

CITATION: Ontario Provincial Police v. The Cornwall Public Inquiry, 2008 ONCA 33

DATE: 20080118
DOCKET: C47951

COURT OF APPEAL FOR ONTARIO

DOHERTY, MOLDAVER and GILLESE J.J.A.

BETWEEN:

ONTARIO PROVINCIAL POLICE, ONTARIO PROVINCIAL POLICE
ASSOCIATION, CORNWALL COMMUNITY POLICE SERVICE, MNISTRY OF
COMMUNITY SAFETY AND CORRECTIONAL SERVICES and THE EPISCOPAL
CORPORATION OF THE DIOCESE OF ALEXANDRIA CORNWALL

Appellants

and

THE HONOURABLE G. NORMAND GLAUDE, COMMISSIONER
THE CORNWALL PUBLIC INQUIRY

Respondent

Gina Saccoccio Brannan, Q.C. for the Ontario Provincial Police

W. Mark Wallace for the Ontario Provincial Police Association

David Rose for the Ministry of Community Safety and Correctional Services

Peter E. Manderville for the Cornwall Community Police Service

Brian J. Gover and Patricia M. Latimer for the respondent Commissioner

Leslie M. McIntosh for the Intervenor, the Attorney General for Ontario

Heard: December 13, 2007

On appeal from the order of the Divisional Court (James D. Carnwath and Colin L. Campbell J.J., Harvey Spiegel J. dissenting) dated September 17, 2007 and reported at (2007), 229 O.A.C. 238, dismissing the appellants' application for an order directing the Honourable Justice G. Normand Glaude, Commissioner, to state a case.

MOLDAVER J.A.:

[1] On April 14, 2005, a Commission known as the Cornwall Public Inquiry was established pursuant to the *Public Inquiries Act*, R.S.O. 1990, c. P. 41 (“Act”). Mr. Justice G. Normand Glaude of the Ontario Court of Justice was appointed as the Commissioner.

[2] The Commission has been functioning for the better part of two years. After sorting out a host of preliminary matters, including the issue of which parties would be granted standing, the Commission began hearing evidence in mid-February 2006. As of mid-July 2007, the Commission had heard from sixty-four witnesses, including eleven contextual expert witnesses, nineteen corporate officials representing various public institutions, twenty-eight alleged victims and six relatives of alleged victims.

[3] Against that backdrop, it is hard to believe that the Commissioner, his counsel and the parties would, at this late stage, be involved in a debate about the subject matter of the Inquiry and the breadth of the Commissioner’s mandate. And yet that is precisely the issue that lies at the core of this appeal.

[4] The issue has its genesis in the evidence of two witnesses, identified for privacy purposes as C12 and C13. Commission counsel seeks to lead their evidence before the Commissioner, while the appellants and the Attorney General for Ontario, as intervenor, seek to exclude it.

[5] In a nutshell, the impugned evidence arises from an allegation by C12 that on December 8, 1993, when she was sixteen years old and living with her mother in Alexandria, Ontario, she was sexually assaulted at knifepoint by two teenage boys. C12 reported the matter to the police in Alexandria the next day. If permitted to testify, C12 and her mother, C13, will speak about the abusive, insensitive and unprofessional treatment that C12 allegedly received at the hands of an officer of the Ontario Provincial Police who took her complaint and commenced the investigation. C12 will also speak about her loss of confidence in the police, her decision not to proceed with the charges and the emotional difficulties that she has suffered as a result of the incident.

[6] The appellants, led by the Ontario Provincial Police (“OPP”), and the intervenor submit that the proposed evidence falls outside the ambit of the Commission’s mandate. They say that the phrase “allegations of historical abuse of young people” in the Order in Council (“OIC”) establishing the Commission restricts the subject matter of the Commission to allegations of abuse of young persons in the Cornwall area by persons who were in positions of trust or authority, and which were reported to a public institution a considerable time after the abuse occurred. Commission counsel, on the other hand, submits that the subject matter of the Commission extends to all cases

involving allegations of abuse of young people in the Cornwall area, including allegations of sexual assault such as those made by C12, so long as the allegations were made before April 14, 2005, the date on which the Commission was established.

[7] Following a hearing in which the parties set out their respective positions, the Commissioner determined that the subject matter of the Commission was the more expansive one urged by Commission counsel. In his written reasons dated June 16, 2007, the Commissioner refused a request under s. 6(1) of the Act to state a case to the Divisional Court questioning his authority to receive the evidence of C12 and C13.

[8] The OPP and others then applied to the Divisional Court under s. 6(2) of the Act for an order directing the Commissioner to state such a case. In the application to the Divisional Court, the appellants posed the following questions:

Question 1: Do the Terms of Reference of the Cornwall Public Inquiry contemplate the hearing of evidence of an allegation of sexual assault on a 16 year old female by a 16 year old male and a 17 year old male which was reported to the police on the day following the alleged offence given the mandate of the inquiry to "...inquire into and report on the institutional response of the justice system ... to allegations of historical abuse of young people...?"

Question 2: In deciding to hear the evidence of C12 and C13, did the Commission of Inquiry properly exercise its jurisdiction or exceed its jurisdiction?

