis added)
>
> 1(d) To consider the role of the RCMP Laboratory in the prosecution of James Driskell… (emphasis added)
>
> 1(e) "…to "give advice about whether any aspect of this case should be further studied, reviewed or investigated…" (emphasis added)

As such, the mandate would not, it is submitted, authorize a further independent review of the Winnipeg Police Service, generally, or a general review of the prosecution branch of Manitoba Justice. It follow, it is submitted, that a general, independent review of the RCMP Forensic Laboratory is similarly well beyond the mandate of the Commission.

Moreover, the RCMP Forensic Laboratory is part of the Royal Canadian Mounted Police, a federal entity created by federal statute (*RCMP Act, R.S.C. 1985, c. R-10*). As such, it is well settled that a provincial commission of Inquiry may not inquire into the management of a federal entity. In *Quebec (Attorney General) and Keable v. Canada (Attorney General*, [1979] 1 S.C.R. 218, Pigeon J. observed at p. 242-243:

> "…Parliament's authority for the establishment of this force [the RCMP] and its management as part of the Government of Canada is unquestioned. It is therefore clear that no provincial authority may intrude into its management. While members of the force enjoy no immunity from the criminal law and the jurisdiction of the proper provincial authorities to

> investigate and prosecute criminal acts committed by any of them as by any other person, these authorities cannot, under the guise of carrying on such investigations, pursue the inquiry into the administration and management of the force. The doctrine of colourability is just as applicable in adjudicating on the validity of a commission's term of reference or decisions as in deciding on the constitutional validity of legislation. As Viscount Simon said in *Attorney General for Saskatchewan v. Attorney General for Canada*, (at p. 124) 'you cannot do that indirectly which you are prohibited from doing directly.' "

More recently, Laing C.J. of the Saskatchewan Court of Queen's Bench, in *Attorney General of Canada v. The Honourable Mr. Justice Edward P. MacCallum* (unreported judgment dated August 18, 2006) when dealing with a similar issue at the Milgaard Inquiry, stated as follows at p. 17:

> "I conclude that the applicant's position is correct that a province cannot authorize an inquiry into the substantive operations of a federal institution, or into its administration or management of the same, beyond what is authorized in its terms of reference which are either accepted, or found by a court to be constitutional because the pith and substance of the terms of reference are a valid exercise of provincial constitutional power."

On behalf of the RCMP, it is respectfully submitted that proposed recommendation 6.1 would, indeed, exceed the jurisdiction of this Commission as an attempt to inquire into the administration and management of the RCMP Forensic Laboratory. As submitted above, the thrust of this proposed recommendation is clearly beyond the scope of this Commission's terms of reference. Given that the Order-in Council makes specific reference to s. 83(1) of the *Manitoba Evidence Act*, C.C.S.M. c. E-150, it is submitted that the Government of Manitoba clearly intended that this Inquiry would be restricted to those matters falling within the constitutional jurisdiction of the Province. Section 83)1) reads in part as follows:

> "Where the Lieutenant Governor in Council deems it expedient to cause inquiry to be made into and <u>concerning any matter within the jurisdiction of the Legislature</u>…" (emphasis added)

For all of these reasons, the R.C.M.P. respectfully requests that the Commissioner should decline to make this particular recommendation.

<u>R.C.M.P. Response – Recommendation 6.2</u>

The R.C.M.P. takes no position on this particular recommendation other than to suggest that any "national" scope of such an audit is beyond the mandate of the Commission. The R.C.M.P. would, of course, fully cooperate with any properly

constituted review process established to examine hair microscopy evidence presented in criminal trials.

R.C.M.P. Response – Recommendation 6.3

While the R.C.M.P. does not accept the underlying premise behind this recommendation, it takes no position on how this type of forensic evidence is received in the criminal justice system.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 8TH DAY OF NOVEMBER, 2006

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M. DAVID GATES Q.C.
COUNSEL FOR THE R.C.M.P.