COMMISSION OF INQUIRY

INTO MATTERS RELATING TO THE DEATH OF NEIL STONECHILD

RULING

INTRODUCTION

I have been asked to decide two preliminary questions:

(a) Should the results of a polygraph test be admitted as evidence before the Inquiry?

(b) Should the refusal to take a polygraph test be admitted as evidence before the Inquiry?

THE FACTS

A commission of inquiry was created by order-in-council dated February 21, 2003 to inquire into the circumstances that resulted in the death of Neil Stonechild and the conduct of the investigation into his death that followed for the purpose of making findings and recommendations with respect to the administration of criminal justice in the Province of Saskatchewan. I was appointed as commissioner for the inquiry. I appointed Joel Hesje as Commission counsel.

Following his appointment Commission counsel began gathering evidence of the events leading up to the Stonechild death and the investigation that followed. In the course of doing so Commission counsel identified two issues which he recommended, wisely, be dealt with as preliminary matters in order that the participants would know what course I would follow. Counsel filed briefs which addressed, very helpfully, the issue surrounding the use of

polygraph evidence. I also had the assistance of Commission counsel.

COMMISSION RULES OF PROCEDURE AND PRACTICE

The rules of procedure and practice contain the following provisions:

> III. EVIDENCE
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> (i) General
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> . . .
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> 2. The Commission is entitled to receive any relevant evidence that might otherwise be inadmissible in a court of law. The strict rules of evidence will not apply to determine the admissibility of evidence.
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> . . .
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> 4. Commission counsel have a discretion to refuse to call or present evidence.

I have substantial latitude in deciding what should properly come before the Commission. The need for flexibility and discretion has been the subject of judicial comment on a number of occasions.

The following quotations from the decision of the Ontario Court of Appeal in *Re The Children's Aid Society of the County of York*, [1934] O.W.N. 418, will illustrate. Mr. Justice Mulock states at p. 419:

> . . . in answering the questions submitted it might be advisable to point out the nature of the inquiry in question. It is one to bring to light evidence or information touching matters referred to the Commissioner. . . . The Commissioner *should avail himself of all reasonable sources of information, giving a wide scope to the inquiry*. If, for example, some person were to inform the Commissioner where useful documents or other evidence could be obtained, it would seem reasonable that he avail himself of such a source of information. . . . It is for the

> Commissioner, from all available sources, to bring to light such evidence as may have a bearing on the matters referred to him. . . .
>
> (emphasis added)

Mr. Justice Riddell at p. 420:

> . . . A Royal Commission is not for the purpose of trying a case or a charge against any one, any person or any institution–but for the purpose of informing the people concerning the facts of the matter to be inquired into. Information should be sought in every quarter available. . . .
>
> Everyone able to bring relevant facts before the Commission should be encouraged, should be urged, to do so.
>
> *Nor are the strict rules of evidence to be enforced; much that could not be admitted on a trial in Court may be of the utmost assistance to the Commission*. . . .
>
> (emphasis added)

Mr. Justice Middleton at p. 421:

> . . . *It is an inquiry not governed by the same rules as are applicable to the trial of an accused person*. The public, for whose service this Society was formed, is entitled to full knowledge of what has been done by it and by those who are its agents and officers and manage its affairs. What has been done in the exercise of its power and in discharge of its duties is that which the Commissioner is to find out; so that any abuse, if abuse exist, may be remedied and misconduct, if misconduct exist, may be put an end to and be punished, not by the Commissioner, but by appropriate proceedings against any offending individual.
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> *This is a matter in which the fullest inquiry should be permitted*. All documents should be produced, and all witnesses should be heard, and the fullest right to cross-examine should be permitted. Only in this way can the truth be disclosed.

. . .

