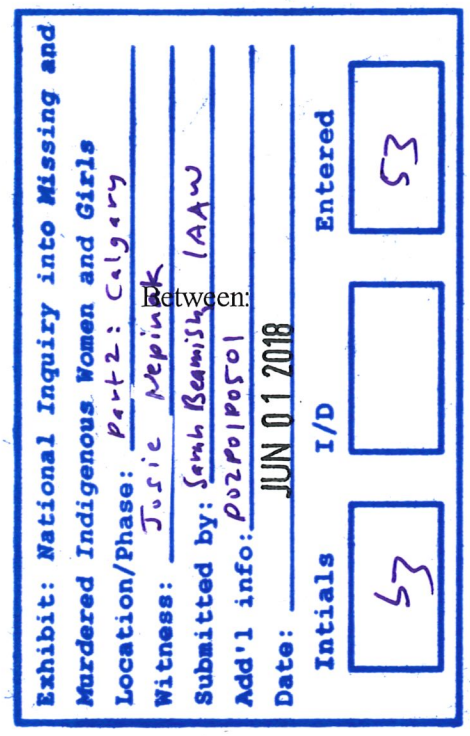
Court of Queen's Bench of Alberta

Citation: R v Barton, 2015 ABQB 159



Date: 20150310
Docket: 120294731Q1
Registry: Edmonton

Between:

Her Majesty the Queen

Crown

- and -

Bradley Barton

Accused

Restriction on Publication

Trial information in Absence of Jury – See the *Criminal Code*, section 648(1). Permission having been given to the jurors to separate, information concerning this portion of the trial must not be published, broadcast, or transmitted in any manner. **NOTE:** This decision is available from the court file, and it may be published after the jury retires to consider its verdict.

Reasons for Judgment (*voir dire*)
of the
Honourable Mr. Justice Robert A. Graesser

Introduction

[1] This *voir dire* is to determine the admissibility of the preserved pelvic region of the deceased in this case, Ms. Cindy Gladue.

[2] Following the autopsy conducted on June 23, 2011, Dr. Graeme Dowling preserved a portion of the deceased's pelvic region.

[3] The Crown seeks to have the preserved tissue tendered as an exhibit and shown to the jury by Dr. Dowling during his testimony at Mr. Barton's trial.

[4] These are the written reasons following the decision which was originally given on February 26, 2015. At that time I reserved the right to convert those reasons into a written decision to edit the reasons. Nothing substantive has been added or deleted from my oral decision.

I. Position of the Parties

A. Crown

[5] The Crown argues that the tissue is real evidence, that it is relevant and material to the issue in the trial, that it is not subject to any exclusionary rule of evidence, and its probative value exceeds any prejudicial effect on Mr. Barton.

[6] The cases submitted to me from Crown counsel are: ***R v Khairi*** 2012 ONSC 5554, ***Barker v The Town of Perry*** (1890) 67 Ia. 146, ***R v Willmott*** 2000 CarswellOnt 8631, ***R v Nikolovski*** [1996] 3 SCR 197 (SCC), ***R v Crawford*** 2013 BCSC 2402, ***R v Mohan*** [1994] 2 SCR 9 (SCC), ***R v Schaefler*** [1993] OJ No 71 (Ont Ct J (Gen Div)), ***R v Teerhuis-Moar*** 2009 MBQB 22, aff'd 2010 MBCA 102 leave to appeal to SCC refused, [2011] SCCA No 18, ***R v Swift*** 2013 ONCA 63, ***R v Wu*** (2002) 170 CCC (3d) 225, ***R v Andrade*** 18 CCC (3d) 41, and ***R v Crawford*** 2013 BCSC 2402 .

B. Defence

[7] Mr. Bottos and Mr. McIntyre, on behalf of Mr. Barton, oppose showing the tissue to the jury, arguing that it is not necessary to do so, that it is duplicative of Mr. Dowling's oral testimony as to his opinions and conclusions following the autopsy. Further, that there are already photographs of the pelvic region which are adequate to enable the jury to understand Dr. Dowling's evidence. He also argues that there is prejudice to Mr. Barton in that the jury may be inflamed against him as a result of seeing Ms. Gladue's tissue in this fashion.

[8] Mr. Bottos also submits that there is a risk that the jury may, by being shown the tissue itself, attempt to essentially usurp the role of the expert.

