
THE GOUDGE INQUIRY: WHAT HAS HAPPENED IN THE PAST 14 YEARS IN THE FORENSIC SCIENCES?

A SUMMARY AND A PROSECUTORIAL PERSPECTIVE

Caitlin Pakosh, HBSc, JD

Assistant Crown Attorney (Newmarket)

Assistant Professor, University of Toronto Mississauga - Forensic Science Program

Contact: caitlin.pakosh@utoronto.ca

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RECENT SYSTEMIC REVIEWS OF FORENSIC EVIDENCE: THE CANADIAN CONTEXT

- Inquiry into Pediatric Forensic Pathology in Ontario (The Goudge Inquiry) [2008]
- Forensic Science in Canada: A Report of Multidisciplinary Discussion (The Hart House Report) [2013]
- Motherisk Hair Analysis Independent Review [2015]
- The Motherisk Commission [2018]
- Report of the Federal/Provincial/Territorial Heads of Prosecutions Subcommittee on the Prevention of Wrongful Convictions (“FPT”) [2018]

OVERVIEW



The Goudge Inquiry: A Summary and Recent Case Law Addressing Judicial Intervention



The Motherisk Review and Commission: A Summary and the *Forensic Laboratories Act*



Preventing Wrongful Convictions: Crown Policy and Takeaway Points



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PART I

A BRIEF SUMMARY OF THE GOUDGE INQUIRY AND RECENT CASE LAW ADDRESSING JUDICIAL INTERVENTION

Inquiry into Pediatric Forensic Pathology in Ontario

R E P O R T

Volume 1 Executive Summary

Volume 2 Systemic Review

Volume 3 Policy and
Recommendations

Volume 4 Inquiry Process

The Honourable Stephen T. Goudge
Commissioner

THE GOUDGE INQUIRY (2008): IN BRIEF

- Forensic pathology = key evidence in nearly any criminal case involving death
- Inquiry launched in response to a series of wrongful convictions related to Dr. Smith's problematic testimony in criminal pediatric death cases between 1991 and 2001.
- Several recommendations made to professionalize the discipline, provide systemic oversight, and prevent bias

THE GOUDGE INQUIRY (2008)

- Findings of October 2008 Report: wide range of failings from 1981 to 2001
 - **Educational background:** Smith not trained, certified and did not disclose inadequate knowledge
 - **Autopsy practice:** seldom attended scene, failed to obtain all relevant information, failed to account for contradictory evidence, documentation careless and uneven
 - **Interaction with criminal justice system:** not mindful of expert's independent, objective role + speculated + anecdotal evidence + lied under oath
 - **Systemic failures of oversight**
- Several recommendations, including: guard against bias by “**thinking truth**” rather than “**thinking dirty**”

R.V. HILLER, 2020 ONSC 6097 – AN EXAMPLE OF FORENSIC PATHOLOGY EVIDENCE TODAY

- Charge: Manslaughter
- COD: Cardiac arrest
- Central issue: Causation

- **Crown's theory:** Hiller caused the St. Louis' death during a fight by placing St. Louis in a headlock that compressed his neck, causing the victim's heart to stop.
 - Based exclusively on the testimony of forensic pathologist Dr. Tweedie, inferring that a headlock caused death

- Accused: Denied placing victim in headlock and testified he was acting in self-defence.
 - At trial, there was no direct evidence of a headlock.

- Finding:
 - Expert's opinion on COD does not prove beyond a reasonable doubt that the accused caused the victim's death

R. V. HILLER: A DELICATE MATTER – JUDICIAL INTERVENTION

- Dr. Tweedie testified twice. Recalled to address questions arising from paramedic's testimony.
- **Question:** What should a trial judge do when they have questions bearing on the validity of an expert opinion and those questions have not been put to the witness by counsel?
- Four options:
 - 1) Set aside questions and just consider the **evidence as presented**.
 - 2) **Reject the opinion**, without giving counsel or the witness an opportunity to address those concerns.
 - 3) **Act on outside knowledge** without expressly referring to it.
 - 4) **Notify counsel** of the judge's concern and provide counsel with the material that grounded the concerns.

R.V. HILLER - CONTINUED

- Correct answer is #4!
- Trial judge told counsel in advance the question that she would ask, gave them opportunity to object, and provided them the opportunity to ask any questions arising from the court's inquiries.
- Judicial intervention a delicate matter:
 - Respect the principles of transparency and fairness
 - Understand the nature and parameter of Dr. Tweedie's opinion as to cause of death
- Trial judge consulted extraneous material but did not rely on any of that material as evidence.