(emphasis added)

The decision of the same court in *Re Bortolotti and Ministry of Housing et al.* (1977), 76 D.L.R. (3d) 408 (Ont. C.A.), confirms these observations. I refer in particular to the decision of Mr. Justice Howland at pp. 415-417:

> The Commission of Inquiry is charged with the duty to consider, recommend and report. It has a very different function to perform from that of a Court of law, or an administrative tribunal, or an arbitrator, all of which deal with rights between parties. *Re Ontario Crime Com'n*, [1963] 1 O.R. 391. . . . It is quite clear that a commission appointed under the *Public Inquiries Act, 1971* is not bound by the rules of evidence as applied traditionally in the Courts, with the exception of the exclusionary rule as to privilege (s. 11): *Re Royal Com'n into Metropolitan Toronto Police Practices and Ashton* [(1975), 10 O.R. (2d) 113] at p. 124 . . . ; *Re Children's Aid Society of County of York*, [1934] O.W.N. 418 at p. 420. . . .
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> The approach of the Commission should not be a technical or unduly legalistic one. A full and fair inquiry in the public interest is what is sought in order to elicit all relevant information pertaining to the subject-matter of the inquiry.
> . . .
>
> The foregoing test of relevancy means that the gates will be opened quite wide in the admission of evidence. All the evidence admitted will not, of course, be of equal probative value. It will be the task of the Commission to determine the weight which should be given the oral or documentary evidence presented to it, when making its recommendation and report.
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> <u>If evidence is reasonably relevant to the subject-matter of the inquiry, the Commission is not entitled to reject it as offending one of the exclusionary rules of evidence as applied in the Courts</u>, other than the rule as to privilege which is made expressly applicable by s. 11 of the *Public Inquiries Act, 1971*.

> If this were not so, it would be possible, as Morden, J., pointed out in *Re Royal Com'n into Metropolitan Toronto Police Practices and Ashton, supra*, p. 121, . . . for the Commission to "define its own terms of reference under the guise of evidential rulings on admissibility" and consequently to govern its jurisdiction. . . .
>
> (emphasis added)

I agree fully with the philosophy expressed in this language.

It is clear the Commission has very wide powers in receiving and considering the evidence to be presented during this inquiry.

EVIDENCE OF POLYGRAPH TESTS

It is trite to say that polygraph evidence and its use have been the subject of widespread and ongoing debate, some of it heated and partisan.

Counsel refer to a number of decisions and commentaries on the subject. I have reviewed them and identified those that appear most representative of current Canadian jurisprudence.

The first significant decision is *R. v. Phillion*, [1978] 1 S.C.R. 18, (1977), 33 C.C.C. (2d) 535 (cited to C.C.C.). In that case the accused, charged with murder, had submitted to a polygraph test. The accused declined to testify but sought to call the polygraphist to attest as to his veracity at the time of the test. The trial judge refused to allow the evidence. The accused appealed to the Ontario Court of Appeal. The accused's appeal to the Ontario Court of Appeal was dismissed as was his appeal to the Supreme Court of Canada. The court's opinion is summarized in the headnote at p. 536:

> The evidence of a polygraph operator consisting of answers given by an accused to certain questions and his opinion that such answers are true is hearsay and inadmissible as self-serving evidence; the mere fact that the answers are given in the presence of a polygraph machine or that the operator has a certain expertise in the use of the machine does not render the evidence admissible. The admission of such evidence would mean that any accused person who had made a confession could elect not to deny its truth under oath, but rather to rely instead on the results provided by a mechanical device in the hands of a skilled operator relying exclusively on its efficacy as a test of truthfulness. It is contrary to the basic rules of evidence to permit such a course. Moreover, there exists no exception to the hearsay rule based on the trustworthiness of the polygraph which would allow the admission of this type of evidence.

The court expanded on these comments in what may be described as the principal decision on the question: *R. v. Beland and Phillips*, [1987] 2 S.C.R. 398. Two accused were charged with conspiracy to commit murder. At trial both accused stated they were willing to undergo a polygraph test, and at the completion of evidence defense applied to have their case reopened so that the accused could undergo polygraph tests and submit the results in evidence. The motion was denied and both the accused were convicted. On appeal, the Court of Appeal overturned the trial judge by holding that in light of all the circumstances the polygraph evidence was admissible. The Crown appealed this verdict to the Supreme Court of Canada. The only issue before the Supreme Court was the admissibility in evidence in a criminal trial of the results of a polygraph examination of an accused. The court reversed the ruling of the Court of Appeal.

