Abortion Clinic Investigation

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INTRODUCTION

This Public Report deals with the Ombudsman's investigation of the purpose, process and relevant circumstances of the provincial government's involvement in the covert surveillance of groups and individuals in the pro-choice movement between January and June, 1987. The investigation was initiated pursuant to section 10 of the Ombudsman Act following complaints to the Ombudsman by the Concerned Citizens for Choice on Abortion (CCCA) and the B.C. Civil Liberties Association (BCCL), that the former Attorney General had improperly interfered with the privacy and political rights of individuals and community groups during this period.

The Ombudsman's office is independent of government; it investigates matters of government administration, setting its own terms of reference within the Ombudsman Act, having full powers of inquiry and reporting directly to the legislative assembly or to the public. The role of the Ombudsman's office is not, however, to review legislative policy itself, as this is part of the political process. Rather, it is to monitor the fairness with which democratically determined policy is administered.

The Ombudsman's office is also neutral. Its role is not to oppose government, but to assist government to achieve administrative fairness in carrying out its policies. In the circumstances of this investigation and report, the office has no position or opinion for or against choice on abortion.

During the investigation, the Ombudsman's office has had full access to all relevant documents and individuals, inside and outside of government. The office of the Attorney General specifically waived any client-solicitor privilege related to this case between the government and its lawyers, Farris, Vaughan, Wills & Murphy (the law firm), so that there would be no doubt as to the Ombudsman's authority to receive full disclosure from the law firm. In addition, the current Attorney General indicated his intention to provide access to CCCA to all relevant documents held by government or the law firm. However, this was not done until the Ombudsman had reviewed all such documents to ensure that no personal information would be disclosed that might be prejudicial to individuals other than as it related to their direct involvement with CCCA and its activities. The Ombudsman has received assurances from the law firm and from the former Attorney General that the specific information gathered from the surveillance was not passed to any party who was not directly involved in preparing to obtain a civil injunction.

The Ombudsman has also had access to all documents, notes and tapes, accumulated by the private investigators but not submitted to the law firm or the government. While these have not been made public, they have been carefully reviewed to assess any impropriety and will be destroyed by this office. Information and assurances as to their non-prejudicial nature have been provided by this office to CCCA and the B.C. Coalition for Abortion Clinics.

The issues raised are of significant importance to British Columbians. The public discussion of the past few weeks has demonstrated widespread distrust of government intentions and actions in these circumstances. Many have

concluded, without the opportunity to consider all of the facts, that the Premier's office, the former Attorney General, the law firm and the private investigators acted improperly and perhaps illegally. Those who were the subject of the surveillance feel that their rights have been violated. A breach of public confidence in the fairness of government is untenable in a democracy. However, it is equally threatening to our society that reputations might be discredited by innuendo and supposition, without an independent review and analysis of all of the evidence.

The purpose of this investigation and report is to consider the government purpose and procedure in this surveillance case. As with any investigation, if impropriety is determined, it is the statutory duty of the Ombudsman's office to explain the reasons for this and to make recommendations to government for changes in administrative practices that ensure greater accountability and fairness in the future. Equally, if government is thought to have acted properly in the circumstances, it is the Ombudsman's duty to ensure that the public fully understands why this is so, if confidence is to be restored.

GENERAL FACTS

At all relevant times to this investigation, section 251 of the Criminal Code of Canada was valid criminal legislation creating an indictable offence punishable by imprisonment, to use any means to procure an abortion outside of specific exceptions involving therapeutic abortion committees at accredited hospitals. The

government policy, as articulated publicly by the Premier, was to enforce this law by not allowing any free-standing abortion clinics to be established or to operate in B.C. Public statements were issued by the Concerned Citizens for Choice on Abortion (CCCA) that they intended to organize and raise funds for the purpose of establishing a free-standing abortion clinic. In these circumstances the former Attorney General says he exercised his judgment to instruct the law firm to prepare a case for a civil injunction to prevent the opening of such a clinic by CCCA.

