

IN THE MATTER OF THE COMMISSION OF INQUIRY  
RESPECTING THE DEATH OF DONALD DUNPHY

**Ruling 3: On Application to Call Psychiatric Expert**

**re Attention, Perception and Memory Distortions following Officer-Involved Shootings and  
re Memory Retrieval following a Deadly Force Encounter**

Constable Joseph Smyth applies for leave to call Dr. Peter Collins, a forensic psychiatrist, to give opinion evidence regarding “the psychological effects of [sic: on?] officers during a shooting event and the aftermath of an officer-involved shooting incident.”

Donald Dunphy was shot and killed in his residence by Cst. Joseph Smyth on April 5, 2015, after Mr. Dunphy allegedly pointed a 22 rifle at the police officer.

During Cst. Smyth’s testimony at the Inquiry issues were raised as to alleged inconsistencies and discrepancies arising from his various police statements concerning what had occurred in the Dunphy residence on the date in question, including:

- descriptions of the event itself;
- the time frames involved;
- the placement of the rifle;
- how he identified himself; and
- his forgetting of attempted calls to Mr. Dunphy

Cst. Smyth seeks to have Dr. Collins testify as to how the effect of stress and trauma on a police officer might explain any alleged inconsistencies and discrepancies.

The question also arose whether Cst. Smyth had been given preferential treatment on the night of the shooting by being allowed to meet with RNC officers and to postpone giving a statement. Various police officers testified they understood that the best time for obtaining an accurate and complete statement from an officer involved in a shooting is at least 24 hours after the event.

Cst. Smyth seeks to have Dr. Collins explain why valid reasons relating to the impact upon memory recall justified a delay in taking a statement from Cst. Smyth, without this resulting in preferential treatment for him. On February 27, I rejected the application for expert evidence, with reasons to follow. These are my reasons:

### **Attention, Perception and Memory Distortions**

Dr. Collins has had extensive involvement in providing expert consultation and testimony in cases of officer-involved deaths. His report of February 21, 2017, which Cst. Smyth wishes to enter into evidence, describes how our brains tend to screen, filter and distort what we were looking at, particularly when we are intently concentrating. Dr. Collins writes:

When human beings are forced to make quick decisions, in response to sudden threats, their attention tends to become very narrowly and externally focused on the perceived threat. [See his opinion, attached as Appendix A].

If called upon, he would testify that individuals, in a high threat situation, “devote their attention to a particular object and tend not to notice unexpected objects”.

In his opinion he would describe how individuals when threatened are subjected to cognitive arousal, leading to perceptual narrowing, especially if a weapon is involved. This “weapons focus effect” is “a biologically mediated, automatic reaction to a traumatic event in

order to focus on that which is most salient to survival”. Attention is directed to a weapon, during the violent event, at the expense of other details.

Dr. Collins refers in his report to a survey by A. Artwohl, *Perceptual and Memory Distortion During Officer-Involved Shootings*: FBI Law Enforcement Bulletin (2002), 71(10), pp. 18-24. A majority of those surveyed felt the incident transpired in slow motion but others thought time sped up. Hearing and vision were affected differently. Officers responded to the threat not with “conscious thought” but, rather on “autopilot”. Most say they responded automatically to the perceived threat and that their training just automatically “kicked in” without thinking about it.

### **Memory Retrieval**

On delaying statements for memory retrieval, Dr. Collins notes the practice varies. Ontario and Alberta normally seek interviews with “witness” as opposed to “subject” officers who it is not possible to compel, within 24 hours. But ASIRT says its preference is to interview witness officers as soon as possible. Also the International Association of Chiefs of Police may ask for pertinent information soon after a shooting and allow recovery time before a full formal statement.

### **The Applicable Law**

This is my second ruling in this Inquiry on the admissibility of expert evidence. Since my decision on February 13, 2017, to refuse admission of an expert report by a biomedical engineer, the Supreme Court of Canada has rendered another decision on the admissibility of expert evidence. In *R. v. Bingley*, 2017 SCC 12, the Court confirmed the criteria of *R. V. Mohan*, [1994]

2 S.C.R. 9 and *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23, applied in my first decision, and allowed the testimony of a “drug recognition expert” certified under a statutory scheme.