[9] In a split decision, the Divisional Court dismissed the application to direct the Commissioner to state such a case. The majority concluded that the Commissioner did not err in construing his mandate broadly. They further held that it was open to him to find that the evidence of C12 and C13 was "reasonably relevant" to the subject matter of the Inquiry. Accordingly, they declined to direct the Commissioner to state a case.

[10] H. Spiegel J., in dissent, came to the opposite conclusion. In his view, the Commissioner misconstrued the subject matter of the Commission and exceeded his jurisdiction in concluding that the proposed evidence of C12 and C13 came within it. He would have allowed the application and answered the questions on the stated case as follows:¹

¹ The first question on the stated case as set out by Spiegel J. is worded slightly differently than the first question as framed by the appellants. In the Commissioner's factum filed with the Divisional Court, he also framed questions that he would have stated in the event he were directed to do so by the Divisional Court. It is not necessary to set

Question 1: Is evidence of sexual abuse of a young person reported at or near the time it was alleged to have occurred reasonably relevant to the Terms of Reference given the mandate of the inquiry to "... inquire into and report on the institutional response of the justice system... to allegations of historical abuse ...?"

Answer: No.

Question 2: In deciding to hear the evidence of C12 and C13 did the Commissioner properly exercise his jurisdiction or exceed his jurisdiction?

Answer: The Commissioner exceeded his jurisdiction.

[11] For reasons that follow, I am respectfully of the view that the Commissioner erred in finding that the proposed evidence of C12 and C13 comes within the subject matter of the Commission. In so concluding, the Commissioner impermissibly redefined and expanded the scope of his mandate and committed jurisdictional error. Accordingly, I would allow the appeal and would answer the questions on the stated case, as framed by the appellants, in the same manner as did Spiegel J.

RELEVANT STATUTORY PROVISIONS

[12] Section 6 of the Act states:

6. (1) Where the authority to appoint a commission under this Act or the authority of a commission to do any act or thing proposed to be done or done by the commission in the course of its inquiry is called into question by a person affected, the commission may of its own motion or upon the request of such person state a case in writing to the Divisional Court setting forth the material facts and the grounds upon which the authority to appoint the commission or the authority of the commission to do the act or thing are questioned.

out these questions; although the Commissioner included much more detail, the ultimate questions he raised do not differ in any significant way from the questions posed by the appellants.

(2) If the commission refuses to state a case under subsection (1), the person requesting it may apply to the Divisional Court for an order directing the commission to state such a case.

(3) Where a case is stated under this section, the Divisional Court shall hear and determine in a summary manner the question raised.

[13] The relevant parts of the OIC dated April 14, 2005, which created the Cornwall Public Inquiry, state:

WHEREAS allegations of abuse of young people have surrounded the City of Cornwall and its citizens for many years. The police investigations and criminal prosecutions relating to these allegations have concluded. Community members have indicated that a public inquiry will encourage individual and community healing;

AND WHEREAS under the *Public Inquiries Act*, R.S.O. 1990, c. P.41, the Lieutenant Governor in Council may, by commission, appoint one or more persons to inquire into any matter connected with or affecting the good government of Ontario or the conduct of any part of the public business thereof or the administration of justice therein or any matter of public concern, if the inquiry is not regulated by any special law and if the Lieutenant Governor in Council considers it desirable to inquire into that matter;

AND WHEREAS the Lieutenant Governor in Council considers it desirable to inquire into the following matters. The inquiry is not regulated by any special law;

THEREFORE, pursuant to the *Public Inquiries Act*:

Establishment of the Commission

1. A Commission shall be issued effective April 14, 2005, appointing the Honourable G. Normand Glaude as a Commissioner.

Mandate

2. The Commission shall inquire into and report on the institutional response of the justice system and other public institutions, including the interaction of that response with other public and community sectors, in relation to:
 - (a) allegations of historical abuse of young people in the Cornwall area, including the policies and practices then in place to respond to such allegations, and
 - (b) the creation and development of policies and practices that were designed to improve the response to allegations of abuse

in order to make recommendations directed to the further improvement of the response in similar circumstances.

3. The Commission shall inquire into and report on processes, services or programs that would encourage community healing and reconciliation in Cornwall.
4. The Commission may provide community meetings or other opportunities apart from formal evidentiary hearings for individuals affected by the allegations of historical abuse of young people in the Cornwall area to express their experiences of events and the impact on their lives.

ANALYSIS

[14] I begin my analysis by referring in more detail to the reasons of the Commissioner for refusing to state a case on the issue whether he had jurisdiction to hear the evidence of C12 and C13. The appellants' position before the Commissioner was that the term "historical abuse of young people" in para. 2 of the OIC restricts the scope of the Inquiry to situations where the abuse complained of occurred to a child, by a person in authority, and which was only reported to an institution much later. In contrast, Commission counsel took the view that the word "historical" means abuse that occurred prior to April 14, 2005, the date of the OIC.

[15] The Commissioner concluded that the proposed evidence came within the subject matter of the Inquiry and for that reason it was within his jurisdiction to admit it. This conclusion is made clear at p. 4 of his reasons where he defined the issue confronting him as follows:

Finally, I should note that the parties did make submissions with respect to relevance of the evidence in question.

