IN THE MATTER OF THE COMMISSION OF INQUIRY

RESPECTING THE DEATH OF DONALD DUNPHY

Ruling 4: On Application to Exclude Portions of Joint Report of Dr. Terry G. Coleman and Sgt. Michael Massine

Cst. Smyth has applied to exclude Dr. Coleman's portion of a joint report he prepared with Sgt. Massine on the grounds that the report (a) exhibits lack of objectivity and bias towards Cst. Smyth; (b) comments negatively on Cst. Smyth's credibility (the ultimate issue for the trier of fact) and unduly denigrates Cst. Smyth's professional training and experience; (c) ventures significantly into an area outside of Dr. Coleman's expertise, as it relates to the conducting of a threat assessment in the context of the protection of public officials; and (d) uses inflammatory and prejudicial language of the type that should not be contained in the report of an independent, objective and impartial report. Cst. Smyth asks that if not totally excluded, portions of Dr. Coleman's report be redacted.

The Royal Newfoundland Constabulary (RNC) has applied to exclude portions of the joint report of Dr. Coleman and Sgt. Massine on the grounds that (a) Dr. Coleman is not qualified with respect to threat and risk assessment as performed by units such as the Protective Services Unit (PSU) and (b) in questioning and/or determining Cst. Smyth's credibility, Dr. Coleman and Sgt. Massine have usurped the function of the Commissioner in answering the ultimate issue.

On March 8, after preliminary discussions with counsel on March 6 and a brief filed on behalf of Cst. Smyth on March 7, I ruled that the most efficient way to proceed and the approach conforming with the case law was to defer a decision on the exclusion of Dr. Coleman's report

until after he and Sgt. Massine had been questioned on their qualifications. I would then decide, following counsels' submissions whether all or portions of the expert report should be excluded from evidence, or whether the opinions expressed should be left in and dealt with in terms of the weight to be afforded them.

Counsel for Cst. Smyth and counsel for the RNC accepted that this approach would be appropriate.

I made certain redactions to the report of Dr. Coleman before he testified, based on some of the concerns raised by counsel for Cst. Smyth and counsel for the RNC.

I reserved my decision in order to provide written reasons. These are those reasons:

The Experts' Qualifications: Dr. Coleman

Dr. Coleman is a retired Chief of Police from Moose Jaw and holds a Ph.D. in Police Studies from the University of Regina and a Master of Human Resource Management from the same university. He began his career as a police officer in 1969 with the Calgary Police Service and remained there until 1996, having achieved the rank of Inspector.

While with Calgary Police, Dr. Coleman established the Crisis Negotiation Team to help resolve situations without the use of force. He was the Commander of the Tactical Unit (SWAT), and involved in protecting the safety of police officers in serious situations that might require the use of force. He was the Crisis Negotiation Commander in a situation where a person who was upset about the handling of his Workers Compensation claim, fired a shot gun at an officer and held staff for several hours, a very tense situation which was ultimately successfully resolved by negotiation.

As Chief of Police, Dr. Coleman was responsible for the workplace safety of his personnel. He re-wrote policies and procedures, including those with regard to officer safety. He provided training and education for police officers in crisis negotiation to maximize not only their safety but that of the public. He was responsible for reviewing use-of-force incidents and addressing any lapses of officer safety either one on one with a police officer or in a larger de-briefing of an incident.

Dr. Coleman was acknowledged by retired Justice Iacobacci to have assisted in his review carried out for the Toronto Police Service in 2014 dealing with Police Encounters with People in Crisis. His work was also cited in the Report of the Fatality Inquiry Regarding the Death of Howard Hyde in Halifax, Nova Scotia, in 2010.

Dr. Coleman has written and published as well as presented extensively on police interaction with persons with mental illness. This includes de-escalation strategies to be employed by police, which in Dr. Coleman's view have broader application than in the mental health field. De-escalation techniques he believes are applicable in many different situations and are not unique to interactions with persons with mental health problems. De-escalation in Dr. Coleman's view is about communication skills to reach a resolution of crises covering a broad range of situations.