At paragraph 13 in *Bingley*, the Court cautioned against permitting trials to devolve into a battle of experts and stressed that the trier of fact must maintain the ability to critically assess the evidence. The Court noted that the trial judge “acts as gatekeeper to ensure that expert evidence enhances, rather than distorts, the fact-finding process”.

The Court in *Bingley*, at paragraph 14, confirmed that expert evidence analysis is divided into two stages:

“First, the evidence must meet the *Mohan* factors: (1) relevance; (2) necessity; (3) absence of an exclusionary rule; and (4) special expertise. Second, the trial judge must weigh potential risks against the benefits of admitting the evidence: *White Burgess*, at para. 24.”

In the present case the main elements to be considered are relevance, necessity and probative value. In *R. v. Myrie*, [2003] O.J. No. 1030 (Sup. Ct.), the defence sought to have admitted expert evidence by a professor of psychology on the frailties of eye witness identification. One of the factors to be discussed was “weapon focus” and how factors such as this affect the validity and reliability of eyewitness identification. MacKenzie J., at para. 24, quoted from *Mohan* regarding the cost benefit analysis involved in assessing probative value versus prejudice:

Cost in this context is not used in [a] traditional economic sense but rather in terms of its impact on the trial process. Evidence that is otherwise logically relevant may be excluded on this basis, if its probative value is overborne by its prejudicial effect; if it involves an inordinate amount of time which is not commensurate with this value or if it is misleading in the sense that its effect on the trier of fact; particularly a jury, is out of proportion to its reliability: p. 411.

MacKenzie J. concluded that the proposed expert evidence was neither relevant nor necessary since the expert would not be testifying to matters that are outside the normal experience of the triers of fact but rather reminding the jury of their normal experience that all witnesses have problems in perception and recall with respect to what occurred during any given circumstance that is brief and stressful.

Another decision worthy of note for present purposes is *Dalla Lana v. University of Alberta*, 2013 ABCA 327, leave to appeal to the SCC refused [2013] S.C.C.A. No. 483. There a majority upheld the decisions of a University Appeal Board and a lower court not to admit the evidence of Dr. Collins, the same expert put forward in the present matter, in a case of alleged sexual assault by a student in residence. In the will-say statement of Dr. Collins he stated “in my professional opinion the case has the hallmarks of a false complaint”. Dr. Collins had never examined the complainant. The Court of Appeal concluded there had been no procedural unfairness in refusing to admit the evidence of Dr. Collins.

## **Analysis**

Let us consider the purposes for which the opinion of Dr. Collins might be considered:

1. Attention, perception and memory distortions

(a) *To help understand why Cst. Smyth fired four shots in quick succession.*

The uncontradicted evidence already before the inquiry is that Cst. Smyth’s training kicked in when he saw the rifle and he went on “autopilot”, firing two shots at Mr. Dunphy’s centre mass and two at his head when he perceived that Mr. Dunphy continued to pose a threat. It is not feasible to train police officers to shoot to wound only, in high stress situations where

their lives are in danger from a weapon levelled at them. Other witnesses have confirmed this is what RNC members and many other police forces are taught in use-of-force training and this is confirmed by the RNC training manual. The evidence of Dr. Collins is not necessary and to admit it would delay the Inquiry while other parties considered whether they need to call expert evidence.

*(b) To understand why the time frames alleged by Cst. Smyth between the time he saw the rifle and the time the shooting ended varied somewhat in his statements.*

I have dealt with the time frames generally in my first decision regarding the biomedical expert. The minimum and maximum times alleged ranging from two to six seconds are clear, I do not need expert evidence to understand why uncertainty regarding the time frames might exist when split-second decisions are being made.