[9] There are also issues raised concerning preservation of the tissue and continuity if it is evidence in this case.

[10] The cases submitted to me from Defence counsel are: ***R v McLeod*** 2005 ABQB 842, ***R v Pickton*** 2007 BCSC 102, ***R v Borbely*** 2012 ONSC 6224, ***R v Currie***, [2000] OJ No 392 (Ont SC), ***R v Effert*** 2011 ABCA 134, ***R v AD*** [2004] OJ 5717 (Ont SC), ***R v O'Connor*** [1995] OJ No 2131 (Ont CA), ***R v Mohan*** [1994] 2 SCR 9 (SCC), ***R v Boswell*** 2011 ONCA 283, ***R v Batista*** 2008 ONCA 804, ***Abbott and Haliburton Co. Ltd. v White Burgess Langille Inman (c.o.b. WBLI Chartered Accountants)*** 2013 NSCA 66, ***Zink v Adrian*** 2005 BCCA 93, ***R v***

Nahar 2004 BCCA 77, ***R v Ali*** [1998] OJ No 3212 (Ont Ct J (Gen Div)), ***R v Beamish*** (1996)144 Nfld & PEIR 302 (PEI SC(TD)), ***Draper v Jacklyn*** [1970] SCR 92, and ***R v Wills*** [2007] OJ No 52.

Background

[11] Mr. Barton is charged with first degree murder in connection with Ms. Gladue's death on June 23, 2011.

[12] The Crown's theory is that Ms. Gladue was a prostitute and that she and Mr. Barton entered into a business relationship. Following a period of drinking in the bar at the Yellowhead Motor Inn on June 22, 2011, Ms. Gladue accompanied Mr. Barton to his room at the hotel around 12:40 am on June 23.

[13] Ms. Gladue's body was found in the bathtub of Mr. Barton's room shortly after 8 am on June 23 after Mr. Barton called 9-1-1 to report that there was a woman bleeding in the bathtub of his room.

[14] The Crown says it will prove that Ms. Gladue bled to death as a result of a wound to her vaginal wall. The Crown says that Dr. Dowling will testify that the wound was an 11 cm cut to Ms. Gladue's vaginal wall and that the cut was caused by a sharp object. It is anticipated that Dr. Dowling's expert report will be presented to the jury. The report includes photographs of the autopsy conducted on Ms. Gladue's body. Some of the photos depict the tissue the Crown seeks to put before the jury.

[15] It is anticipated that the Defence will lead evidence to the effect that the injury to the vaginal wall was not caused by a sharp object and was instead blunt trauma caused by the insertion of fingers and possibly a fist into Ms. Gladue's vagina.

[16] There will undoubtedly be conflicting expert opinions concerning the nature of the wound in Ms. Gladue's vagina, and the injury-producing mechanism. The Crown argues that is it important for the jury to see the tissue itself, as it is real evidence that is relevant and material to a key issue in the trial: the cause of the injury itself.

[17] The Crown's application was supported by Dr. Dowling, who testified on *voir dire* that he believed that it would be of benefit to the Court and the jury to see the actual tissue to better understand his evidence and opinions. His evidence was to the effect that while everything in his evidence could be demonstrated using the photographs taken at the autopsy, some of the photos were not as bright as he would like and the tissue itself showed certain aspects of the injury important to his evidence, and others potentially important to the defence, more clearly than the photographs.

[18] On the *voir dire*, Dr. Dowling introduced his expert report, being the autopsy report, and reviewed the photographs taken at his direction during the autopsy. After reviewing the photos and introducing his opinion, he moved to the tissue and proceeded to use the tissue to illustrate his observations and his opinions. His use of the tissue during the *voir dire* was done with the aid of an overhead projector, so the tissue and his gloved hands could be seen on a screen visible throughout the courtroom.