The law firm was of the opinion that a successful injunction application could be made if evidence could be gathered to show that identifiable people had the intention and ability to open a clinic; that the funds, premises, equipment and professional staff were available; and that the opening was imminent. The law firm hired a private investigator and instructed her to obtain information that could be used for this purpose. The law firm subsequently advised the former Attorney General that a private investigator was being used to collect information.

The private investigator and several associates conducted covert surveillance of meetings and activities of the CCCA from February, 1987 to June 1987. By mid-June they had reported to the law firm that there was no evidence of an actual ability to open and operate a free-standing abortion clinic. The law firm reported this to the Attorney General and he reported similarly to the Principal Secretary to the Premier. Since there was no need to apply for an injunction, the retainer was concluded and the investigators' surveillance came to an end in June.

PURPOSE

It is first necessary to determine what the government's purpose was in this case. Specifically, was it to attempt through legal process to stop the opening or operation of an abortion clinic; or was it some wider purpose designed unfairly to discredit and put to a disadvantage individuals and groups to whom it held different opinions? The latter would clearly be an improper purpose; the former requires cautious consideration and is discussed at length below.

The group and individuals who have complained about the surveillance in this case strongly suspected that the actions of government were for a wider and improper purpose. Of particular significance to them is the apparent interest in the identity of members and financial contributors of the groups working for the opening of an abortion clinic. They were concerned to know the extent of the information gathered and to whom that information had been given.

However, this investigation has carefully examined all documentary evidence and the explanations of the former Attorney General, the law firm and the investigators, and can find no persuasive evidence that these activities were motivated by any purpose other than to commence civil proceedings to stop a free-standing abortion clinic from opening, with the intention that the evidence gathered would be made public through affidavits filed in court.

There appears to be nothing improper in an Attorney General acting by lawful means to prevent crimes, in addition to prosecuting them after they have apparently been committed. In AGBC vs Couillard (1984) 59 B.C.L.R.

102, Chief Justice McEachern granted a civil injunction on the application of the Attorney General to restrain conduct amounting to a public nuisance from the West End district of Vancouver. In doing so, he noted the following statement by Viscount Dilhorne from Gouriet vs Union of Post Office Wkrs. [1977] 3All E.R.70 (H.L.) at 91:

> "An Attorney General is not subject to restrictions as to the application he makes, either ex officio or in relator actions, to the courts. In every case it will be for the court to decide whether it has jurisdiction to grant the application and whether in the exercise of its discretion it should do so. It has been and in my opinion should continue to be exceptional for the aid of the civil courts to be invoked in support of the criminal law and no wise Attorney General will make such an application or agree to one being made in his name unless it appears to him that the case is exceptional."

The former Attorney General was of the opinion that the circumstances were exceptional, and that he would be successful in obtaining an injunction restraining the opening of an abortion clinic against identified individuals who could be shown to have the intention and the ability to do so. In coming to this opinion, he had the benefit of expert legal advice and the experience in the West End nuisance case. He says that he also considered that acting pre-emptively through a civil injunction would allow the affected parties to test the legitimacy of the criminal law without first having to break it. He considered this to be a less heavy-handed and socially disruptive approach.

The former Attorney General exercised his judgment in planning to seek a civil injunction to enforce legitimate government policy. This investigation has determined that the Premier's office was aware of and approved of this

general purpose. That the purpose may not have been acceptable to significant segments of the population; that the Attorney General may have ultimately been unsuccessful in achieving the purpose through civil court process; and that in the opinion of many the judgment may be considered flawed are not determinative of the question. In all of the circumstances of this case, this investigation is unable to conclude that the purpose itself was improper.

PROCEDURE

The Ombudsman's investigation also considered the procedure applied by government to fulfill the intended purpose of preparing for a civil injunction.