In my view, the question before me is *one of jurisdiction only* as relevance would go to issues such as admissibility generally and the weight to be given to such evidence, which is not the subject matter of a section 6 application.²
[Emphasis added.]

[16] In reaching this conclusion, the Commissioner expressed the opinion that both of the competing interpretations of “historical” that were advanced by the parties “have merit and that they are not mutually exclusive but are quite compatible.” He acknowledged that “the main focus of Parliament” in appointing the Inquiry “was to highlight the cases that had been in the spotlight in the community at the time of the decision to convene this Inquiry; hence, the reference to allegations of historical abuse.” More will be said later in these reasons about the nature of the cases that were in the spotlight in Cornwall at the time of the decision to convene the Inquiry. Suffice to say at this point that these cases involved allegations of historical abuse of young people by persons in authority or positions of trust.

[17] Having identified the main focus of his mandate, the Commissioner was of the view that such mandate should not be read as being limited to a consideration of those particular cases:

I am of the view that while Parliament certainly indicated that historical allegations of abuse would be a central part of the Inquiry, the mandate certainly does not read to limit it to those specific cases.

To interpret the mandate in such a way is unduly restrictive and contrary to the spirit of the preamble and to section 3 of the Order in Council.

² The Commissioner’s statement that matters of relevance, such as “admissibility generally and the weight to be given to such evidence” are “not the subject matter of a section 6 application” is not entirely accurate. As was held by this court in *Re Bortolotti et al. and the Ministry of Housing et al.*, discussed *infra*, such matters can give rise to jurisdictional error if the proposed evidence is not “reasonably relevant” to the subject matter of the inquiry.

[18] On the Commissioner's view of the expansive mandate created by the OIC, the proposed evidence of C12 and C13 came within the terms of reference and as such, it was clearly admissible.

[19] The majority of the Divisional Court, in dismissing the appellants' application to direct the Commissioner to state a case, correctly articulated the principles that govern applications under s. 6 of the Act. These principles were first set out by Morden J. in *Re Royal Commission into Metro Toronto Police Practices* (1975), 10 O.R. (2d) 113 (Div. Ct.) and were later approved by Howland J.A. in *Re Bortolotti et al. and Ministry of Housing et al.* (1977), 15 O.R. (2d) 617 (C.A.). Howland J.A. held at p. 623 that applications under s. 6(1) of the Act are confined to matters of jurisdiction only:

Section 6(1) of the *Public Inquiries Act, 1971* no longer provides for a case to be stated as to the "validity of any decision, order, direction or other act of a commissioner". I am in agreement with the conclusion of Morden, J., in *Re Royal Com'n into Metropolitan Toronto Police Practices and Ashton* (1975), 10 O.R. (2d) 113 at pp. 119-21, 64 D.L.R. (3d) 477 at pp. 483-5, 27 C.C.C. (2d) 31, that "authority" in s. 6(1) means "jurisdiction", and that *the statutory powers of the Court are now "supervisory only, i.e., confined to seeing to it that the Commission does not exceed its jurisdiction. They do not extend to enable the Court to substitute its discretion for that of the Commission where the latter has made a decision lying within the confines of its jurisdiction."* [Emphasis added.]

[20] Howland J.A. went on at pp. 623-24 to explain how the court on a s. 6 application is to assess whether the Commission has committed a jurisdictional error:

An error of jurisdiction arises where the Commission has not kept within the subject-matter of the inquiry as set forth in Order in Council 2959/76. In the exercise of its powers under s. 6(1) of the Public Inquiries Act, 1971, the Divisional Court has a supervisory role to perform respecting errors of jurisdiction. In considering whether the Commission has exceeded or has declined its jurisdiction, it is necessary to determine what evidence is admissible before the Commission...

In my opinion, any evidence should be admissible before the Commission which is reasonably relevant to the subject-matter of the inquiry, and the only exclusionary rule which should be applicable is that respecting privilege as required by s. 11 of the Public Inquiries Act, 1971. [Emphasis added.]^[3]

[21] *Bortolotti* thus directs that an error of jurisdiction occurs when the Commission admits evidence that is not reasonably relevant to the subject matter of the inquiry. Howland J.A. addressed the meaning of the phrase “reasonably relevant” at pp. 624-25:

Having determined that the test of reasonable relevance should be applied, it is necessary to consider the meaning of the words "reasonably relevant".

The definition of "relevant" which has been commonly cited with approval by the Courts is that in *Stephen's Digest of the Law of Evidence*, 12th ed., art. I. It states that the word means that "any two facts to which it is applied are so related to each other that according to the common course of events one either taken by itself or in connection with other facts proves or renders probable the past, present or future existence or non-existence of the other". *In concluding what evidence is admissible as being reasonably relevant to a commission of inquiry, I would adopt the statement in McCormick on Evidence, 2nd ed., at p. 438: "Relevant evidence, then, is evidence that in some degree advances the inquiry, and thus has probative value ... "*

In deciding whether evidence is reasonably relevant it is necessary to scrutinize carefully the subject-matter of the inquiry as set forth in Order in Council 2959/76. This is the governing document....[Emphasis added.]

