

## **APPLICATION TO CALL EXPERT EVIDENCE**

The RNC, Cst. Smyth and the RNCA wish to call 2 experts: one in relation to threat assessment, specifically in units such as the PSU; and another, a psychiatrist, in relation to the impact of an officer shooting on the officer's "memory" and perception, both in the moment and afterwards.

As required, counsel divided up the issues and Avis initially took the lead with respect to the psychiatrist's opinion and Kennedy with respect to the threat assessment expert.

### **Notice**

Kennedy first wrote inquiry counsel on 2 November 2016 regarding the need for a threat assessment expert requesting that they consider Inspector Mark Beaulieu, a specialist in that area.

The expert who Kennedy had suggested turned out to be a former instructor of Smyth and inquiry counsel did not pursue the matter for that reason. (See transcript: 16 February 2017, p.72)

Avis mentioned during and after the interview of Supt. Jason Sheppard that a "memory" expert may be necessary but did not pursue the matter with inquiry counsel after that and this was not any kind of formal notice.

Oral notice was given by Avis during the hearings prior to 16 February 2017 and again on 16 February 2017 (p.73, transcript. Still looking for the first time it was mentioned.)

On the first occasion Avis indicated that the RNC were waiting for the use of force expert report since the Commissioner advised that the commission's expert report may cover the issues of concern. A similar discussion took place on the 16 and again on 24 February, and on both occasions the Commissioner indicated that perhaps we should wait.

On 24 Feb Avis, however, pointed out that we felt we could not afford to wait since if we had waited until after the commission's expert report is filed and/or the expert's testimony, this would definitely could or would result in a delay in the completion of the hearings. This is why Kennedy and Avis began pursuing the opinions in early February having then decided that Kennedy would pursue the psychiatric opinion and Avis would pursue the threat assessment expert.

It has been stated that these applications are late in the day but, with respect, the same is true of the commission's expert opinions. The fairer view, it is respectfully submitted, is that in order to meet the inquiry schedule deadline both inquiry counsel and counsel with standing have done their best to obtain their reports in a timely manner. In particular Avis and Kennedy were waiting for the commission's reports, as suggested and/or directed by the Commissioner, but moved on

them so as not to cause any delay in the hearing schedule. Under the circumstances, there has been no delay.

Avis is responsible for a 7 to 10 day delay in (mis)communicating with the OPP and could have had the report perhaps a week earlier. If this is an issue, Avis is fully responsible for this delay. However, as noted above, there is not really any delay here.

Whatever issues that may arise as a result of the expert reports coming towards the end of the hearings, apply to both the commission's expert reports as well as those proposed on behalf of the RNC, RNCA and Smyth.

The remainder of this application/argument will refer only to the threat assessment expert.

### ***Relevance***

No less than five of the ten terms of reference apply directly to what Smyth did from the time he received the tweet of concern to the moment he arrived at Dunphy's door the second time, namely his threat assessment. (Terms 3(1)(b), (c), (d), (e) and (h)) This highlights the importance of the threat assessment and the degree of public concern.

Term 3(2)(a) speaks of "the need to maintain public confidence in law and order."

Everyone who has been asked regarding Smyth's threat assessment has fully supported his actions but all of them, except for Tom Mahoney, are members of the RNC or the RCMP. A significant issue before the commission is police investigating police and in order to instil the necessary public confidence some objective evidence on the issue is necessary.

Simmonds and Flaherty have raised and continue to raise the issues surrounding Smyth's threat assessment with every witness they can and, in keeping with their instructions, raise concerns with respect to his actions. Inquiry counsel have also done so from the perspective of representing the public viewpoint.

Inquiry counsel have been asking a number of witnesses for their opinion on the future of the PSU and how it should be run, and the witness proposed would be able to address this issue as well.

The expert will also be able to answer questions regarding how the PSU functioned at the time of the shooting.

### ***The Need for Expert Opinion***

Inquiry counsel has been asking throughout the hearings for the police officer's opinions on this issue which, by implication, indicates the need for opinion evidence.

The protocol in the PSU is that it is the officer's responsibility to ascertain whether or not there is a concern that needs to be assessed, and what the level of threat and risk is. This requires training, experience and expertise in an area that is beyond the average layperson's knowledge.

### *Expert and Field of Expertise*

The proposed expert is OPP Staff Sergeant Patrick Lenehan of JOPIS (Justice Officials Protection and Investigation Section). Unfortunately S/Sgt Lenehan does not have a CV as such but is in the process of preparing one and assures me it will be ready by the end of the day and so it will be sent by tomorrow at the latest.

There is clearly a defined area of expertise in which Lenehan is able to give opinion evidence.

### *Methodology*

Lenehan was provided with an outline of proposed facts and asked to consider eight questions as he prepared his opinion. (See attachments) Avis recognizes that there are variations in the facts but that is what cross-examination is for and it is more Smyth's actions on that day that are at issue rather than what he discovered and based his actions on.

If the application is accepted, Avis will be providing Lenehan with materials for cross, such as the course on targeted violence, and any other document or exhibit proposed by any counsel.

### *Procedure*

Avis proposes that he lead Lenehan's evidence, which will hopefully assist inquiry counsel; and that direct should not take more than 30 to 45 minutes at the outside. A half day should be more than sufficient for his entire evidence since there are not that many questions to ask.

Lenehan is not available the week of 27 Feb but is available from then on. He sees no difficulty in appearing by phone.

### *Cost*

The RNC and Smyth both have the greatest interest **and** jeopardy of any party. All they are asking for is a one day out of some 45 days of hearings to introduce expert evidence they consider essential to both the Inquiries mandate and their clients' interests.

In this regard, it should be recognized that Avis and Kennedy have specifically divided their areas of mutual interest in order to reduce costs and hearing time, as has been done with these applications. Another example, one of many, is that Kennedy took the lead with respect to the RCMP investigation. As a result, Avis, who has a background in criminal law, homicide investigations and use of force, has not had to read any of the RCMP file with a few limited exceptions in order to prepare for his limited role, resulting in substantial savings in time and money.

Furthermore, the RNC in order to meet its disclosure obligations has required the full-time services of Wendy Zdebiak for some 7 months and the services of Kim Harding for just over half-time (on average). This is over 10 months of person hours at a cost of at least \$100,000. In addition each of the RNC members testifying have spent numerous hours assisting the inquiry with their disclosure and the overall disclosure provided by the RNC. This amount of time and money is still being expended on a daily basis.