[19] My observations of Dr. Dowling's evidence on *voir dire* are as follows:

- The photographs are 5 x 7, in colour and while of good quality, are two dimensional;
- The photographs are approximately half real size, although I understand the photos will be shown to the jury during Dr. Dowling's testimony by way of projection on a large screen;
- The photographs depict a three dimensional object, the deceased's pelvic region;
- The photographs are graphic and unpleasant to view;
- It was somewhat difficult to follow Dr. Dowling's descriptions and orientations of the photographs at times;
- I was able to understand the gist of Dr. Dowling's observations and to understand his opinions and the reasons for his opinions during his evidence using the autopsy photographs;
- The tissue is better viewed on the overhead screen than at Dr. Dowling's side, as the overhead gives a complete view of what Dr. Dowling was attempting to show and the overhead was blown up in size;
- The tissue was not particularly recognizable as female genitalia because of the manner in which it has been preserved;
- Viewing the tissue was not as unpleasant as viewing many of the autopsy photos, in particular 2 through 30;
- Viewing the tissue and the manner in which it was used by Dr. Dowling to illustrate his observations, conclusions and opinions was easier to follow than his evidence using the autopsy photos;
- Cross-examination of Dr. Dowling was easier to follow with the use of the tissue, and;
- The presentation using the tissue was very respectful and inoffensive and the initial shock or revulsion subsided very quickly.

Law

[20] Surprisingly, there does not appear to be any Canadian law directly on the point of the use of the human tissue in court. There are numerous cases dealing with photographs of human tissue but the use of portions of a victim's body as evidence at trial is novel. Therefore, my analysis of the admissibility of the tissue must start with general principles concerning admissibility of evidence.

[21] The tissue is real evidence; indeed, the tissue here is unique evidence. It is the tissue that was damaged leading to the victim's death. The nature and the causation of the injury to this tissue is the key issue in this case. The tissue is the key to determination of how the injury was caused and what may have been used to cause the injury: a sharp object or some other mechanism such as a fist.

[22] Dr. Dowling's evidence was based on his observations of the tissue itself, not the photographs of the tissue.

[23] There is no doubt that the tissue itself is the best evidence that may be used by Crown and Defence to show the nature of the injury and to illustrate the opinions and the reasons for the opinions of the experts involved in this case.

[24] There is no general exclusionary rule relating to the use of the tissue at trial.

[25] A good starting point is ***R v Violette*** 2009 BCSC 421. There, the issue was the admissibility of evidence of grenade testing; a grenade had been exploded by Crown experts and was no longer available for testing by the Defence. The Defence sought exclusion of the evidence of the tests. General principles of evidence were discussed by Romilly J:

> **29** The basic rule of evidence is that all relevant evidence is to be received by the trier of fact unless the evidence is subject to an exclusionary rule: ***R. v. Seaboyer***, [1991] 2 S.C.R. 577 at 609-11, 66 C.C.C. (3d) 321. The broad, inclusive rule exists to ensure that triers of fact have access to as much relevant information as possible to assist them in determining the truth.
>
> **30** Evidence is relevant if, as a matter of logic and human experience, it renders the existence or absence of a material fact in issue more or less likely: ***Re Truscott*** (2006), 216 O.A.C. 217, 213 C.C.C. (3d) 183 at para. 22. No minimum probative value is required for evidence to be deemed relevant, and relevance does not involve considerations of probative value: ***R. v. Watson*** (1996), 30 O.R. (3d) 161, 108 C.C.C. (3d) 310 at 323-24 (C.A.).
> ***Violette*** at paras 29-30

[26] He also discussed potential prejudice to the accused by the introduction of graphic depictions of evidence:

> **35** A common source of prejudice arises when evidence has the potential to arouse emotions of prejudice or hostility in the jury, and so prevent them from exercising their duty in an objective manner. This prejudice is seen most often in murder trials in which pictures of the crime scene and of the victim are particularly disturbing. If a depiction is particularly haunting, it can impair the ability of the jury to focus objectively on the issues in the case.
>
> ...
>
> **37** The jurisprudence on this issue has matured since 1969, and in my view, the current state of the law is comprehensively and accurately expressed by Mr. Justice Dambrot in ***R. v. C. (R.)*** (2000), 31 C.R. (5th) 306 (Ont. S.C.J.):
>
> > [5] In ***R. v. Foreman*** (1996), 3 O.T.C. 276 (Ont. Gen. Div.), Philp J. summarized what has become the usual approach to the admissibility, in particular, of graphic depictions of the deceased in murder cases. At paragraph 11 of his judgment, Philp J. stated:
> >
> > > [11] ... The test, now accepted by our courts, was first enunciated by Doherty J. in ***Regina v. P.(R.)*** (1990), 58 C.C.C. (3d) 334 at page 346-47, where he adopts the approach detailed by Mr. Marc Rosenberg, as he then was, in his paper delivered in November 1989. Mr. Rosenberg sets out three steps that the trial judge must go through in determining the admissibility of any controversial pieces of evidence that may be relevant to the trial.

