

# **RULING ON THE TERMS OF REFERENCE**

## **1. BACKGROUND:**

As I have stated previously, when I accepted appointment to this Commission, I had advised the Government of Newfoundland and Labrador that other professional commitments precluded me from commencing public hearings until September of this year. That did not pose a problem since substantial preparation by the staff over the spring and summer was required in any event, to be ready for the hearings.

The status of each of the three individuals who were subjected to the criminal proceedings in question is distinct. Mr. Parsons not only was acquitted but his factual innocence was acknowledged and he was compensated. Mr. Dalton was acquitted but it has not been acknowledged that he is factually innocent. Mr. Druken was not even given the opportunity to be acquitted, let alone acknowledged to be factually innocent.

The public hearings did commence on September 23 and we were able to complete one of the five subject areas described in the Terms of Reference. This term related to the delay in the Dalton appeal of his murder conviction.

However, it was apparent to me and to many of the counsel with standing, that the remaining items in the Terms of Reference raised a number of questions that should be resolved if we are to proceed expeditiously and effectively. Therefore, the week of October 28 was scheduled for the purpose of hearing the views of all parties in relation to the meaning and scope of the Terms of Reference.

As I have emphasized on a number of occasions, a Commission of Inquiry is a captive of its Terms of Reference, subject to additional constraints imposed by the law, including the law of the Constitution. It follows that the scope of a Commission's mandate is determined not by the Commissioner, but by the Government. The constitutional limitations arise, not only from the separation of powers between the federal and provincial levels of government in relation to the criminal law power and the administration of justice, respectively, but also as between government and the judiciary.

At the outset of the first phase involving delay in the Dalton appeal, both Mr. Dalton and his counsel urged me to inquire into his factual innocence. Mr. Dalton was acquitted by a jury and therefore, is entitled to an irrebuttable "presumption" of innocence. However, he seeks a finding of "actual" innocence, in other words, a finding that he did not commit the crime in question or, in this case, that no crime

occurred. Otherwise, he asked, on what basis is this Commission to determine whether he should be compensated, and if so, in what amount?

A similar issue arises in relation to the items of the Terms of Reference related to Mr. Druken. However, it is even more complicated. Unlike Mr. Dalton, Mr. Druken has never been acquitted of the murder in question. The proceedings against him were discontinued by a “stay of proceedings”. Mr. Druken is also entitled to be presumed innocent but, unlike Mr. Dalton, there is nothing in law to prevent Mr. Druken from being charged with the same offence. In this respect, his presumption of innocence is not irrebuttable but is similar to that of all other members of the public. His status, again, raises serious difficulties in determining whether he should be compensated, and if so, the basis on which such compensation should be determined.

These and other issues related to the Terms of Reference are addressed under the headings which follow.

## **2. SCOPE OF TERMS 1(a) and 1(b):**

Term 1(a) requires the Commissioner:

To inquire into the conduct of the investigation into the death of Catherine Carroll, and the circumstances surrounding the resulting criminal proceedings commenced against Gregory Parsons for the murder of Catherine Carroll.

Term 1(b) is identical except the names of the victim and the accused are replaced by the names “Brenda Young” and “Randy Druken” respectively.

The aspect of these terms referring to the “investigation” does not appear to raise concerns. However, the aspect of the “criminal proceedings” does. In this respect, I had asked Mr. Avis to ensure the exploration of the concerns that may arise when a Commission engages in a consideration of similar issues to those that have already been the subject of criminal trials and appeals. With that consideration in mind, how is the phrase “criminal proceedings” to be interpreted?

The first question to be addressed is the meaning of the phrase “circumstances surrounding”. It is of interest that the Terms of Reference in the Morin inquiry simply use the phrase “into the criminal proceedings” while those in Sophonow also include the preface “circumstances surrounding”. It has been suggested that this phrase qualifies the scope of the examination of the criminal proceedings and precludes an examination of what occurred “in the face of the Court”. This view is reinforced by the ordinary meaning of the word “surround”, which implies being “outside”.