[22] Having correctly set out the applicable legal principles from *Bortolotti* at paras. 14-17 of their reasons, the majority did not go on to perform the review function that they

³ Section 11 reads:

11. Nothing is admissible in evidence at an inquiry that would be inadmissible in a court by reason of any privilege under the law of evidence.

had identified, namely, “to scrutinize carefully the subject matter of the inquiry as set forth in the Order in Council”. Instead, the majority took a deferential approach to reviewing the Commissioner’s decision on the subject matter of the Inquiry and simply concluded that it was “open to him to place a different construction on ‘historical’ and ‘abuse’ as set out in the Terms of Reference in order to carry out his mandate” (at para. 20).

[23] In my respectful view, the majority erred in taking a deferential approach. No deference is owed to the Commissioner on the issue of the definition of the subject matter of the Inquiry. The Commissioner’s jurisdiction is limited to that subject matter, which is prescribed by the legislature in the OIC creating the Commission. If the Commissioner defines the subject matter too broadly or too narrowly, he or she will have rewritten the OIC and redefined the terms of reference. That, of course, is impermissible and constitutes jurisdictional error.

[24] In my view, the Commissioner misconstrued the OIC and in so doing he enlarged the subject matter of the Inquiry and conferred a much wider jurisdiction upon himself than the legislature contemplated. In interpreting the OIC as he did, I believe that the Commissioner committed four errors:

- (1) he failed to consider the context and circumstances in which the Commission was established;
- (2) he failed to consider relevant wording in the preamble to the OIC that provided valuable insight into the nature and type of allegations at issue;
- (3) he failed to construe wording used in the OIC harmoniously and with reference to the document as a whole;
- (4) by reason of the first three errors, he misidentified the subject matter of the Inquiry and ascribed to himself a mandate that is beyond anything contemplated by the legislature.

[25] I now propose to address each of the four errors.

(1) *Failure to consider the context and circumstances leading to the creation of the Commission*

[26] The starting point for interpreting the Commissioner’s mandate is a consideration of the terms of the OIC: *Bortolotti*, p. 623. In this case, however, the words of the OIC are not plain and obvious and do not admit of only one meaning. The Commissioner essentially acknowledged this difficulty at the outset of his analysis with his comment

that the parties' competing interpretations of the word "historical" as used in the OIC both "have merit" and are "quite compatible". Likewise the word "abuse" - which appears in the paragraphs describing the mandate of the Commissioner and in the preamble - is capable of being broadly or narrowly construed, and yet the term is not defined in the OIC.

[27] Given the unclear language used in the OIC, the Commissioner was entitled to and should have looked beyond the four corners of the document for assistance in interpreting its meaning. Had he done so, he would have gained valuable insight into the scope of his mandate from the background circumstances and context in which the Commission was created.

[28] In upholding the Commissioner's interpretation of the subject matter of the Commission, the majority of the Divisional Court also failed to consider the background circumstances that led to the establishment of the Inquiry. With respect, I believe that it was necessary to have careful regard to these circumstances when defining the subject matter of the Inquiry.

[29] The background circumstances that gave rise to calls for this public inquiry are referred to in summary form in the first two sentences of the preamble to the OIC as follows:

WHEREAS *allegations of abuse of young people* have surrounded the City of Cornwall and the citizens for many years. *The police investigations and criminal prosecutions relating to these allegations have concluded.*⁴ [Emphasis added.]

[30] The factual matrix surrounding "the allegations of abuse of young people" in the City of Cornwall and the details of the completed "police investigations and criminal prosecutions relating to them" is described in the affidavit of acting Detective Superintendent Colleen McQuade of the OPP, dated July 18, 2007. In her affidavit, Det. Supt. McQuade details the background and history of allegations of historical sexual abuse involving children in the Cornwall area by persons in authority or positions of trust and how those allegations ultimately came to public attention. She refers to an initial complaint made in 1992 by a thirty-four year old Cornwall resident who claimed that, as a child, he had been sexually abused by a priest and a probation officer. She comments on the charges that were laid in relation to those allegations and how those charges eventually came to be withdrawn. She then details steps taken in 1994 by a member of

⁴ More will be said about these two sentences shortly. For now, I note that in his reasons purporting to identify the subject matter of the inquiry, the Commissioner made no mention of the second sentence.

the Cornwall Police Service that resulted in the public exposure of the original allegations, including the circumstances surrounding the withdrawal of charges relating to them, as well as further allegations of historical sexual abuse involving the priest made by two other adult complainants.

[31] Det. Supt. McQuade's affidavit also outlines the repercussions arising from these allegations, including charges that were laid "under the *Police Act*" against the Cornwall police officer who disclosed the pertinent information, as well as an ensuing civil action that the officer brought against a number of "named individuals and organizations including the former and current Chiefs of Police of the Cornwall Police Service". According to Det. Supt. McQuade, in the context of his civil suit, the Cornwall police officer and his lawyer "began to collect information regarding other alleged victims of child sexual abuse, a clan of pedophiles in the Cornwall area, a conspiracy [by the priest and the probation officer] and their lawyer... in the fall of 1993, to murder [the officer] and the members of his family, and a conspiracy to obstruct justice in late summer 1993 by prominent members of the Cornwall community including, amongst others, [the lawyer of the priest and the probation officer], the Crown Attorney, the Bishop of the Diocese and the Chief of Police".