Commission counsel initially asked that Dr. Coleman be qualified to give opinion evidence regarding strategies and techniques to be employed by police in situations such as that encountered by Cst. Joseph Smyth in his interaction with Donald Dunphy, including appropriate de-escalation strategies and measures to be taken to ensure officer safety. Commission counsel later, after discussions with counsel, modified the submission and requested that Dr. Coleman be qualified to give opinion evidence regarding appropriate de-escalation strategies and measures to

be employed by police to ensure officer safety in situations such as that encountered by Cst. Smyth in his interaction with Donald Dunphy.

The Experts' Qualifications: Sgt. Massine

Sgt. Massine has been employed in law enforcement since 1987, including as a patrol officer, in plain clothes, in undercover operations, as a community liaison, on Emergency Response Teams, in major crime investigation, and in identification services, with the main focus on officer safety training. He holds a Master of Arts Degree in Leadership and Training from Royal Roads University and an Advanced Certificate in Police Leadership from Dalhousie University.

He is currently employed as the Police Academy Use of Force Coordinator at the Justice Institute of British Columbia – a position held since December 2014. In that position Sgt. Massine is responsible for curriculum development and delivery of the Standardized Use of Force Instructor Course, Fundamentals of Police Instruction. As well he acts as liaison for the Justice Institute with the Government of BC (Police Services Branch) relating to the creation of use of force related standards under the BC PSB relating to the creation of use of force related Standards under the BC Police Act. He also teaches in the Recruit Training Program, develops curriculum and delivers training for special projects as they arise.

Sgt. Massine has previously been qualified to provide expert opinion in court on Use of Force, use of various weapons, and excited delirium. In 2011, he provided expert opinion evidence at a coroner's inquest into an in-custody death in British Columbia pertaining to the Victoria Police Department's training program for excited delirium.

In 2008 he presented to the Braidwood Commission, which included an explanation of the National Use of Force Framework, and since June 2010 he has worked with the BC Ministry of Public Safety and Solicitor General to develop provincial standard training courses including Crisis Intervention and De-Escalation Techniques, which were mandated as part of the recommendations from the Braidwood Commission.

Sgt. Massine has written and published several articles on topics related to Police Use of Force and Use of Force Training of Police Officers He is currently chair of the Province of BC Use of Force Community of Practice which is a panel of twelve use of force coordinators from BC municipal police agencies. The mandate of that committee is to research best practices in officer safety training and to develop provincial training standards.

Sgt. Massine described his operational experience as including:

- Being shot at
- Having guns pointed at him
- Being threatened with other weapons as well

In one incident, his actions (non-firearm) were a factor in the death of a subject. He has also used all force options on the National Use of Force Model with varying degrees of force, specifically: Presence (plain clothes, patrol uniform, ERT), Communication (CID), Physical Control Soft/hard (various techniques), Intermediate Weapons (OC Spray, CS Gas, baton, CEW, Bean Bag rounds, Noise Flash Diversionary Devices), Lethal Force (non-firearm). He has drawn and presented his firearm (pistol and long gun) on several occasions but has never discharged it in the course of his duties.

Commission Counsel asked to have Sgt. Massine qualified to give expert opinion evidence on the use of force, including crisis intervention and de-escalation training and curriculum development, design and delivery as it relates to officer safety.

Background Information

On November 26, 2016, a letter of retainer was completed for Dr. Coleman. This read in part:

> **2. *Scope of Retainer***
>
> *Your mandate is to provide the following services to the Commission:*
>
> *(a) To review relevant documentation and evidence regarding the interaction between Donald Dunphy and Cst. Joseph Smyth leading up to Donald Dunphy's death and to provide your opinion regarding strategies and techniques to be employed by police in such situations. This would include provision of a written report.*
>
> *(b) To provide advice regarding such other matters, within your expertise, that may be identified by the Commission from time to time.*

Notice of the retainer of Dr. Coleman and his curriculum vitae were distributed to Counsel on December 7, 2016. Feedback was requested.

On December 28, 2016, Sgt. Massine was retained, with a mandate as follows:

> ***2. Scope of Retainer***
>
> *Your mandate is to provide the following services to the Commission:*
>
> *(a) To review evidence and documentation including policies, procedures, protocols and manuals of the Royal Newfoundland Constabulary related to*

> *use of force and to provide your opinion regarding issues related to use of force pertinent to the Commission's mandate. This would include provision of a written report and collaborating, as needed, with Dr. Terry Coleman.*

Similarly, counsel were notified of Sgt. Massine's retention and qualifications.