> ... the steps which the trial judge must go through are as follows:
>
> 1. The judge must determine the probative value of the evidence by assessing its tendency to prove a fact in issue in the case including the credibility of witness.
>
> 2. The judge must determine the prejudicial effect of the evidence because of its tendency to prove matters which are not in issue [or I add because of the risk that jury may use the evidence improperly to prove a fact in issue.]
>
> 3. The judge must balance the probative value against the prejudicial effect having regard to the importance of the issues for which the evidence is legitimately offered against the risk that the jury will use it for other improper purposes, taking into account the effectiveness of any limiting instruction.
>
> Doherty J. notes that the onus is on the accused to demonstrate that the balance favours exclusion of otherwise admissible evidence.
>
> This formulation of the law has been applied more recently in ***Bartkowski***; ***R. v. Ellard***, 2005 BCSC 552; and ***R. v. Arsoniadis***, [2007] O.J. No. 1211 (S.C.J.).
>
> (***Violette*** at paras 35, 37)

[27] The decision also has a helpful description of purposes for which controversial photographs have been admitted:

> **38** Dambrot J. goes on in ***C.(R.)*** to refer to a list of purposes for which controversial photographs have been admitted from the judgment of Chadwick J. in ***R. v. Schaefler***, [1993] O.J. No. 71 (C.J. (Gen. Div.)); controversial photographs have been admitted:
>
> 1) to illustrate the facts on which experts base their opinion and to illustrate the steps by which they arrive at their opinions;
>
> 2) to illustrate minutiae of objects described in the testimony of a witness, e.g., to show the nature and the extent of the wounds;
>
> 3) to corroborate testimony and provide a picture of the evidence and to assist the jury in determining its accuracy and weight;
>
> 4) to link the injuries of the deceased to the murder weapon;
>
> 5) to provide assistance as to the issues of intent and whether the murder was planned and deliberate;
>
> 6) to help the jury determine the truth of the theories put forth by the crown or defense, e.g.: as to which accused committed the crime; as to whether the crime was committed in self-defence.

> Based on his assessment of the law, Dambrot J. concluded in ***C.(R.)*** that the jury would not likely be influenced by the brutal depictions portrayed in the photographs and videotape in question. However, "out of an abundance of caution", he decided that he would exclude those depictions which he felt would not be of significant assistance to the jury.
>
> (***Violette*** at para 38)

Schaefler has been cited in numerous other cases since it was decided in 1993.

[28] Justice Romilly concluded:

> **47** From the foregoing review of the case law, I make three observations. First, the bar for excluding evidence because of its shocking nature is a high one. The reason for this is a combination of the general rule of evidence law, discussed above, and the fact that juries can be depended on to heed instructions and perform their duties dispassionately, even in the face of disturbing evidence.
>
> **48** Second, trial judges have typically excluded evidence which duplicates or unnecessarily belabours horrific aspects of the evidence because the probative value of redundant evidence is extremely low.
>
> **49** Finally, the exercise of the trial judge's discretion to exclude is highly context driven, with the probative value and prejudicial effect of the evidence depending entirely on the nature of the evidence and the live issues in the trial, and also on the trial judge's assessment of the impact of the evidence on the trial process as a whole.
>
> (***Violette*** at paras 47-49)

[29] The Defence relies, in part, on ***R v Pickton*** 2007 BCSC 102 and ***R v McLeod*** 2005 ABQB 842.