In this case, the government expressed, through the Premier, its legitimate political decision not to permit the opening of free-standing abortion clinics. However, by then employing an extraordinary and intrusive process, it sent a dangerous message to those who held a different view. However unintentionally, it has given the impression that the law enforcement arm of government can be used to enforce a partisan political purpose. The use of this power to infiltrate groups which openly represent a significant segment of the community in the middle of a wrenching social debate was to exercise questionable judgment.

Perhaps the greatest responsibility of those who exercise democratically-acquired power is to expose themselves constantly and tolerantly to the challenge of other views. At the same time, government must not be hobbled in its law enforcement responsibilities by absolute

prohibitions. There may well be situations where civil process and covert surveillance is appropriate and necessary. However, great care should be taken to ensure that political rights are not sacrificed merely for the sake of clever remedies.

In this case, the former Attorney General has publicly recognized that the uncontrolled use of investigators to spy on community groups was inappropriate; the Premier and current Attorney General have publicly agreed.

Clearly, there is nothing improper with retaining a private law firm expert in injunctive relief to give its opinion and then represent the Attorney General in enforcing a legitimate government purpose in the civil courts. However, reviewing the details of the client-solicitor relationship in this case is made more difficult by the absence of a letter of instruction from the Attorney General and written opinions or reports from the law firm.

The absence of these documents perhaps is not surprising, given the long-standing relationship between the former Attorney General and the lawyer with whom he was dealing. He had complete confidence in the professional advice of the lawyer and in the belief that no improper process would be undertaken in his name. In the words of the former Attorney General "If I thought I had to give him written instructions not to act improperly, I would not have hired him." While the retainer agreement was oral, arrangements in the Attorney General's Ministry were made to review and pay the bills according to a controlled limit and standard hourly rates for Attorney General's civil work.

Regarding reports, the law firm says that with the exception of an internal firm memo dated June 18, 1987 and its statements of accounts, all reports to the Attorney General were oral. No documentary evidence or details of persons or groups investigated were passed on. Given the nature of the reports, i.e. that they advised that there was no evidence of an actual ability to open and operate an abortion clinic and that, therefore, there was no need to apply for an injunction, this is perhaps understandable, although not satisfactory.

However common it might be for lawyers' civil files not to contain detailed written opinions, instructions and reports, cases of this type require different treatment. Here, the government was seeking an unusual remedy, employing intrusive means, using public funds and dealing with a matter which would become public and controversial as it went to court. The absence of a clear record of intentions, legal reasoning and results was likely to fuel public suspicions of impropriety, and this is not in the public interest.

It became obvious to the law firm that it would need outside assistance in assembling the evidence necessary for the injunction. Much of the information gathered by the investigators through their surveillance was available publicly or on request, without any need for covert activity. If the government had acted openly to gather this information and publicly express its purpose much of this ensuing public controversy would have been avoided. Confrontation surrounding public interest disputes is often generated by the extremes, which are able to gain influence over more moderate elements in society in a climate of suspicion created by secret, covert activity.

This applies equally to government and its citizens and, as the evidence subsequently showed, the public statements made by pro-choice groups of their intention and ability imminently to open a free-standing abortion clinic were not in fact accurate. In any event, the evidence had to be gathered and, as is common litigation practice, a private investigator was hired to do so.

Instructions to the private investigator were specific, though oral, i.e. to gather evidence by lawful means of the identity of people working towards opening or operating the clinic and of the actual ability to do so. The private investigator was known to the law firm from previous assignments, and was also highly recommended by her former employer. Although she was licensed as a security employee with a company with which she was then associated, through a complicated arrangement she billed under a newly incorporated and related company which did not yet have its security business licence. This was not known to the law firm and it is understandable that it was not discovered at the outset given the past experience with this investigator as a licensed security employee.