Counsel were aware of the qualifications of Dr. Coleman and Sgt. Massine since December. Counsel for Cst. Smyth had several discussions with Commission Counsel after receiving notification of the retainers of Dr. Coleman and Sgt. Massine and did not raise any concerns prior to receipt of the report. Counsel for the RNC and Cst. Smyth also attended a meeting of all counsel on January 4, 2017 and again no issue was raised with respect to the retention of the experts. No concern was expressed about these experts by any party until February 27, after receipt of their report. At that time counsel for the RNC gave notice the RNC would be challenging the qualifications of Dr. Coleman and Sgt. Massine because of their alleged lack of qualifications, because they allegedly determine ultimate issues and take issue with and/or determine Cst. Smyth's credibility, and because their report allegedly lacks objectivity and independence. Later counsel for the RNC restricted the challenge of qualifications to Dr. Coleman. Counsel for Cst. Smyth gave similar notice with respect to a challenge related to Dr. Coleman only.

The Applicable Law

Cst. Smyth seeks to have the expert report of Dr. Coleman excluded at the qualification stage, arguing that, as decided in *White Burgess Langille Irman*, 2015 SCC 23, [2015] 2 S.C.R. 182 ("*White Burgess*"), at paragraphs 40 and 45, the objectivity, independence and impartiality of an expert bears not just on the weight but also on the admissibility of the evidence.

Cromwell J. in *White Burgess*, at para. 46, makes it clear, however that the threshold requirement of recognizing a duty to the court that overrides their obligation to the party calling them is “not particularly onerous”. If the proposed expert attests that he or she is able and willing to comply with the expert’s duty to the court, the admissibility threshold is met. The burden then shifts to the party opposing admission to establish “a realistic concern” that the expert is unable or unwilling to comply with the duty. See *White Burgess*, at para. 48.

It is helpful at this stage to set out a complete review of the principles recently confirmed by the Supreme Court of Canada on the matter of excluding an expert’s testimony at the qualifications stage for lack of objectivity, independence, and impartiality, as opposed to dealing with the issue of admissibility after finding the witness otherwise qualified or admitting and treating any frailties as going to weight.

I will first give a summary of applicable issues and then examine the case law in more detail.

In *White Burgess*, the Supreme Court of Canada confirmed the following principles applicable to the admissibility of expert evidence:

- Admissibility of expert opinion evidence is governed by the four part test in *R. v Mohan*, [1994] 2 SCR 9: (a) relevance, (b) necessity in assisting the trier of fact, (c) absence of an exclusionary rule, and (d) a property qualified expert;

- An expert has a duty to the Court to be impartial, independent, and unbiased;

- A lack of objectivity can go to the admissibility of the expert evidence, but more commonly it will merely go to weight;

- At the admissibility stage, the objectivity of the expert should be examined under the final part of the *Mohan* test: “a properly qualified expert”;

- After an expert attests that he or she accepts the duty to the court, then the party challenging admissibility has a burden to raise a “realistic concern” that the expert is unable or unwilling to comply with that duty;

- If a realistic concern is raised, then the burden shifts back to the party seeking to rely on the expert evidence to establish on a balance of probabilities that the expert is capable of complying with his or her duty to the court;

- The threshold test for admissibility is "not particularly onerous", and it will be "quite rare" and only in "very clear" cases that expert evidence will be completely inadmissible and excluded at the threshold stage;

- Anything less than clear unwillingness or inability on the part of proposed expert to provide the court with fair, objective and non-partisan evidence should not lead to exclusion.

- If the evidence meets the threshold requirements of admissibility, then the court must still exercise its gatekeeper function and balance the potential risks and benefits of admitting the evidence. At this 'stage', the scope of expert evidence might also be circumscribed to minimize any lingering concerns about the proposed expert testimony.

- Once the threshold for admissibility has been met, the trial judge must still take into consideration the expert's independence and impartiality in weighing the evidence.

In exercising its gatekeeper function and balancing the potential risks and benefits of admitting the evidence, the court must consider the degree to which the opinion evidence is relevant, necessary, reliable, and unbiased, as well as any risk that the evidence will be confusing, prejudicial, or too time consuming: *White Burgess*, paras 23-25 and 54.