Mr. Justice McIntyre, speaking for the majority, set down two principles:

(i) the admission of polygraph evidence would run counter to the well established rules of evidence;

(ii) the admission of polygraph evidence will serve no purpose which is not already served, and, further, if allowed would disrupt proceedings, cause delays, and lead to numerous complications.

He then proceeded to discuss each in detail.

(i) The admission of polygraph evidence would run counter to the well established rules of evidence

(1) the rule against oath-helping;
(2) the rule against past consistent statements;
(3) the rule relating to character evidence; and
(4) the expert evidence rule.

(1) The rule against oath-helping

This rule is intended to prohibit a party from presenting in chief evidence that has, as its sole purpose, the bolstering of the credibility of that party's own witness. Such evidence offends this rule because the only purpose it would serve would be to add support to the accused's testimony. In effect, the polygraph operator would be telling the court that the accused was not lying.

(2) The rule against past consistent statements

This rule encompasses two separate types of evidence:

(i) The rule which precludes an accused from eliciting from witness self-serving statements which he has previously made.

(ii) A witness, whether a party or not, may not repeat his own previous statements concerning the matter before the court, made to other persons out of court, and may not call other persons to testify to those statements.

The purpose of the rule is to prevent the courts from being diverted from the real issues in the case. An example is the presentation of evidence that witnesses said that the accused made statements to them that were similar to the ones the accused made in court. Repetition of the accused's statements by another witness adds nothing to the weight and reliability of the accused's testimony. Thus, the testimony of a polygraph operator would, in effect, be merely corroboration of the accused's testimony, and, thus, offend the rule against past consistent statements. Mr. Justice McIntyre applied the above reasoning for the exclusion of past consistent statements to polygraph evidence in the following statement:

> . . . Polygraph evidence when tendered would be entirely self-serving and would shed no light on the real issues before the court. Assuming, as in the case at bar, that the evidence sought to be adduced would not fall within any of the well-recognized expectations to the operation of the rule -- where it is permitted to rebut the allegation of a recent fabrication or to show physical, mental or emotional condition -- it should be rejected. To do otherwise is to open the trial process to the time-consuming and confusing consideration of collateral issues and to deflect the focus of the proceedings from their fundamental issue of guilt or innocence. . . . (para. 69)

(3) The rule relating to character evidence

The rule relating to character evidence holds that an accused may adduce evidence of his general reputation, but he cannot relate specific acts which might tend to establish his character. The court held that the testimony of a polygraph operator would offend this rule because, in effect, his testimony would be that on a specific event the accused did not lie.

This might lead the trier of fact to the inference that the accused is of sound moral character. Mr. Justice McIntyre applied the rule relating to character evidence to the testimony of a polygraph operator when he wrote:

> . . . Where such evidence is sought to be introduced, it is the operator who would be called as the witness, and it is clear, of course, that the purpose of his evidence would be to bolster the credibility of the accused and, in effect, to show him to be of good character by inviting the inference that he did not lie during the test. In other words, it is evidence not of general reputation but of a specific incident, and its admission would be precluded under the rule. It would follow, then, that the introduction of evidence of the polygraph test would violate the character evidence rule. (para. 72)

(4) The expert evidence rule

The expert evidence rule holds that the testimony of an expert is only admissible if it will aid the court in understanding something that is outside the experience or understanding of the court. Thus, if on the proven facts of the case the court can form its own opinion, then the testimony of experts is inadmissible due to the fact that it is unnecessary. In applying this rule to polygraph evidence, Mr. Justice McIntyre held that such evidence would relate only to the issue of the accused's credibility and this issue is well within the domain and understanding of the court. In excluding polygraph evidence under the expert evidence rule he stated the following, "Here, the sole issue upon which the polygraph evidence is adduced is the credibility of the accused, an issue well within the experience of judges and juries and one in which no expert evidence is required. It is a basic tenet of our legal system that judges and juries are capable of assessing credibility and reliability of evidence." (para. 75)

(ii) The admission of polygraph evidence will serve no purpose which is not already served, and, further, if allowed would disrupt proceedings, cause delays, and lead to numerous complications.