[30] In ***McLeod***, Justice Slatter, as he then was, stated:

> **4** The general principle in cases of this sort is that relevant evidence should be admissible. The Crown has a high burden of proof, and it should be allowed to present the evidence it feels is necessary to prove the case. On the other hand, if the prejudicial affect of the evidence outweighs its probative value, then the evidence can be excluded. In deciding on the probative value and relevance of evidence, it is obviously necessary to know the issues in the trial. In this case it is not disputed that Mr. Gamboa is dead, nor that he was shot six times, nor that his body was abandoned and burned on a rural road. The primary issue in the case is the identity of the shooter, and the intention of the shooter. Self defence and provocation do not appear to be live issues. I am satisfied that some of the photographs are probative on the issue of identity, and others might well be relevant to the issue of the intent of the shooter.
>
> (***McLeod*** at para 4)

[31] However, Justice Slatter observed:

> **7** I would also make the general observation that just because one photograph might have probative value in excess with its prejudicial effect, does not mean that numerous

> similar photographs still meet the test. In some cases the probative value of one photograph will outweigh the prejudicial effect, but the prejudicial effect of a dozen photographs on the same subject would then override the probative value. That is the case with some of the photographs in question, as they are somewhat repetitive.
>
> (***McLeod*** at para 7)

[32] He ruled that "the Crown was entitled to tender some photographs of the scene Mr. Gamboa's body was found in order to provide the context" (***McLeod*** at para 9). Slatter J excluded some photographs on the basis that they have little probative value on the issues of identity and intent, which were the issues at that trial (see ***McLeod*** at para14).

[33] In ***Pickton***, the issue related to the introduction of autopsy photographs. Mr. Pickton argued that the photographs would be emotionally disturbing for members of the jury and would not be of any assistance to them in comprehending and assessing the scientific issues on the trial.

[34] The Crown noted that graphic medical images in the mass media are prevalent, and they thus enable jurors to dispassionately review unpleasant images. The Crown argued with respect to the probative value of the photographs and argued that the prejudicial effect would be minimal.

[35] Williams J referred to the same passages noted in ***Violette***, and in particular the test enunciated in ***Foreman*** and the observations from ***Schaefler*** (see ***Pickton*** at para 4).

[36] I accept those as accurate statements of the law in this area, at least as it applies to graphic depictions of evidence.

Discussion

[37] My conclusion is that the tissue here is presumptively admissible. It is not a graphic depiction of evidence, it is evidence in itself. If the photographs are admissible, the object of the photograph itself should be admissible as real evidence.

[38] The issue becomes, then, one of balancing the probative value of the evidence and the prejudicial effect.

[39] Mr. McIntyre and Mr. Bottos argue strongly that the tissue is highly disturbing, it may be offensive to some jurors and it may tend to inflame the jury. I would supplement those arguments by observing that it is important to avoid distracting jurors from the task at hand and their oath, which is to dispassionately consider the evidence.

[40] The Defence also argues that the probative value is limited, noting that Dr. Dowling did not use the tissue at the preliminary inquiry, that the intention to seek leave to use it was only made two days ago, and that Dr. Dowling acknowledges that he could illustrate all of his observations and opinions using the autopsy photos. Thus, they argue, there is little probative value and significant prejudice to the accused.

[41] Mr. Barton has a constitutionally protected right to a fair trial, and that must be zealously guarded.

[42] The Crown argues that there is significant probative value to the use of the tissue itself at trial and that there is little if any prejudice to the accused, pointing out that the use of the tissue on the *voir dire* resembled a biology lab presentation and was not offensive.

[43] This is a difficult matter as I am the gatekeeper of the evidence and must ensure a fair trial. Fair trial does not only mean a fair trial for the accused. The Crown is entitled to present its case in the manner it considers best, subject to the rules of admissibility.

[44] In a murder trial, there will invariably be graphic evidence; the more horrific the scene of the incident and the condition of the body, then the more disturbing or unsettling the evidence. Jurors are expected to view unpleasant sights and listen to unpleasant evidence. Rarely are jurors not taken far out of their personal comfort zones.

[45] The February 2015 issue of *Canadian Lawyer* has an article which notes the prevalence of post-traumatic stress disorder in judges and lawyers involved in the criminal justice process arising out of what they have seen and heard in court. That phenomenon must certainly be just as applicable to jurors.