However, once the law firm received statements of account from the investigator issued in the name of what purported to be a security business, it would have been prudent for it to assure itself that the business and the investigators employed by it were properly licensed under the Private Investigators and Security Agencies Act. Ruling 3 of the Professional Conduct Handbook issued by the Law Society of B.C. provides that "No member shall employ unlicensed investigators in circumstances to which the Act applies."

In the circumstances, the law firm was not advised of the licensing difficulties until July or August of 1987, after all investigative services were concluded and billed for. The breach of the Act had been reported to the Registrar responsible for such matters and the investigator was subsequently registered appropriately. There is no indication that these licensing difficulties had any direct impact on the propriety of the surveillance activities carried out by this investigator or others engaged by her related to this contract.

A matter of particular concern to the complainants in this case is the opinion that the use of private investigators to conduct covert surveillance for public purposes is improper. Such activity by investigators would normally involve misrepresenting their identity to third parties.

In considering the propriety of the use of private investigators in this case, the Law Society's position is relevant. As noted above, the Society's Rules contemplate the employment of investigators by lawyers. It is in fact common for investigators to be so employed to gather evidence through covert surveillance, which can involve misrepresenting their identity to third parties. The Law Society itself employs an investigator who does just this while investigating complaints against lawyers i.e. he presents himself as a client with a similar problem to the complainant's to the lawyer who has been complained about to test his professional behaviour. In following such practice, the Law Society's purpose is to gather evidence which could be used in civil proceedings to stop someone from breaching the Legal Profession Act, which the Law Society is entrusted to uphold in the public interest. This suggests a parallel to the Attorney General's case.

However, what may be considered acceptable generally does not necessarily apply to the government when it is in the position of client. Specifically, assuming that open and direct relationships are inadequate, should government require higher standards of investigative practises when covert surveillance is carried out on its behalf?

It should first be considered whether a distinction should be made between police and non-police investigators. This distinction is perhaps irrelevant given the widespread use of non-police investigators in the public service, often in covert surveillance in such areas as Workers' Compensation, ICBC and Income Assistance. Also, as is sadly apparent, police forces are not immune from wrongdoing by individual members, and holding accountable those who are responsible for improper conduct can be a very difficult task.

Rather than comparing police to non-police investigators, it may be more helpful to compare public to private investigators, and this raises squarely the issue of accountability. As this office has discussed in its 1987 Annual Report, in theory any public service can be delivered or provided by private parties. The service remains public in nature if it is for a public purpose or to meet a public responsibility. This would include the covert surveillance by private investigators in this case. However, the vitally important question in the private or public delivery of any public service is how the service provider can be held accountable for the fair and effective performance of the duties. In this case, the need for strict accountability of the investigators, and indeed the private lawyers, makes the issue of clear, written instructions from the Attorney General to the

lawyers, and from the lawyers to the investigator, of significant importance. Such instructions, as with the privatization of any public service, should include a statement of the exact purpose of the service, well defined and measurable standards of service, the limits of the contractor's authority, details of fee and expense controls, restrictions on sub-contracting of the service, the duty of confidentiality, licensing requirements, and timely and comprehensive written reporting responsibilities.

If government is going to privatize the delivery of public services, it must be willing and able to hold private contractors to high standards. In most situations, and certainly in such a case as is being considered here, this means that government must effectively regulate the activities. While these accountability tools may seem cumbersome, they are essential to maintaining public confidence in the fairness of government action.

In B.C. the Private Investigators and Securities Agencies Act is intended to regulate investigative activities. Section 25 of this Act provides for the appointment by Cabinet of an advisory board to consider and advise on matters of minimum standards and codes of ethics that should be adopted in the public interest. Such a board has not been established.

Section 26 of the Act empowers the Solicitor General to make regulations respecting, among other things, standards of training for private investigators. These would seem to be basic requirements of fair and effective regulation in the public interest. Regulations that have been established do not deal effectively with the issue of such standards.