The same judge once again pointed out that issues of credibility are well within the ambit of the courts. Further, he added the concern that if admitted such evidence could receive undue emphasis due to the mystique of science surrounding it. Finally, he stated that the admission of such evidence would raise many difficult evidential issues. He articulated some of the evidential problems that would arise as follows:

> . . . What would the result be, one may ask, if the polygraph operator concluded from his test that witness "A" was lying? Would such evidence be admissible, could it be excluded by witness "A", could it be introduced by the Crown? These are serious questions, and they lead to others. Would it be open to the opponent of the person relying upon the polygraph to have a second polygraph examination taken for *his* purposes? If the results differed, which would prevail, and what right would there be for compelling the production of polygraph evidence in the possession of a reluctant party? It is this fear of turmoil in the courts which leads me to reject the polygraph. . . . (para. 78)
>
> (emphasis in original text)

I found the comments of Ian Freckelton and Hugh Selby in the recent text, *Expert Evidence: Law, Practice, Procedure and Advocacy*, 2d ed. (Lawbook Co., 2002), quite helpful. The authors note at p. 200 that polygraphy was developed late in the 19th century by the Italian criminologist Lombroso who postulated that changes in blood pressure and pulse accompany lying.

They then make the following observations:

> For its effectiveness, it has been suggested that polygraphy

depends on implanting into the subject a belief in the infallibility of the machine and on the design of effective control questions. "The whole fragrant stew of imposition, trickery and downright lying (by the examiner, not the subject) is reminiscent of a certain type of hard police interrogation of subjects whom the interrogators 'know' to be guilty": Elliott (1982, pp. 104, 108).

The use of the polygraph is based upon the assumption that a person who is lying will exhibit indicative answers. The risk that was isolated early in the development of the polygraph was that innocent but anxious people could be labelled as a liar and so as guilty: see Raskin (1989, p. 252). The means adopted by researchers to address this risk was the "control question test", designed to settle the person being tested and to enable the operator to gauge when the person is telling the truth and when he or she is lying. Supporters of the polygraph assert laboratory studies reporting accuracy of polygraph examination of between 93 and 97 per cent: see, eg. Raskin (1989). However, as Kapardis (1997, p. 217) noted, a number of the apparently supportive studies suggest that at best a polygraph examination risks labelling 20 per cent of suspects as liars who are later found to be innocent. In a disturbing study, Parrick and Iacono (1989) offered prison inmates, half of them psychopaths, $US20 to beat the polygraph. The psychopaths did little better than the non-psychopaths but the significant finding was that, using the control question technique, the polygraph examiners wrongly classified 45 per cent of the innocent subjects as guilty of crimes. In a later experiment, conducted with the polygraph division of the Royal Canadian Mounted Police (Parrick and Iacono (1991)) the experimenters found further evidence to support the contention that the control question technique misidentifies nearly half of innocent suspects as liars. This has led supporters of the polygraph to develop a further technique called the "directed lie test": see Honts and Raskin (1988); see also Raskin (1989). The polygraph's reliability remains controversial with passionate opponents of its reliability (see the discussion in Kapardis (1997, pp. 216-223)) remaining probably in the ascendancy <u>in relation to its forensic, as against its investigative, use</u>. (pp. 200-01)

(emphasis added)

They then mention the sole decision where such evidence was allowed: *R. v. Wong*, [1977] 1 W.W.R. 1 (B.C.S.C.), and conclude the case was wrongly decided. It has not been followed anywhere in Canada as far as I can determine, nor, with respect, should it. They point out that *R. v. Phillion* and *R. v. Beland* have settled the issue in Canada. They refer (at p. 202) particularly to this statement from *R. v. Beland* as to the use of polygraph evidence, "It will disrupt proceedings, cause delays, and lead to numerous complications which will result in no greater degree of certainty in the process than that which already exists."