The Report of the Morin Inquiry clearly indicates that the Commissioner had no hesitation in reviewing matters that had occurred in a trial even though they may have been ruled upon by the trial judge. Nor is there any suggestion in the Sophonow Report that the phrase “circumstances surrounding” limited the examination of the criminal proceedings in question. Indeed the Commissioner there appeared quite willing to address the role of a trial judge. However, it was “not necessary” for him to do so since that had been done by the Manitoba Court Appeal. The Commission did “...agree with and endorse their findings pertaining to the conduct of those trials”.

This approach is reinforced by the breadth of the phrase “criminal proceedings”. It does not commence with the trial but with the laying of a charge. Restricting this inquiry to matters outside of the criminal proceedings would leave very little to be examined. Potentially important issues such as the relationship of the prosecution to the police, and the prosecution disclosure to the defence, would be precluded.

Term 7 of the Terms of Reference authorizes the Commissioner to rely upon “...any transcript or record of pre-trial, trial or appeal proceedings before any Court...”. This also supports an interpretation that is not limited to matters “outside” of the actual criminal proceedings.

Finally, to interpret the phrase “criminal proceedings” so restrictively would undermine the very purpose of this inquiry. Its basic task is to determine “what happened” in these two cases and “why”, in order to inform the public and to identify areas where improvements might be made to the administration of justice in Newfoundland and Labrador. To carve out significant areas of “what happened” as being “out-of-bounds” would undermine that basic purpose.

As a result, the phrase “circumstances surrounding” must be interpreted as expanding rather than limiting the examination of the criminal proceedings in question. This permits an examination of both the actual criminal proceedings and any additional matters which may have affected those proceedings.

It follows that all aspects of the criminal proceedings may be examined provided such examination is required by the purpose for which this Commission has been created. More is said about this under the heading, Constitutional Issues. However, this limitation with respect to “purpose” is important. This inquiry cannot be a “fishing expedition” to re-open every potentially contentious issue that might arise. The issues to be explored must be relevant to the central purpose. In this respect, I adopt, as a guideline in assessing relevance, the standard proposed by Mr. Avis, namely, is the conduct or issue in question “serious enough to have potentially affected the investigations or the verdicts”?

Item 5 of the Terms of Reference also imposes limits on the scope of the inquiry under Items 1(a) and 1(b). It precludes a “retrial” or findings related to “civil or criminal responsibility”. Since these reflect constitutional limitations, they are also addressed under the heading, Constitutional Issues.

### **3. COMPENSATION IN TERMS 1(c) and 1(e):**

Term 1(c) requires the Commissioner:

To advise on whether, in the circumstances of his case, Randy Druken should receive financial compensation from Government and if so, the appropriate amount of such compensation?

Term 1(e) relates to whether compensation should be given to Ronald Dalton and if so the appropriate amount, but is restricted to being “for the eight years in which he awaited the perfection of his Appeal”. It should be noted that in the case of Gregory Parsons, the Government has acknowledged his factual innocence and has already awarded compensation.

The Terms of Reference for this Inquiry are unique in placing the issue of compensation before a Commission without an acknowledgement by the Government of factual innocence. It was submitted by some of the parties that this was an implicit mandate to embark upon an inquiry into factual innocence in the two cases where the issue of compensation has been raised. I am of the view that the current Terms of Reference do not permit an inquiry into the factual innocence of Mr. Druken or Mr. Dalton. For reasons discussed under the heading Constitutional Issues, I believe that a provincial commission of inquiry could be given such a mandate. However, such a mandate has not been given to this Commission.

In the event that this commission of inquiry should be given such a mandate, the Government should recognize that this would entail considerable additional time and resources. While I have not reviewed the evidence relevant to the cases in question, there is also, always the possibility that, ultimately, such an inquiry could be inconclusive on the issue of factual innocence.