[32] Det. Supt. McQuade explains that this information was delivered to the Chief of Police of the London Police Service in late 1996 and, by early 1997, it had found its way to the OPP and the Ministry of the Attorney General. Eventually, the Regional Director of Crown Attorneys for the Eastern Region of Ontario "requested that the OPP investigate the myriad of allegations contained in the information which [the Cornwall police officer] had provided". This in turn led to the commencement in July 1997 of an investigation by the OPP "into allegations of historic sexual abuse in the Cornwall area known as 'Project Truth'". That project ultimately resulted in "fifteen (15) persons being charged with one hundred and fifteen (115) offences involving thirty-four (34) alleged victims". All criminal proceedings arising from the project concluded on October 18, 2004. On November 4, 2004, the Premier of Ontario "announced that the Government of Ontario was committed to calling a public inquiry into 'Project Truth'".

[33] In my view, this information fleshes out the meaning of the first two sentences of the preamble to the OIC and makes it clear that the "allegations of abuse of young people" that had "surrounded the City of Cornwall and its citizens for many years" refer to the allegations of historical sexual abuse of young people by persons in authority or positions of trust that were the focus of Project Truth and the "police investigations and criminal prosecutions" in relation to those allegations that had now concluded.

[34] I am fortified in this interpretation of the preamble to the OIC by various Hansard extracts that both pre-date and post-date the formation of the Commission on April 14, 2005. Three of the relevant extracts pre-date the OIC and the other post-dates it.

[35] The first relevant Hansard extract is from April 20, 2004, when the MPP for Stormont-Dundas-Charlottenburgh, Mr. Jim Brownell, posed the following question to the Attorney General:

During the past decade in my riding of Stormont-Dundas-Charlottenburgh, there have been numerous cries for an independent public inquiry into childhood sexual abuse allegations and cover-ups in Cornwall. As a candidate in the last election, I wholeheartedly supported a public inquiry. The lives of many people have been touched by the issues surrounding these allegations. The citizens, police forces, public organizations and those who work in the judiciary system are in need of a sense of worth and community. A thorough investigation will have positive consequences for those who work to uphold pride, sensibility and the spirit of community in my riding.

[36] The Attorney General Michael Bryant responded:

There is right now a criminal proceeding that is underway. ...
A public inquiry cannot be held at this time, while this criminal proceeding is underway.

...

When the criminal proceeding is complete, at that point, we will be relying upon that member to continue to be an advocate on behalf of his community....

[37] Another Hansard extract of significance is from November 4, 2004, when MPP Peter Kormos from Niagara Centre posed the following question to the Premier:

A cloud continues to hang over the city of Cornwall because you haven't kept your promise to hold a full public inquiry into the Project Truth investigation. It's a troubling story because, as you know, a citizens' committee itself uncovered evidence of sexual assaults on close to 50 victims, some of them as young as 12 years old. The OPP subsequently laid 115 charges against 15 people, yet only one person was ever convicted, and most of the cases were stayed by the crown because of prosecutorial delay.

[38] In response to MPP Kormos' query, Premier Dalton McGuinty expressed his commitment to holding such an inquiry after the expiry of the appeal period in the criminal proceedings.

[39] In Hansard from November 18, 2004, MPP Bronwell made the following remarks:

... On November 4, 2004, the Premier stood before this House and committed to the people of my riding that a full public inquiry would be called in the Project Truth investigations once all criminal proceedings were concluded.

I'm happy to announce today that on Monday, November 15, 2004, the last of the criminal proceedings were concluded, and yesterday the Premier, myself and the Attorney General, Michael Bryant, committed to holding a full public inquiry in this case....

The Project Truth investigations and subsequent criminal proceedings have clouded over the Cornwall area for the past decade. With the announcement of this public inquiry, the truth of allegations of misconduct and alleged cover-ups will be able to come to light. The people of Cornwall and area will be able to lift this cloud of allegations and have these investigations come to a conclusion. [Emphasis added]

[40] The final relevant Hansard extract is from April 19, 2005, when MPP Brownell expressed his thanks to the Attorney General and Premier for ordering the Inquiry:

First let me congratulate and thank you and the Premier for the realization of a full public inquiry into the sex abuse scandal that has shaken the community of Cornwall and area. I was proud to be with you yesterday at city hall in Cornwall to see the looks of relief on the faces of the victims as it became clear that the McGuinty team was fulfilling its promise to hold an inquiry. From the formation of this government, you have worked tirelessly with me and with those involved in the community and area to see that this long-standing concern was addressed.

[41] The Attorney General responded as follows:

Yes, with the public inquiry, under the *Public Inquiries Act*, he has all the tools at his disposal to leave no stone unturned and to provide recommendations that ultimately, we hope, will lead to some reconciliation and healing for the people of Cornwall. Along the way, we will work with the commission, as the commissioner sees fit, to ensure that victims get the services they need during what will inevitably be a very painful time for them. *Ultimately, with this public inquiry, we will finally get to the bottom of what happened and will get recommendations so we can proceed better in the future, in a way that not only can everybody have confidence in the system, but the victims can feel that justice has been done.* [Emphasis added.]