The second issue, the decision not to take a polygraph test has also attracted a good deal of judicial comment. I refer to *R. v. Hebert* (1990), 77 C.R. (3d) 145 (S.C.C.). Mr. Justice Sopinka had this to say at p. 157:

> However, it cannot be denied that, apart altogether from the privilege, the right to remain silent – the right not to incriminate oneself with one's words – is an integral element of our accusatorial and adversarial system of criminal justice. As Cory J.A. (as he then was) noted in *R. v. Woolley* (1988), 63 C.R. (3d) 333, 40 C.C.C. (3d) 531 at 539, 37 C.R.R. 126, 25 O.A.C. 390 (C.A.): "The right to remain silent is a well-settled principle that has for generations been part of the basic tenets of our law." (See also *R. v. Hansen* (1988), 46 C.C.C. (3d) 504 (B.C.C.A.).) In a different context, Lamer J. pointed out in *R. v. Collins*, [1987] 1 S.C.R. 265 at 284, 56 C.R. (3d) 193, [1987] 3 W.W.R. 699, 13 B.C.L.R. (2d) 1, 33 C.C.C. (3d) 1, 38 D.L.R. (4th) 508, 28 C.R.R. 122, 74 N.R. 276, that the acquisition of a self-incriminatory admission from an accused following a Charter violation "strikes at one of the fundamental tenets of a fair trial, the right against self-incrimination". I take Lamer J.'s words to mean that the full range of an accused's right to stand mute in the face of an accusation by the state is not exhausted by reference to the privilege against self-incrimination as that privilege has been defined by this court. It follows, it seems to me, that the basic principle underlying the right to remain silent must be a "principle of fundamental justice" within the meaning

> of s. 7 of the Charter. In other words, the right to remain silent is truly a right.
>
> I find evidence of the existence of this principle in the courts' historical solicitude for an accused's silence. It is settled law that silence in the face of an accusation by or in the presence of the police cannot serve as evidence against an accused: . . .

He continued at pp. 158 and 159 as follows:

> In *Stein v. R.*, [1928] S.C.R. 553 at 556, 50 C.C.C. 311, [1929] 1 D.L.R. 143 [Man.], this court held, on the basis of *Christie* [[1914] A.C. 545], that a trial judge had erred in failing to direct the jury that, "in the absence of any assent by the accused either by word or conduct to the correctness of the statements made in his presence, they had *no evidentiary value whatever* as against him and should be *entirely disregarded*" (emphasis added). . . .
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> . . . As the cases referred to earlier indicate, the mere silence of a criminal accused in the presence of a person in authority is not capable in law of supporting an inference of consciousness of guilt. The essence of the *Christie* rule is that, *even if* the circumstances of an accusation cry out for an explanation or denial, the accused's silence, without more, is not evidence against him: there must be "word or conduct, action or demeanour" pointing to an adoption of the statement by the accused.
>
> (emphasis in original text)
>
> It is sometimes argued in this connection that an accused's silence in the face of a police accusation is nothing more than a particular example of the liberty we all enjoy to do that which is not prohibited, embodied in the maxim "nulla poena sine lege". Since the law does not positively require a response, silence is allowed: see *R. v. Esposito* (1985), 53 O.R. (2d) 356, 49 C.R. (3d) 193, 24 C.C.C. (3d) 88 at 94, 20 C.R.R. 102, 12 O.A.C. 350 (C.A.), per Martin J.A., citing Lamer J. in *Rothman v. R.* [[1981] 1 S.C.R. 640], at p.683. . . .