In *White Burgess,* Cromwell J. speaking for the Court explained the nature of an expert's duty to the court as follows:

> [27] One influential statement of the elements of this duty are found in the English case *National Justice Compania Naviera S.A. v. Prudential Assurance Co.*, [1993] 2 Lloyd's Rep. 68 (Q.B.). Following an 87-day trial, Creswell J. believed that a misunderstanding of the duties and responsibilities of expert witnesses contributed to the length of the trial. He listed in *obiter dictum* duties and responsibilities of experts, the first two of which have particularly influenced the development of Canadian law:
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> 1. Expert evidence presented to the Court should be, and should be seen to be, <u>the independent product of the expert uninfluenced as to form or content by the exigencies of litigation</u>…
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> 2. An expert witness should provide independent assistance to the Court by way of <u>objective unbiased opinion</u> in relation to matters within his [or her]

> expertise….An expert witness in the High Court should never assume the role of an advocate. [Emphasis added; citation omitted; p. 81.]
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> (These duties were endorsed on appeal: [1995] 1 Lloyd's Rep. 455 (C.A.), at p. 496.)
>
> [32] Underlying the various formulations of the duty are three related concepts: impartiality, independence and absence of bias. The expert's opinion must be impartial in the sense that it reflects an objective assessment of the questions at hand. It must be independent in the sense that it is the product of the expert's independent judgment, uninfluenced by who has retained him or her or the outcome of the litigation. It must be unbiased in the sense that it does not unfairly favour one party's position over another. The acid test is whether the expert's opinion would not change regardless of which party retained him or her….

Issues with an expert's ability to carry out its duty to the court can be addressed at the admissibility stage:

> [45] Following what I take to be the dominant view in the Canadian cases, I would hold that **an expert's lack of independence and impartiality goes to the admissibility of the evidence in addition to being considered in relation to the weight to be given to the evidence if admitted**. That approach seems to me to be more in line with the basic structure of our law relating to expert evidence and with the importance our jurisprudence has attached to the gatekeeping role of trial judges. Binnie J. summed up the Canadian approach well in *J.-L.J.*: "The admissibility of the expert evidence should be scrutinized at the time it is proffered, and not allowed too easy an entry on the basis that all of the frailties could go at the end of the day to weight rather than admissibility" (para. 28).
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> [46] I have already described **the duty owed by an expert witness to the court: the expert must be fair, objective and non-partisan. As I see it, the appropriate threshold for admissibility flows from this duty**. I agree with Prof. (now Justice of the Ontario Court of Justice) Paciocco that "the common law has come to accept . . . that expert witnesses have a duty to assist the court that overrides their obligation to the party calling them. If a witness is unable or unwilling to fulfill that duty, they do not qualify to perform the role of an expert and should be excluded": "Taking a 'Goudge' out of Bluster and Blarney: an 'Evidence-Based Approach' to Expert Testimony" (2009), 13 Can. Crim. L.R. 135, at p. 152 (footnote omitted). **The expert witnesses must, therefore, be aware of this primary duty to the court and able and willing to carry it out.**

The expert's testimony accepting the duty will generally be sufficient to establish that the admissibility threshold is met (absent challenge). If there is a challenge, then the burden shifts to

the party opposing admission of the evidence to establish a "realistic concern" that the expert is unable or unwilling to comply with the duty to the court. If the party challenging admissibility raises a realistic concern, then the burden shifts back to the party seeking to rely on the expert evidence to establish on a balance of probabilities that the expert is capable of complying with his or her duty to the court.

Although the Court did not define what constitutes a "realistic concern", it gave some examples (including 'becoming an advocate'). A high standard was set for complete exclusion of expert evidence (para. 49):

> [49] **This threshold requirement is not particularly onerous and it will likely be quite rare that a proposed expert's evidence would be ruled inadmissible for failing to meet it. The trial judge must determine, having regard to both the particular circumstances of the proposed expert and the substance of the proposed evidence, whether the expert is able and willing to carry out his or her primary duty to the court**. For example, it is the nature and extent of the interest or connection with the litigation or a party thereto which matters, not the mere fact of the interest or connection; the existence of some interest or a relationship does not automatically render the evidence of the proposed expert inadmissible. In most cases, a mere employment relationship with the party calling the evidence will be insufficient to do so. On the other hand, a direct financial interest in the outcome of the litigation will be of more concern. The same can be said in the case of a very close familial relationship with one of the parties or situations in which the proposed expert will probably incur professional liability if his or her opinion is not accepted by the court. **Similarly, an expert who, in his or her proposed evidence or otherwise, assumes the role of an advocate for a party is clearly unwilling and/or unable to carry out the primary duty to the court**. **I emphasize that exclusion at the threshold stage of the analysis should occur only in very clear cases in which the proposed expert is unable or unwilling to provide the court with fair, objective and non-partisan evidence. Anything less than clear unwillingness or inability to do so should not lead to exclusion, but be taken into account in the overall weighing of costs and benefits of receiving the evidence.**