[42] In my view, these extracts are telling. They provide valuable insight into the background and purpose of the OIC. They were available to the Commissioner and the Divisional Court as an interpretative aid and should have been used in determining the legislative purpose for creating the Commission: see *Re Canada 3000 Inc.; Inter-Canadian (1991) Inc. (Trustee of)*, [2006] 1 S.C.R. 865 at paras. 57-59; *Bruker v. Marcovitz*, 2007 SCC 54 at paras. 3-8.

[43] Considered in conjunction with the factual matrix outlined by Det. Supt. McQuade in her affidavit, these Hansard extracts provide clear evidence of the context and circumstances in which the Commission was created. I would summarize them as follows:

- a clan of pedophiles allegedly operated in the Cornwall area for a very long period of time;
- prominent local citizens allegedly conspired to cover up the activities of the clan of pedophiles; and
- Project Truth and the prosecutions it spawned failed to generate satisfactory results and a cloud of suspicion and mistrust continues to hang over the citizens of Cornwall.

[44] Had the Commissioner or the majority of the Divisional Court referred to the Hansard extracts and the factual matrix as outlined by Det. Supt. McQuade in her affidavit filed with the Divisional Court, they would have recognized that the legislative intention in appointing the Inquiry was not to investigate the institutional response to all allegations of abuse in the Cornwall area that pre-date April 14, 2005, including

allegations of sexual assault such as those made by C12. Rather, the legislative intention in ordering the Inquiry was more focused: the legislature sought to have the Commissioner investigate the institutional response to allegations of historical sexual abuse of young people in the Cornwall area by persons in authority or positions of trust and recommend ways in which those institutions could better respond to this type of allegation.

(2) *Failure to consider relevant wording in the preamble*

[45] As set out above, the first two sentences of the preamble to the OIC state:

WHEREAS allegations of abuse of young people have surrounded the City of Cornwall and its citizens for many years. The police investigations and criminal prosecutions relating to these allegations have concluded.

[46] In defining the subject matter of the Inquiry in broad terms, the Commissioner paid particular attention to the first sentence of the preamble. He mentioned this sentence in his reasons with a view to substantiating his conclusion that the legislature had chosen to give him a wide mandate. Thus, he noted that there was no reference in the preamble to “allegations of abuse at the hands of persons in authority” and that “the preamble clearly contemplates a general inclusive statement, not limited to historical allegations, but referring to ‘allegations of abuse of young people [that] have surrounded the City of Cornwall’ ...”.

[47] With respect, the Commissioner’s analysis ignores the second sentence of the preamble. As noted, that sentence narrows the so-called “general inclusive” allegations of abuse referred to in the first sentence to those that formed the subject matter of “police investigations and criminal proceedings related to these allegations [that] have concluded.” Such allegations related to historical sexual abuse of young people in the Cornwall area by persons in authority or positions of trust that were the subject of the Project Truth investigations.

[48] The Commissioner’s failure to consider the second sentence of the preamble was serious and in my view it skewed his subsequent analysis of the subject matter of the Commission.

(3) *Failure to construe the wording of the OIC harmoniously and with reference to the document as a whole*

[49] In determining that his mandate entitled him to look into institutional responses relating to any and all allegations of sexual assault involving young people in the

Cornwall area prior to April 14, 2005, the Commissioner focused heavily on para. 2(b) of the OIC. For convenience, para. 2 is again reproduced:

Mandate

2. The Commission shall inquire into and report on the institutional response of the justice system and other public institutions, including the interaction of that response with other public and community sectors, in relation to:
 - (a) allegations of historical abuse of young people in the Cornwall area, including the policies and practices then in place to respond to such allegations, and
 - (b) the creation and development of policies and practices that were designed to improve the response to allegations of abuse

in order to make recommendations directed to the further improvement of the response in similar circumstances.

[50] The Commissioner noted that para. 2(b) contains no reference to “historical” abuse; rather, it refers to “policies and practices that were designed to improve the response to allegations of abuse”. In the Commissioner’s view, that provision, properly construed, calls for a “broad and liberal interpretation” as opposed to one that is restricted to “complaints [of historical abuse] reported by adults.”

[51] With respect, I believe that the Commissioner erred in reading para. 2(b) in isolation and in construing the words “allegations of abuse” differently from the words “allegations of historical abuse” used elsewhere in para. 2 and in other provisions of the OIC. In my view, he should have construed those phrases harmoniously and with reference to the document as a whole. Had he done so, I am satisfied for several reasons that he would have treated the words “allegations of historical abuse” and “allegations of abuse” synonymously.

[52] First, as I have already pointed out, the Commissioner misconstrued the words “allegations of abuse” in the first sentence of the preamble. Had he read those words in conjunction with the second sentence of the preamble, he would have realized that the “allegations of abuse” were the allegations of abuse that formed the subject matter of

Project Truth, i.e. allegations of historical sexual abuse of young people in the Cornwall area by persons in authority or positions of trust.