Compensation in cases of factual innocence or wrongful conviction normally is based upon an acknowledgement by the Executive branch of government that a miscarriage of justice has occurred. Factual innocence may be apparent from the evidence and result following a criminal trial. Even in such cases, compensation is not always granted by the Government. Indeed, a factually innocent person may be convicted even where all procedural safeguards have been respected.

The decision to award compensation to a wrongfully convicted person is an Executive decision. It is not made because of any legal obligation. It is an *ex gratia* payment made because it is the view of the Government that it is in the public interest to do so. Attempts have been made to establish guidelines as to when such payments should be made, but ultimately, the decision tends to involve an acknowledgement that the factually innocent person has suffered unacceptable consequences because the criminal justice system did not operate the way it should have.

Counsel for the Attorney General submitted that it still would be possible for this Commission to award compensation to Mr. Dalton for the delay in his appeal, even without a determination of factual innocence. However, as Mr. Dalton himself suggested, there may be a significant difference between awarding compensation for delay to one who is factually innocent and to one who is potentially guilty. Quite frankly, I have great difficulty in determining how compensation can be calculated for Mr. Dalton in these circumstances. Is one or the other status to be assumed? If so, which one? However, I will hear specific submissions related to Term 1(e) when we reach that phase.

Similar concerns arise with respect to potential compensation for Mr. Druken with the added factor that he has not even been acquitted. There appear to be a number of aspects of the criminal proceedings in relation to Mr. Druken, which warrant examination pursuant to Term 1(b). Perhaps the issue of compensation will be clarified after that phase has been completed. However, I presently have the same difficulty with respect to potential compensation for Mr. Druken as I have for Mr. Dalton.

#### **4. CONSTITUTIONAL ISSUES:**

The constitutional foundation for a public inquiry of this nature is section 92 (14) of the Constitution Act, 1867, which assigns responsibility for the administration of justice, including criminal justice, to the provinces. The Government of Newfoundland and Labrador considered issues arising from the murder convictions of Gregory Parsons, Randy Druken and Ronald Dalton to be of sufficient public importance to warrant establishing this Inquiry. Item 5 of the Terms of Reference provides that I am to perform my duties:

...without expressing any conclusions or recommendations regarding the civil or criminal responsibility of any person or organization and without permitting the enquiry to become a retrial....

These words express constitutional limitations, which apply to every provincial commission of inquiry that is reviewing criminal proceedings.

Such a commission may review the same subject matter as that of a criminal investigation and trial, but it must do so for a different and legitimate provincial purpose. It examines what mistakes or congruence of circumstances may have led to the results in question. It tells the Government what happened and why and it may make recommendations to avoid pitfalls in future cases. It may review the conduct of police officers, prosecutors and defence counsel, but it does not do so as a disciplinary body. It may review the findings of a trial judge, but it does not do so as an appellate court. As one of the parties stated, a court of appeal does not ask, “what went wrong”? It may do these things for the public purpose described above. It must avoid efforts by any of the parties to “retry” the case in an adversary manner and it must scrupulously avoid making findings which express an opinion as to criminal or civil responsibility in law.

This leads to a further constitutional issue, which was alluded to above, namely: May a provincially constituted commission of inquiry, (indeed even a federally constituted one), be authorized by its terms of reference to inquire into and report on whether a person who has been tried in a criminal court, is factually innocent? The constitutional hurdle for an inquiry, in such circumstances would appear to be far more difficult to overcome. Presumably such a commission would have to examine the same evidence as well as many of the identical issues as those at the criminal trial.

However, there are important differences. The most fundamental is that a criminal trial does not address “factual innocence”. The criminal trial is to determine whether the Crown has proven its case beyond a reasonable doubt. If so, the accused is guilty. If not, the accused is found not guilty. There is no finding of factual innocence since it would not fall within the ambit or purpose of the criminal law.