With respect to situating the analysis within the *Mohan* framework, the Court clarified, at paragraph 53 that concerns related to the expert's duty to the court and his or her willingness and capacity to comply with it are best addressed initially in the "qualified expert" element.

Cromwell J. noted that “Situating this concern in the ‘properly qualified expert’ ensures that the courts will focus expressly on the important risks associated with biased experts”.

Finally, it was noted that, if the threshold requirements for admissibility are met, there then follows a second discretionary gatekeeping step where a judge must decide whether the expert evidence is sufficiently beneficial to the trial process to warrant its admission despite any potential harm or prejudice that may result:

> [54] Finding that expert evidence meets the basic threshold does not end the inquiry. Consistent with the structure of the analysis developed following *Mohan* which I have discussed earlier, the judge must still take concerns about the expert’s independence and impartiality into account in weighing the evidence at the gatekeeping stage. At this point, relevance, necessity, reliability and absence of bias can helpfully be seen as part of a sliding scale where a basic level must first be achieved in order to meet the admissibility threshold and thereafter continue to play a role in weighing the overall competing considerations in admitting the evidence. At the end of the day, the judge must be satisfied that the potential helpfulness of the evidence is not outweighed by the risk of the dangers materializing that are associated with expert evidence.

At the ‘gatekeeper’ stage of the analysis, which requires the judge to balance the potential risks and benefits of admitting the evidence, the scope of the expert’s testimony can be circumscribed to manage any lingering concerns (including about impartiality), see *Ps International Canada Corp. v Palimar Farms Inc.*, 2016 SKQB 23:

> [36] The judge’s function as gatekeeper is of particular importance. Part of the gatekeeper function includes carefully identifying and delineating the scope of expertise within which the witness will be permitted to give opinion evidence. In *Vigoren v Nystuen*, 279 Sask R 1, the Court of Appeal described the importance of properly identifying the scope of the witness’ expertise at para. 67:
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>> 67 In recent years, this Court and the Supreme Court of Canada have consistently underlined the need for trial judges to carefully assess and identify the scope of the expertise of an expert witness in advance of him or her testifying. For example, in *Parker v. Saskatchewan Hospital Assn.*, [2001] 7 W.W.R. 230 (Sask. C.A.), Cameron J.A. stated as follows at para. 112:

> Again, this ties in with the need to carefully qualify expert witnesses before they testify. All reasonable efforts should be made to ensure they are qualified neither too narrowly nor too widely. This may entail enquiry into the nature and extent of the opinions to which they propose to testify. While care at the qualification stage is especially important in jury cases, it remains of considerable importance in non-jury cases as well. A rigorous approach at this stage can avoid difficulty, especially the difficulty posed by the potential reception of opinion evidence that transcends the scope of expertise of the witness. Strictly speaking such evidence is not admissible, and its admission can be troublesome.

See also: *R. v. Mohan*, [1994] 2 S.C.R. 9; *R. v. J.-L.J.*, [2000] 2 S.C.R. 600.

This was the approach taken in *Anderson v. Canada (Attorney General)*, 2015 CanLII 63429 (NL SCTD), where Canada argued that the proposed expert, who was intended to provide evidence on the history of Newfoundland and Labrador, should not be qualified to give expert testimony because he was 'unable to provide fair, objective and non-partisan assistance to the Court'. In considering the objection raised by Canada, Stack J. identified and applied the principles set out in *White Burgess* (paras. 24 – 29):