[53] Second, it must be noted that para. 2, although divided into sub-paragraphs, is one complete sentence. Paragraph 2(b) must be read together with the language in para. 2(a) and with the concluding words in that provision, which refer both explicitly and implicitly to allegations of historical abuse. Paragraph 2(a) speaks of “allegations of *historical abuse* ... including *the policies and practices then in place* to respond to such allegations” [Emphasis added.]. The concluding language of para. 2 speaks of “recommendations directed to further improvement of the response *in similar circumstances*” [Emphasis added.]. Surely “similar circumstances” refers to allegations of historical abuse, as the appellant suggests, and not allegations of sexual assault of any kind, as Commission counsel suggests.

[54] Third, the Commissioner failed to have regard to para. 4 of the OIC. Paragraph 4 is a free-standing provision that provides for informal opportunities “for individuals affected by *the allegations of historical abuse* of young people in the Cornwall area” to express their views and feelings [Emphasis added.]. That provision dovetails with the third sentence in the preamble to the OIC and it reflects the view of community members that “a public inquiry will encourage individual and collective healing”. If the subject matter of the inquiry were meant to include allegations of sexual assault such as those made by C12, it is illogical that the legislature would have restricted the community meetings and other informal opportunities to “individuals affected by allegations of historical abuse of young people in the Cornwall area”. And yet, para. 4 is clearly restricted in that fashion.

[55] When para. 2 of the OIC is read as a whole and in conjunction with the other provisions of the OIC including the preamble, it is apparent that the legislature was directing the Commissioner to look at institutional policies and practices – past, present and future – in responding to allegations of historical abuse of young people in the Cornwall area. Such allegations would include those that were the subject of the Project Truth investigation as well as any similar allegations of historical abuse of young people by persons in authority or positions of trust that were not investigated by Project Truth or that came to light after the Project Truth investigation ended. This interpretation harmonizes the meaning of the word “allegations” throughout the OIC, including its meaning in the preamble, para. 2 and para. 4.

[56] In contrast, reading para. 2(b) as the Commissioner does leads to the untenable conclusion that, by virtue of this clause, the legislature intended the Commissioner to compare and contrast present-day institutional responses to any and all allegations of abuse, including but not limited to the allegations of historical abuse, with past institutional responses limited solely to allegations of historical abuse under para. 2(a).

With respect, that interpretation is not logical. Moreover, it isolates para. 2(b) and promotes it from a clause that describes one discrete component of the Commissioner's mandate into a clause that single-handedly broadens his mandate beyond all proportions – something which in my view, the legislature did not contemplate. That leads me to the fourth error.

(4) *Failure to interpret the OIC in a manner that was reasonable and within the contemplation of the legislature*

[57] The Commissioner identified the primary focus of his mandate as follows:

In reviewing the mandate, it is clear that the main focus of Parliament was to highlight the cases that had been in the spotlight in the community at the time of the decision to convene this Inquiry; hence, the reference to allegations of historical abuse.

...

I am of the view that while Parliament certainly indicated that historical allegations of abuse would be a central part of the Inquiry, the mandate certainly does not read to limit it to those specific cases.

[58] The Commissioner further observed that the Commission was “nearing the end of the victims’ evidence and it is not the intention of this Inquiry to now open the floodgates, or to widen the mandate that I have set to date.”

[59] With respect, these words of the Commissioner do not sit well with the expansive view he took of his mandate. As already indicated, by interpreting the OIC as he did, the Commissioner ascribed to himself a mandate that is truly breathtaking in its scope. By defining the words “historical” as he did, the Commissioner gave himself jurisdiction to assess the response of various institutions (past, present and future), including the justice system, the police, Children’s Aid Societies and the like, to any and all allegations of sexual abuse made by young people in the Cornwall area, including historical allegations of abuse such as those investigated by Project Truth and allegations of sexual assault, such as those reported by C12, presumably from the date of Cornwall’s inception in 1834 to April 14, 2005, the date on which the Commission was formed.

[60] Such a wide-ranging mandate is inconsistent with the Commissioner’s acknowledgement that the “main focus of Parliament was to highlight the cases that had been in the spotlight in the community at the time of the decision to convene this Inquiry;

hence, the reference to allegations of historical abuse.” I fail to see how, on the Commissioner’s view of his mandate, he could reasonably hope to keep the floodgates from opening. If C12’s evidence (which falls outside the Commissioner’s view of the main focus of the Inquiry) were to be admitted, it would open the door to similar testimony from hundreds of complainants and their family members who might wish to come forward and speak of their experiences with the police and other institutions, both pro and con, not to mention the hundreds of judicial officers, police officers, CAS workers and the like who would no doubt wish to respond.

[61] In short, the Commissioner’s view of his mandate runs the risk of standing the so-called “main focus” of the Inquiry on its head and creating an unwieldy, if not unmanageable, mega-inquiry that could go on for years at great public expense. Such an outcome would diminish the value to be gained from the important work that the legislature had assigned to the Commissioner.

Conclusion on the Subject Matter of the Commission

[62] Properly construed, the OIC empowers the Commissioner to look into and report on institutional responses – past, present and future – relating to allegations of historical abuse of young people in the Cornwall area by persons in authority or positions of trust, including the allegations investigated in Project Truth as well as similar such allegations. Allegations that were reported at the time of the abuse, or years later, or both, would fall within this mandate. In other words, the Commissioner can look at the response of various institutions to allegations made and reported in the 1950s, as well as their response to allegations made for the first time or renewed in the 1990s.⁵

[63] C12’s evidence does not come within the subject matter assigned to the Commissioner by the terms of the OIC. With respect, the Commissioner erred in holding otherwise. The same holds true for C13’s evidence. For these reasons, Questions 1 and 2 of the stated case should be answered as Spiegel J. did in his dissenting opinion.