[46] One of the cases I reviewed was ***R v Kinkead*** 199 OJ No 1498 (Ont Sup Ct J). In that case, the Crown sought to introduce photos of the victims at the crime scene, autopsy photos and a video of the victims at the scene. The Defence sought exclusion arguing that some of it was marginally probative of the issues at trial, the photos were highly inflammatory and showed the nature of the wounds and blood. On that issue, LaForme J stated:

> **16** Prejudice to trial fairness does not arise solely because of the number of graphic photos, although it may no doubt be a factor. Conversely, one photo, in and of itself, might well give rise to the prejudice in issue. Moreover, the exercise, while not an easy one, is not to sanitize the commission of a ghastly and brutal crime. Rather, as I have said, it is to minimize the prejudice that may arise from the offering of otherwise probative evidence, where required.
>
> **17** All of the oral evidence in this trial will describe the brutality of this crime and the jury will know its nature. They will know there was a crime committed that resulted in a considerable amount of blood, damage and death to the two sisters. Indeed, they will know this probability exists when they hear Mr. Kinkead arraigned. In my view, and in my experience, juries are generally not surprised, horrified or inflamed to the point of hatred by the scenes they expect to see from a horrific crime. It is certainly true that we live in a time when communications are extraordinarily rapid, comprehensive and complete. The public is deluged with graphic accounts of horrible and dreadful news delivered both in orally pictorial detail assisted by visual depictions. Movies and television shows leave nothing to the imagination. While I would not go so far as to say the Canadian public is totally numb to violence and brutality, I have no hesitation in arriving at the conclusion that it is not always surprised or stunned by it. All of which is to say; I nonetheless continue to believe that we must remain cautious and accept that people can still be horrified and inflamed by what they see. Consequently this exercise continues to be necessary, however, any prejudice alleged must be based upon contemporary common sense and have an air of reality to it.
>
> **18** It is not sufficient, without proof, to allege a prejudice that is one of mere speculation or conjecture. As I said above, I am of the view that juries are intelligent,

> well meaning and conscientious citizens who take their oaths very seriously. Unless common sense or some other proof indicates the contrary, I believe that juries respect and abide by their sworn duties and comply with the instructions of the court.
>
> (***Kinkead*** at paras 16-18)

[47] I note that ***McLeod*** was considered in ***R v Ansari*** 2008 BCSC 1415 where McEwan J stated:

> **6** ***R. v. McLeod*** is authority for the proposition that photographs should include only those necessary to supplement the evidence of the pathologist. It is not authority for the proposition that words are an adequate substitute for photographs. The booklet the Crown intends to tender is admissible with one qualification. The most disturbing photograph is of a gaping neck wound (photo no. 5) that is depicted in at least one other photograph, albeit reduced in size. If the pathologist may adequately describe the nature and mechanism of that injury by reference to the smaller photograph he should do so.
>
> (***Ansari*** at para 6)

[48] In that case, the Crown argued that the graphic photographs were relevant to show the jury the nature and distribution of the deceased's wounds, which might shed light on the accused's state of mind which was the key issue at trial. Most of the photographs were allowed in that case, despite the fact that the accused admitted that he inflicted the wounds.

Conclusions

[49] Here, I am of the view that the tissue is real evidence on the key issue in the trial. It is in many ways better than the photographs of it taken during the autopsy. It is probative in assisting the pathologist in explaining the wounds suffered by the deceased, which is the key issue. It is the best evidence on that issue.

[50] Mr. Bottos has characterized probative value as a "2" and prejudicial effect as a "98". I disagree. While it is unnecessary for me to put a number on probative value, I will describe it as high probative – being highly relevant and material to the key issue.

[51] It was demonstrated on the *voir dire* as being of significant assistance in helping Dr. Dowling explain the wounds suffered by Ms. Gladue. His evidence using the tissue was more understandable than his evidence using the photos. I do not mean to criticize his evidence using the photos; but his evidence using the tissue was an improvement. The Crown is entitled to present its case in the most effective way it can, subject to achieving the necessary balance between probative value and prejudicial effect.

[52] As to the prejudicial effect of using the tissue, I recognize that there is a natural discomfort to the presence of a body part in court. It is perhaps unprecedented to present this type of evidence to a jury, at least in Canada. But the absence of precedent does not mean that it should not be done.

[53] This is an unusual case according to Dr. Dowling. He has been a forensic pathologist for 29 years and has conducted some 6,000 autopsies. He testified on *voir dire* that this is only the second case he has had involving pelvic injuries where he has actually removed the pelvic region

from the victim's body. He testified that he recognized at the outset, during the autopsy, that his conclusion was likely controversial. He testified that he viewed it as important that the tissue be preserved so that defence experts and the ultimate triers of fact might have the benefit of the tissue itself, which he described as being more helpful than photographs, at least to him as a pathologist.