> [24] In *White, [Burgess*] the Supreme Court of Canada has held that the impartiality, independence and absence of bias of a proffered expert witness go to his qualifications to provide the intended evidence to the court. At paragraph 2, Cromwell, J. says:
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>> [2] Expert witnesses have a special duty to the court to provide fair, objective and non-partisan assistance. A proposed expert witness who is unable or unwilling to comply with this duty is not qualified to give expert opinion evidence and should not be permitted to do so. Less fundamental concerns about an expert's independence and impartiality should be taken into account in the broader, overall weighing of the costs and benefits of receiving the evidence.
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> [25] At paragraph 53, Cromwell, J. confirms that concerns about the duty of the expert witness to be impartial, independent and without bias should be addressed in assessing whether the proffered witness is a properly qualified expert:
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>> [53] In my opinion, concerns related to the expert's duty to the court and his or her willingness and capacity to comply with it are best addressed

> initially in the "qualified expert" element of the *Mohan* framework… A proposed expert witness who is unable or unwilling to fulfill this duty to the court is not properly qualified to perform the role of an expert. Situating this concern in the "properly qualified expert" ensures that the courts will focus expressly on the important risks associated with biased experts ….
> [Citations omitted.]

[26] Before we examine Canada's specific concern, let us review in more detail the duties of impartiality, independence and lack of bias that an expert witness owes to the Court.

Experts' Duties to the Court

[27] Many Canadian jurisdictions have explicit rules governing the roles and duties of expert witnesses. This province does not. Consequently, the common law principles prevail (*White [Burgess]* at paragraph 31). Cromwell, J. sets out the applicable concepts in paragraph 32:

> [32] Underlying the various formulations of the duty are three related concepts: impartiality, independence and absence of bias. The expert's opinion must be impartial in the sense that it reflects an objective assessment of the questions at hand. It must be independent in the sense that it is the product of the expert's independent judgment, uninfluenced by who has retained him or her or the outcome of the litigation. It must be unbiased in the sense that it does not unfairly favour one party's position over another… These concepts, of course, must be applied to the realities of adversary litigation. Experts are generally retained, instructed and paid by one of the adversaries. These facts alone do not undermine the expert's independence, impartiality and freedom from bias.

[28] The proffered expert is duty-bound to be independent, impartial and unbiased. **How is the expert's adherence to these duties tested?** At the first instance by reliance on the expert himself. Mr. Cuff has stated in the covering letter to the Narrative Report:

> I acknowledge that it is my duty to provide evidence in relation to these proceedings that is fair, objective and non-partisan, that is only related to my area of expertise and to provide additional assistance to the court as may be required. I acknowledge that these duties prevail above and over any obligations which I may owe to any party by whom I have been engaged.

[29] Thus, Mr. Cuff has attested to his duties to the Court. This could be enough to meet the threshold for admissibility. As stated in *White* [Burgess] at paragraphs 48 and 49:

> [48] Once the expert attests or testifies on oath to this effect, the burden is on the party opposing the admission of the evidence to show that there is a realistic concern that the expert's evidence should not be received because the expert is unable and/or unwilling to comply with that duty. If the opponent does so, the burden to establish on a balance of probabilities this aspect of the admissibility threshold remains on the party proposing to call the evidence. If this is not done, the evidence, or those parts of it that are tainted by a lack of independence or by impartiality, should be excluded. This approach conforms to the general rule under the *Mohan* framework, and elsewhere in the law of evidence, that the proponent of the evidence has the burden of establishing its admissibility.
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> [49] This threshold requirement is not particularly onerous and it will likely be quite rare that a proposed expert's evidence would be ruled inadmissible for failing to meet it […]
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> [Emphasis added by Stack J.]

The concern identified by Canada was that the expert was potentially "unable or unwilling to provide the Court with fair, objective and non-partisan evidence" because he had assumed the role of an advocate. Evidence included an e-mail where the expert referenced part of his task as being to find 'evidence which points to the liability of the Government of Canada'. It was explained that this was meant in a joking manner. Although Justice Stack had a 'concern', he did not rule the expert testimony inadmissible (paras. 36-40):