In contrast, a commission has a very different purpose. It is to provide advice to the provincial Government as to whether all of the circumstances, including a previous wrongful conviction, warrant an official response. This might include the granting of compensation or the making of an apology. This would not involve the exercise of the criminal law power under section 91(27) of the Constitution Act, 1867. Rather, it would flow from section 92 (14) with respect to the administration of criminal justice.

Moreover, the report of a commission has no legal consequences. It does not make a binding decision and does not affect legal rights. It is merely the advice of a commission to better enable a provincial Government to carry out its responsibilities in a legitimate sphere of its jurisdiction.

This result may be viewed from another perspective. There is no question that a provincial government may decide to make an *ex gratia* payment to a person

who has been wrongfully convicted of a crime. In making such a decision, the Government must rely on advice from someone who has thoroughly reviewed the criminal proceedings in question and all other relevant factors. Why then can the Government not rely on a commission, which has legal status and powers, as the vehicle to inquire into the matter and provide such advice?

Thus, while such proceedings before a commission might have the appearance of a “re-trial”, they would be for a completely different purpose. They would not be bound by criminal rules of procedure or evidence and could take into account matters inadmissible at the criminal trial as well as additional facts or developments which became known subsequent to the criminal trial.

It must be emphasized that it would not be permissible for such a commission to determine that the person in question was “factually guilty”. Such a finding would be attempting to do exactly what only a criminal court may do. Rather, if factual innocence cannot be determined, that is all that should be reported. This may be a fine distinction, but so also may be the distinction between a finding of misconduct and one of criminal responsibility. That distinction was ably articulated by my former colleague, Cory, J in *A.G. Canada v. Canada (Commission of Inquiry on the Blood System)* [1997] 3 S.C.R. 440. Similar care and appropriate language would be necessary where a commission declines to make a determination of factual innocence.

There are, of course, other constitutional limitations upon such an inquiry. For example, the judge who presided at the criminal trial (or any other judge) may not be called to testify before such a commission. There are other legal restrictions imposed by the law of privilege and the Criminal Code provisions related to jurors.

## **5. CONCLUSION:**

I am grateful to all counsel for their submissions in relation to these issues. The parties will observe that I have not adopted some of the submissions made by Commission Senior Counsel (Hearings). That should not be viewed as surprising but rather as a reflection of the division of responsibilities I have established. Commission Counsel (Hearings) makes submissions in the hearing room, together with counsel for all of the parties and there may be strong disagreement reflected in those submissions. However, once those submissions have been made, I rely only on Commission Counsel (Advisory) to provide legal and constitutional advice and to assist in formulating my reasons.

To summarize my conclusions with respect to the Terms of Reference:

- The next phase of this Inquiry relating to Term 1(a) (investigation and criminal proceedings in Parsons) may proceed on the basis indicated in these reasons;
- The phase relating to Term 1(b) (investigation and criminal proceedings in Druken) may proceed on the same basis;
- The compensation phases in Terms 1(c) and 1(e) may not be possible to address in the absence of determinations of factual innocence.

The current situation with respect to the compensation issues raises serious concerns. There has been no determination by the Government of factual innocence. For this Commission to embark on such a determination would require an amendment to the Terms of Reference as well as substantial additional time and resources. Another possible option might be an amendment to direct this Commission to address compensation on the basis of an assumption of factual innocence.

Finally, I wish to observe that, on the eve of the hearings in relation to these Terms of Reference, a press release was issued by the Premier-elect of Newfoundland and Labrador. It suggested that the Government would be pleased to hear any recommendations I might want to make by way of amendments to the Terms of Reference. I do not consider it to be appropriate for me to make any such recommendations at this time.

The nature and scope of the Terms of Reference are a matter of public policy for the Government, which also involve a consideration of their financial implications. Counsel for the Attorney General participated in the hearings related to the Terms of Reference and I assume the Attorney General has received a copy of the transcript of those proceedings, as I requested. In the event any changes to those Terms are proposed, I trust I will have an opportunity to comment on any such proposals.

The Right Honourable Antonio Lamer, P.C., C.C.

Signature: \_\_\_\_\_