*(c) To help understand why Cst. Smyth in the re-enactment could not recall the Rubbermaid tub upon which the rifle allegedly came to rest after the shooting and initially recalled the barrel of the rifle pointing up instead of down.*

Cst. Smyth admits his memory is inadequate regarding the presence of the tub and the way the rifle was pointed. Expert evidence explaining why his memory might have been faulty will not help to establish the actual position of the rifle, which is the issue for consideration. The evidence is not necessary, therefore, in the sense adopted in *Mohan*.

*(d) Whether or not Cst. Smyth identified himself with his rank (Acting Sergeant) or just as “Joe Smyth”.*

This does appear to be an inconsistency but Cst. Smyth in his testimony did not claim it resulted from memory distortion. He said he remembered not using his title to try and build rapport with Mr. Dunphy. I have not been shown how expert evidence on the frailties of memory would help resolve this discrepancy.

*(e) Why Cst. Smyth might have forgotten initially to tell investigators he had attempted four calls to Mr. Dunphy shortly before his visit to Mr. Dunphy’s brother’s residence.*

The proposed expert evidence might assist in establishing this could be due to Cst. Smyth’s memory failure following the stress of the incident but the minimal probative value is outweighed by the probable delay in the Inquiry from the admission of the evidence.

Generally, it appears that the opinion of Dr. Collins is being put forward to enhance the credibility of Cst. Smyth in some areas where his statements have been inconsistent or somewhat inaccurate. For the most part these inaccuracies or inconsistencies have been relatively minor and no more than one with common sense would expect from anyone following a traumatic incident such as occurred here. Keeping in mind that it is my task to ultimately determine the credibility of Cst. Smyth, I am not persuaded that the expert evidence on memory distortion will add anything significant in this regard. The expert evidence is not necessary and it should not be admitted. See *Bingley* and *White Burgess*. Again, any probative value is minimal and outweighed

by the significant prejudice resulting from delay. I am influenced also by the caution in *Bingley* against having the process devolve into a battle of experts.

## 2. Memory Retrieval

Several police officers have testified they have seen authoritative articles which recommend waiting from 24 to 72 hours before taking a statement from police officers who have been involved in a shooting or other traumatic event.

The RNC training manual refers to “post-incident amnesia and allowing for a healthy night’s sleep” in order to permit the greatest and most “pure” memory recall. The report of Dr. Collins noted that in Alberta the preference is to interview witness officers as soon as possible, in Ontario generally they do this within 24 hours, and the International Association of Chiefs of Police suggests “while many officers be asked to provide pertinent information soon after a shooting to aid the initial investigative process, whenever feasible, officers should have some recovery time before providing a full formal statement”. It appears that Dr. Collins is accepting that a mainstream consensus does not exist on this point. This process is not one which fits within the time provided for this Inquiry. I note that this is not a case where the police officer was in shock to the extent noted in the literature provided by Dr. Collins. For example, the article by R. Edward Geiselman, Rest and Eyewitness Memory Recall (2010), 28 Amer. J. of Forensic Psychology, Issue 2, page 1 refers to witnesses in apparent shock, incoherent, sweating or pacing and recommends that decisions to delay their statements be made on a case-by-case basis, with a preliminary brief interview followed by a later full investigative interview. Cst. Smyth appeared pale, withdrawn and shaky but considered himself capable of doing an interview.



In any event, Cst. Smyth was given approximately 24 hours to make his statement. Dr. Collins' opinion on this is not necessary in Cst. Smyth's situation. The opinion may be helpful in this Inquiry's second phase of recommending policy changes, should I decide it would be beneficial to mandate when statements should be taken. But for now, I do not need to know why it may have been a good thing in terms of accuracy of detail to have had Cst. Smyth's statement delayed. It may be that further psychiatric information will have to be obtained by government to determine what the best practice should be in the timing of statements.

On the relevance of this evidence to the question of whether Cst. Smyth received preferential treatment on when his statement was taken, this is not a material fact because Cst. Smyth, as a "subject" officer, involved in the shooting and not merely a witness, could not be compelled to give a statement if he did not consent. This is a matter requiring public education on the law involved, something which Dr. Collins would not address but which this Inquiry Report might address.

### **Disposition**

For the reasons set out above, the application to call Dr. Collins is dismissed.



Leo Barry  
Commissioner

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