> [36] In assessing whether Mr. Cuff's evidence should be ruled inadmissible, I am to have regard to both his particular circumstance and the substance of his proposed evidence (*White [Burgess]* at paragraph 49). Notwithstanding the email referred to above, opposing counsel has not established that Mr. Cuff is, in fact, biased, or that he is acting as an advocate for the Plaintiffs. Canada has not pointed to anything in Mr. Cuff's background or to anything specific in the Narrative Report itself to establish that Mr. Cuff is unable or unwilling to discharge his duties to the Court. In this case, I am satisfied that there are sufficient safeguards to protect the integrity of the trial, including the nature of the evidence to be given by Mr. Cuff, its ability to be assessed by the trier of fact after cross-examination and the likelihood of testimony from other potential experts.
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> [37] I have identified a concern about Mr. Cuff's impartiality and independence that does not preclude admission of his evidence at the first level

> of the admissibility analysis. Is that the end of the inquiry? Cromwell, J. says at paragraph 54 of *White [Burgess]* that it is not:
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> > [54] Finding that expert evidence meets the basic threshold does not end the inquiry. Consistent with the structure of the analysis developed following *Mohan* which I have discussed earlier, the judge must still take concerns about the expert's independence and impartiality into account in weighing the evidence at the gatekeeping stage. At this point, relevance, necessity, reliability and absence of bias can helpfully be seen as part of a sliding scale where a basic level must first be achieved in order to meet the admissibility threshold and thereafter continue to play a role in weighing the overall competing considerations in admitting the evidence. At the end of the day, the judge must be satisfied that the potential helpfulness of the evidence is not outweighed by the risk of the dangers materializing that are associated with expert evidence.
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> [38] In these circumstances, given the limited (but necessary) utility of the evidence as to the chronology and context of the historic records, the potential helpfulness of the evidence is not outweighed by the risk of the dangers that are associated with expert evidence materializing.
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> [39] Mr. Cuff is therefore a qualified expert for the purposes of the Narrative Report, and the remaining *Mohan* factors have been resolved in favour of permitting his evidence. What then am I to do with any lingering concern that I have about his impartiality and independence? Cromwell, J. addresses this in *White* [*Burgess*] at paragraph 45:
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> > [45] I would hold that an expert's lack of independence and impartiality goes to the admissibility of the evidence in addition to being considered in relation to the weight to be given to the evidence if admitted.

Justice Stack was overall satisfied that the expert evidence should be admitted and subjected to the normal rigours of the trial process, aside from one section of the expert's report which 'strayed from history into the realms of cultural anthropology and sociology'. As neither discipline was within the expertise of the proposed expert, that section of the report was declared inadmissible.

Position of Cst. Smyth

Let us now consider the arguments and case law relied on by counsel for Cst. Smyth.

Report should be excluded

In *Day v. Karagianis*, 2005 NLTD 21 ("*Day*"), a medico-legal report introduced by the plaintiff was ruled inadmissible because the trial judge found that it: (a) lacked independence and objectivity; (b) contained pejorative and judgmental language; (c) made legal interpretations and conclusions; (d) was an instrument of advocacy and argument on behalf of the Plaintiff; and (e) failed to confine itself to the appropriate area of expertise.

Although the court ruled the report inadmissible, the expert was permitted to give viva voce evidence subject to guidelines set by the court. In *Gallant v. Brake-Patten*, 2012 NLCA 23 ("*Gallant*"), the Court, at paragraph 72 characterized this result as "an illustration of a court purging inappropriate material from an expert's evidence so as to enable otherwise valuable evidence to be put before the court", which allowed the expert to be heard, provided that she "confined her evidence to assisting the court with matters within her area of expertise". Counsel for Cst. Smyth submits that, as in *Day*, Dr. Coleman's portion of the joint report should be excluded from evidence.

Offending portions of report should be redacted

In *Gallant* the issue was potential witness bias. Hoegg, J.A., for a unanimous court, made an extensive review of the law of expert testimony. She noted that experts' reports containing legal analysis were ruled inadmissible in *McNamara Construction Co. v. Newfoundland Transshipment Ltd.*, [2000] N.J. No. 447 (Nfld. T.D.); *Day*, *supra*; and *Corner Brook Pulp & Paper Ltd. V. Geocon*, [2000] N.J. No. 446 (Nfld. T.D.).