The question was also addressed in *R. v. B. (S.C.)* (1997), 119 C.C.C. (3d) 530, by the Ontario Court of Appeal. They had this to say at paras. 41 and 42 of the judgment:

> 41 . . . Nothing in these reasons should be taken as touching on the admissibility of evidence that an accused or suspect refused to cooperate with the police.
>
> 42 There are policy concerns and fundamental constitutional principles at play where the Crown seeks to tender evidence of a refusal to cooperate which are not engaged when the defence tenders evidence of an accused's cooperation with the police. Our criminal justice system accepts as a basic tenet the proposition that persons cannot be required to supply evidence which may assist in their ultimate conviction: *R. v. Chambers* (1990), 59 C.C.C. (3d) 321 at 340 (S.C.C.). Put differently, people are free to choose whether they will assist the police in their investigation. This fundamental liberty becomes a constitutional right when a person is detained or arrested: *R. v. Hebert* (1990), 57 C.C.C. (3d) 1 (S.C.C.). The freedom to choose whether to assist the state in the investigation of an alleged crime would be illusory if the failure to render assistance could, standing alone, be used as evidence against a person at trial. Similarly, the right to maintain the integrity of one's body against unauthorized state intrusion would lose its force if the exercise of that right could take on an incriminatory connotation at trial.

Counsel points out that the evidence of a polygraph refusal is totally unnecessary in this inquiry inasmuch as the person who refused the request will be required to testify and will be subject to cross-examination. His credibility will be assessed on the basis of his *viva voce* testimony.

ANALYSIS

In my respectful view the issues raised in these applications can be resolved fairly easily.

The principles set down in *R. v. Beland and Phillips* have general application to the evidence of experts. They are not confined to criminal cases. While it is clear that exclusionary rules of evidence do not apply in the context of commissions of inquiry, a tribunal should be no less vigilant to ensure that notwithstanding the very wide powers it has to receive and consider evidence only evidence that is reasonably relevant and material to the subject matter of the inquiry should be allowed.

Evidence as to the results of a polygraph test is not reasonably relevant to the issue of credibility of a witness, particularly where the examinee testifies at the inquiry. It chiefly offends the rule as to expert evidence. As the Supreme Court of Canada pointed out the credibility of the examinee is an issue well within the experience of the trier of the facts. Indeed the essential function of the Commission is to hear the facts and reach conclusions on those facts. To allow a polygraph operator to usurp that function flies in the face of the long and well established jurisprudence in this country. I refer also to the decision in *R. v. Marquard*, [1993] 4 S.C.R. 223 and the comments at p. 248:

> . . . Credibility must always be the product of the judge or jury's view of the diverse ingredients it has perceived at trial, combined with experience, logic and an intuitive sense of the matter: see *R. v. B. (G.)* (1988), 65 Sask. R. 134 (C.A.), at p. 149, *per* Wakeling J.A., affirmed [1990] 2 S.C.R. 3. Credibility is a matter within the competence of lay people. Ordinary people draw conclusions about whether someone is lying or telling the truth on a daily basis. The expert who testifies on credibility is not sworn to the heavy duty of a judge or juror. Moreover, the expert's opinion may be founded on factors which are not in the

> evidence upon which the judge and juror are duty-bound to render a true verdict. . . .

Similarly, evidence of a refusal to submit to a polygraph test is not reasonably relevant as no proper inference can be drawn from the exercise of the right to remain silent in the course of a criminal investigation. Again, this is particularly so where such person does testify at the inquiry.

I am mindful always of the need to have any evidence material and reasonably relevant to this Inquiry brought before me. I am not entitled however, to accept evidence that offends the principles set out in the above decisions. In the final analysis I must determine the credibility of the witnesses. The two questions posed at the commencement of my ruling must be answered in the negative.

I have considered the use of polygraph evidence in relation to the first branch of the Commission's terms of reference: the inquiry into the circumstances that resulted in the death of Neil Stonechild. The second branch of the terms of reference relate to the conduct of the investigation into the death of Neil Stonechild. Polygraph testing is a widely used investigative tool. Evidence of polygraph testing may be reasonably relevant to the extent it touches on the conduct of the investigation. This ruling should not be taken as a determination of that issue.

Dated at the City of Saskatoon, in the Province of Saskatchewan, this 4th day of September, 2003.

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Mr. Justice David H. Wright
Commissioner