[54] I recognize that this is a discretionary matter: ***Draper v Jacklyn*** [1970] SCR 92 (SCC). I am mindful of my responsibility to guard the accused's rights to a fair trial. However, the onus of proving that the prejudicial effect of introducing the tissue outweighs the probative value of its introduction is on the accused. I am not satisfied they have met that burden.

[55] The potential for prejudice is speculative. The jury has already been exposed to highly disturbing photos of Ms. Gladue in the bathtub and of the bathroom. It will be exposed to autopsy photos which, in my view, having seen Dr. Dowling's evidence on *voir dire* using the tissue, are more disturbing and unsettling than the more scientific and impersonal appearance of the preserved tissue. I know that reflects my own observations. As argued by Mr. Bottos, I may have been somewhat hardened to disturbing sights by virtue of my law practice and my experiences on the bench. That may be true, but many judges have observed that we should not underestimate the intelligence and sophistication of jurors, and exclusionary rules relating to jurors' sensibilities were developed at a gentler time in our history.

[56] Undoubtedly, some jurors may be upset by the presence of the tissue in the courtroom. I fail to see, however, that its presence is likely to have the effect of distracting them from their duty to dispassionately and impartially consider the evidence in this case, or that it may inflame them against Mr. Barton. These possibilities appear to me to be remote, and I would frankly be more worried about the photos which have already been shown to the jury and which are already exhibits in this case.

[57] I am satisfied from Dr. Dowling's evidence that there are no concerns about the continuity of the tissue.

[58] I am also satisfied that the tissue has been preserved in a way that allows it to be viewed in substantially the same manner as the tissue was during the autopsy. I realize that it is paler, having been bleached by the formalin to some extent. That, in reality, lessens the graphic nature of its appearance. It is also different in character, having been hardened by the formalin treatment and preservation. Dr. Dowling's evidence, which I accept, was that the tissue was preserved in an acceptable manner and that the tissue in its preserved state allows him to describe everything relevant to his observations and conclusions, as well as to allow other experts to do the same thing.

[59] The change in texture is something that should be pointed out to the jury early in Dr. Dowling's testimony when he begins to use the tissue so the jury is not misled in any way that the texture of the tissue, as it is now, reflects the texture and pliability of the tissue while Ms. Gladue was alive.

[60] As a result, I will allow Dr. Dowling to use the tissue during his evidence at trial. It is not necessary for the jury to see the tissue other than on the screen so I will direct Dr. Dowling to testify when he is using the tissue from the side of the courtroom that is opposite the jury, and to be shielded by a screen.

[61] It is also important that the tissue be kept in Dr. Dowling's possession when not in court, as it is intended to be shown to Defence experts. It should be preserved appropriately until this matter (including all appeals, if any) have been finally disposed of.

[62] It would be my intention to mark it as an exhibit for identification purposes only.

[63] I am grateful to counsel for their thorough and expedient work on this difficult issue.

Concluding Remarks

[64] I echo Justice Williams' comments in ***Pickton***, where he stated at para 9:

> Leading expert or technical evidence in a jury trial is quite often a very different matter. The evidence must be developed in a manner that is detailed and eminently understandable. The fact that the triers of fact are lay persons must be recognized and allowances made. A party is entitled to present its case in a way that can be fully comprehended by the jurors. If that involves a reliance on illustrative material to enhance understanding, that seems to me to be in order. Obviously, the court must take care to ensure that the presentation of the case does not descend into an over-exposing of the jury to graphic evidence, particularly where it is likely to engender strong reactions; a concern for balance and the efficient use of court resources dictates that. However, in my view, the obligation to manage a proper balance should not entail unduly restricting a party from putting evidence before the jury that is reasonably necessary to facilitate a fair understanding of the case.

[65] Use of the tissue here, in the manner proposed by the Crown, reasonably satisfies these objectives.

Heard on the 25th day of February, 2015.
Dated at Edmonton, Alberta, this 10th day of March, 2015.

Robert A. Graesser
J.C.Q.B.A.

Appearances:

C.A. Downey
C.D. Godfrey
for the Crown

D. Bottos
E. McIntyre
for the Accused