Is the evidence of C12 and C13 reasonably relevant to the subject matter of the Inquiry?

[64] Although the evidence of C12 and C13 falls outside the subject matter of the Inquiry, it could nevertheless be admissible if it were found to be “reasonably relevant to the subject matter of the inquiry”: *Bortolotti* at p. 624. It would meet that test if it had a bearing on an issue to be resolved and could reasonably, in some degree, advance the

⁵ I do not agree with the dissenting opinion of Spiegel J. to the extent that he concluded at para. 31 that the term “historical” in para. 2(a) of the OIC imports a requirement that there must necessarily be a lapse of time between the time of the abuse and the time of reporting for the allegation to be considered as historical.

inquiry. A decision to admit evidence on this basis will attract a high degree of deference from a reviewing court and will be judged against a standard of reasonableness.

[65] Affording a high degree of deference to such a ruling makes eminent good sense. Otherwise, Commissions would constantly be in a state of “stop and go” as disgruntled parties trundled off to the Divisional Court to challenge evidentiary rulings with which they disagreed. If the Commissioner believes that an item or body of evidence, though peripheral to the subject matter of the Commission, bears on an issue to be resolved and will in some degree advance the inquiry, so long as the Commissioner’s view is reasonably based, the admission of the evidence will not constitute jurisdictional error. (For a general discussion of the standard of reasonableness see *Canada (Director of Investigation and Research, Competition Act) v. Southam Inc.*, [1997] 1 S.C.R. 748 at paras. 56-62 and *Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247 at paras. 46-56).

[66] The Commissioner made no finding on whether the evidence of C12 and C13 was reasonably relevant to the subject matter of the Inquiry. To be precise, he did not turn his mind to the issue, having concluded that their evidence came within his mandate and was thus clearly admissible.

[67] In circumstances where the Commissioner has not ruled on whether the proffered evidence is reasonably relevant to the subject matter of the Inquiry, I would normally refrain from commenting on whether the evidence is capable of passing the deferential test of “reasonably relevant” as set out in *Bortolotti*. However, the issue was canvassed by the parties in oral argument and I think it would be helpful to address it, in an effort to avoid further delays.

[68] Assuming that the evidence of C12 and C13 stands alone and is not the prelude to an avalanche of other such evidence from like complainants and their family members, I fail to see how it could reasonably advance the inquiry that the Commission had been asked to perform. Without wishing to minimize the seriousness of C12’s complaint or the gravity of her allegations against the investigating officer, her evidence, if true, essentially comes down to one person having been treated inappropriately by a police officer in a case where she allegedly was sexually assaulted by other teenagers. Her evidence does not speak to systemic problems that may or may not exist in the way police respond to allegations of sexual abuse of young people by persons in a position of trust or authority. In other words, it has no probative value in relation to the Commissioner’s mandate.

[69] On the other hand, if C12’s evidence does not stand alone but is a prelude to an avalanche of similar evidence – the reception of which is likely to be very time-

consuming, hotly contested and liable to deflect the Commissioner from the task at hand – any marginal probative value that such evidence might have would, in my view, be greatly outweighed by its prejudicial effect. As such, it would likewise not pass the “reasonably relevant” test.

[70] In so concluding, I do not wish to leave the impression that there can be no meaningful overlap, in so far as institutional responses are concerned, between cases such as the one described by C12 and the cases such as those investigated by Project Truth. Nor am I suggesting that allegations of historical sexual abuse of young people by persons in authority or positions of trust are a breed apart and entirely distinct from all other allegations of sexual abuse, including allegations of sexual assault committed by teenagers. By way of example, studies that have explored the systemic responses of institutions such as the police to general allegations of abuse made by young people might well pass the reasonable relevance test, even though the subject matter of the study will not be precisely the same as the subject matter of this Inquiry.

[71] For these reasons, I am of the view that the proposed evidence of C12 and C13 is not reasonably relevant to the subject matter of the Inquiry and should therefore not be received.

[72] In conclusion, I would answer the questions in the stated case as framed by the appellants as follows:

Question 1: Do the Terms of Reference of the Cornwall Public Inquiry contemplate the hearing of evidence of an allegation of sexual assault on a 16 year old female by a 16 year old male and a 17 year old male which was reported to the police on the day following the alleged offence given the mandate of the inquiry to “...inquire into and report on the institutional response of the justice system ... to allegations of historical abuse of young people...?”

Answer: No.

Question 2: In deciding to hear the evidence of C12 and C13, did the Commission of Inquiry properly exercise its jurisdiction or exceed its jurisdiction?

Answer: The Commissioner exceeded his jurisdiction.

Signed: "M.J. Moldaver J.A."
"I agree Doherty J.A."
"I agree E.E. Gillese J.A."

RELEASED: "DD" JANUARY 18, 2008