It is recommended, as a matter of administrative fairness, that an advisory board under section 25 be appointed and that the Solicitor General reconsider the regulations pursuant to section 26 of the Private Investigators and Security Agencies Act so as to deal with the issue of standards of training for private investigators. Such regulatory measures are particularly important when private investigators are providing public services.

Issues of privacy and information are particularly important in individuals' relationship to government. Because of the intrusive nature of government, and the wide scope of its impact on our lives, we are properly suspicious of activities which suggest any improper use of information which concerns us that government has in its possession. Our vulnerability makes it essential that government be, at once, protective of our personal or private information that it holds and open to our need for access to information of its actions and decisions which affects our lives. In the absence of comprehensive privacy and access to information legislation, it is recommended that all provincial public institutions adopt and publish a statement of fair administrative practises regarding privacy and information so as to enhance public understanding, trust and participation in government.

In all of these circumstances of this case, it is the conclusion of this office that the procedure employed by the former Attorney General was inadequate in that effective regulatory controls were not applied to ensure fair treatment of the public, and that this constitutes an error of omission. Because of its power and its special role in society, the standards required of government are higher than those of private individuals, and these were

not fully respected in this situation. Although the evidence does not indicate specific wrongdoing by the private lawyers or investigators engaged by the former Attorney General, in the absence of effective means to hold them accountable the public interest was at risk. Further, on being exposed to public scrutiny, a clear record simply was not available as it should have been to demonstrate to the public that what was done was justifiable in the circumstances. The existence of such standards and controls of itself exacts a discipline on public officials and those acting on their behalf when considering potentially harmful action, and later provides an account of that which was done in which the public can take confidence.

It cannot be substantiated that the omission in this case was intentional or reckless. However, it does amount to an error which should not be repeated. If damage was caused by this error, then it is to the public trust in the fairness of government. The remedy is that better safeguards must be in place in the future.

SUMMARY OF CONCLUSIONS AND RECOMMENDATIONS

Conclusions:

1. There is no persuasive evidence that the government's purpose in this case was to discredit unfairly or put to a disadvantage individuals and groups who held pro-choice views.

2. The limited government purpose was to commence civil proceedings to attempt to stop the opening of a

free-standing abortion clinic. While this purpose was not improper in the circumstances, it did involve the exercise of judgment by the former Attorney General which is legitimately open to question by the public. As an extraordinary and intrusive measure, it had the potential to intimidate the legitimate exercise of political rights by individuals and community groups, as well as to limit criminal activity. In this sense, it was inappropriate.

3. The activities of the private lawyers and investigators in this case were limited to gathering information and preparing documents relevant to the government's purpose of commencing civil proceedings. Such activities effectively ended in June, 1987 with the conclusion that there was no actual ability to open and operate a free-standing abortion clinic.

4. The procedure employed by the former Attorney General involved error in that there was inadequate accountability and control over the actions of private lawyers and investigators carrying out public duties. Whether the actions of these contractors were proper or not, this represented a breach of government's responsibility to exercise proper care and attention in the performance of public duties.

5. This error of omission was neither intentional nor reckless.

Recommendations:

1. Government should ensure, in the interests of public confidence in fair public administration, that covert practices not be employed when open and direct relationships are adequate.

2. The private contracting of public services should be documented by clear written instructions and effective control to ensure that all actions carried out on behalf of government are manifestly accountable to the public interest.

3. An advisory board should be established pursuant to section 25 of the Private Investigators and Security Agencies Act to consider and advise on matters of minimum standards and codes of ethics that should be developed in the public interest.

4. The Solicitor General should reconsider the regulations pursuant to section 26 of the Private Investigators and Security Agencies Act so as to deal with standards of training for private investigators.

5. In the absence of comprehensive privacy and access to information legislation in B.C., provincial institutions should adopt and publish a statement of fair administrative practises regarding privacy and information so as to enhance public understanding, trust and participation in government.

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