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PART 2

THE MOTHERISK REVIEW AND COMMISSION

THE MOTHERISK COMMISSION INDEPENDENT REVIEW: JUSTICE LANG (2015)

- *Motherisk Commission* (MRC): Justice Lang's review examined the use of drug and alcohol hair-strand testing in criminal and child protection cases between 2005 and 2015. Findings (at p. 4):
 - 1. Testing was **inadequate** and **unreliable** in use in child protection and criminal proceedings
 - 2. MDTL operations **did not meet** internationally recognized **forensic standards**
 - 3. Hospital for Sick Children did not provide meaningful **oversight** over MDTL
 - 4. The use of the hair testing in legal proceedings has serious implications for the **fairness** of those proceedings and warrant additional review

The logo for the Motherisk Commission, consisting of the letters 'MRC' in a bold, blue, sans-serif font.The full name of the Motherisk Commission, 'MOTHERISK COMMISSION', in a bold, grey, sans-serif font, positioned to the right of a vertical grey line.

Source: motheriskcommission.ca

REPORT OF THE MOTHERISK COMMISSION: JUSTICE BEAMAN (2018)

- 2005-2015: Motherisk Laboratory tested more than 24,000 hair samples for drugs and alcohol, from over 16,000 different individuals, for child protection purposes.
- **Aim:** to determine whether the testing had a substantial impact on the CAS and court decisions. If so, it was possible that the child, parent or other caregiver might have a legal remedy.
- Cases reviewed: 1,271 from CASs across Ontario
 - 189 of the 1,271 cases (14.9%) involved Indigenous families
- Motherisk test results had a substantial impact on the outcome of 56 cases.
 - 7 of the 56 substantial impact cases (12.5%) involved Indigenous families
- In vast majority of cases, other evidence supported the CAS and court decisions.

CASES AND INQUIRIES ADDRESSING SCIENTIFIC RESEARCH AND EVIDENTIARY RELIABILITY SPARK LEGISLATIVE REFORM

- ❖ Faulty application or misunderstanding of science and/or erroneous expert opinion evidence has led to injustices but has also sparked positive systemic change
 - March 8, 2018: *Forensic Laboratories Act* received Royal Assent in Legislative Assembly of Ontario. Regulations to be drafted.
 - Accreditation required to carry out lab tests requested for legal purposes
 - Purpose: to enhance oversight, accountability, and transparency



Source: news-medical.net



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PART 3

CROWN POLICY AND PRACTICAL TIPS

ONTARIO POLICY GUIDING THE CROWN: EXPERTS

- Classic pillars of the Crown's duty in all cases: RPC + public interest
- Section 12 – Expert Evidence
 - General duty: to see that justice is done in the circumstances of the particular case
 - Prosecutor should decide at earliest possible opportunity whether expert evidence is required
 - Disclosure: includes all expert reports, summaries of expert opinions and, if requested, any underlying material relied upon by the expert where it is practicable to do so
 - Presenting expert evidence: Limitations should be fully impressed upon the court – includes the expert's qualifications and inferences that can be reliably drawn from the expert's opinion
 - Reporting concerns: must report to Crown Attorney adverse judicial findings or comments about an expert or her own concerns about the expert's participation in criminal justice system.

PRACTICE TIP #1: IS THE EXPERT APPROPRIATELY QUALIFIED?

- Is the expert **qualified** to provide the opinion being offered?
 - Research the expert and the discipline
 - Evaluate the expert's report
- If so, is the opinion being offered within the **scope** of that expertise?
 - Consult with expert **before** trial
- Consider whether an **agreement** can be reached



Source: MS Word Creative Commons

WHAT MAKES A “GOOD” EXPERT?

- **Minimum** qualifications should be met before an expert is relied upon:
 - Accreditation and quality assurance
 - Training and continuing education
 - Membership in oversight organizations and relevant academies or associations
- **Additional** qualifications to consider:
 - Level of relevant education
 - Experience: always obtain a CV!
 - Publications, presentations, and research
 - Supervisory/peer review/education roles
 - Treatment in case law

PRACTICE TIP #2: KNOW THE STRENGTHS AND LIMITATIONS OF THE OPINION

- Key duty of the Crown when presenting expert evidence
 - What are the **strengths** of the opinion?
 - What are the **limitations** of the opinion?
- **INFERENCES** → What inferences can be **reliably** drawn from the opinion?
 - These inferences should be put to the expert
 - **Do not leave these inferences to submissions!**

PRACTICE TIP #3: DOES THE OPINION HAVE INDICATORS OF RELIABILITY, FROM A SCIENTIFIC PERSPECTIVE? BIAS?

- **Flexible approach:** No definitive checklist to evaluate reliability
- **Research foundation v. experiential foundation:** Is the opinion evidence-based?
 - If not, why not?
- **Role:** Is the expert staying within their role and abiding by their duty to provide independent, impartial and unbiased opinion evidence? No expert advocacy!
- **Assumptions:** Every scientific discipline has underlying assumptions → What are they?
- **Language:** Is the language being used by the expert reflective of the discipline's standards or might they point to the presence of bias (even unconscious bias)?

THANK YOU FOR LISTENING!