This issue of encroachment on legal commentary was addressed by Hoegg, J.A., at para 88:

> On a practical level however, there will be cases where the expression of an opinion by an expert may, depending on the subject matter, inevitably have to stray into the area of legal commentary. The fact that an expert's report may incidentally do so, should not necessarily so taint the report as to render it

> inadmissible in totality. It is only where the approach taken is so comprehensive and blatant that the court concludes that the reliability or utility of the opinion as a whole is seriously compromised - ie. [sic] so tainted as a whole as not to have a modicum of objectivity - that the report as a whole should be rejected as inadmissible. **In other cases, the court should consider redacting offending portions and admitting the rest. In still other cases where the offending passages are minor or incidental, the report could be admitted with the issue being dealt with as one of weight.**

Also note the following statement (although it was pre-*White Burgess*), at para 93:

> 93 In summary, in civil cases, if expert evidence meets the Mohan criteria for admissibility, it is admissible. Bias or partiality in expert evidence which is based on the expert having a connection with a party or issue or a **possible pre-disposition or approach in the case is a reliability issue** which is best determined when the whole of the expert evidence is considered in the context of all of the trial evidence. **As such, the issue is one of weight and not admissibility.**

Coleman should not be allowed to give any opinion "approaching the ultimate issue of credibility"

In *R. v. J.-L.J.*, 2000 SCC 51 ("J.-L.J."), the Court was establishing a framework for assessing the reliability of novel science and, consequently, the admissibility of novel scientific evidence in court. Counsel for Cst. Smyth cites paragraph 37 of this decision on the matter of 'approaching the ultimate issue'.

> 37 Dr. Beltrami's evidence, if accepted, was potentially very powerful. Once it is accepted that the offence was probably committed by a member of a "distinctive group" from which the accused has been excluded, it is a short step to the conclusion on the ultimate issue of guilt or innocence. Dr. Beltrami's underlying hypothesis was that if the respondent did not "score" on the plethysmograph, he must lack the disposition to commit such acts. The inference is that if he lacks the disposition then he did not do it. The closeness of his opinion to the ultimate issue is another reason for special scrutiny, as mentioned by Sopinka J. in *Mohan* , at p. 25:
>
> > The closer the evidence approaches an opinion on an ultimate issue, the stricter the application of this principle.

In *Mohan*, the Supreme Court considered the admissibility of evidence concerning paedophilia. The defence had sought to call a psychiatrist to testify that the perpetrator of three of the four offences was likely a paedophile and that testing of the accused showed that he was not a paedophile.

Sopinka J., writing for the Court, held that in determining admissibility it was "necessary to consider the limitations imposed by the rules relating to character evidence, having regard to the restrictions imposed by the criteria in respect of expert evidence". Sopinka J. held that this kind of psychiatric evidence must be carefully scrutinized. <u>He sounded a special caution where the evidence was tendered on the ultimate issue before the trier of fact</u>:

> In summary, therefore, it appears from the foregoing that expert evidence which advances a novel scientific theory or technique is subjected to special scrutiny to determine whether it meets a basic threshold of reliability and whether it is essential in the sense that the trier of fact will be unable to come to a satisfactory conclusion without the assistance of the expert. The closer the evidence approaches an opinion on an ultimate issue, the stricter the application of this principle.

Sopinka J. held that the judge in deciding whether this expert evidence is admissible should consider "the opinion of the expert and whether the expert is merely expressing a personal opinion or whether the behavioural profile which the expert is putting forward is in common use as a reliable indicator of membership in a distinctive group".

On this point of 'ultimate issue' see also *R v. Natsis*, 2014 ONCJ 532:

> 126 The Supreme Court of Canada has repeatedly affirmed that the common law rule precluding expert evidence on the ultimate issue no longer applies in Canada: *R. v. B. (R.H.)*, [1994] 1 S.C.R. 656 (S.C.C.), at para. 25:
>
>> While care must be taken to ensure that the judge or jury, and not the expert, makes the final decisions on all issues in the case, it has long been accepted that expert evidence on matters of fact should not be excluded simply because it suggests answers to issues which are at the core of the dispute before the court: *Graat v. The Queen*, [1982] 2 S.C.R. 819. See also *Khan v. College of Physicians and Surgeons of Ontario* (1992), 9 O.R. (3d) 641 (C.A.), at p. 666 (per Doherty J.A).

See also *R. v. Bryan* (2003), 175 C.C.C. (3d) 285, at para. 16: "there is now no general rule precluding expert evidence on the ultimate issue"; and *R. v. Solleveld***,** 2014 ONCA 418, at paras 17 – 20.

Coleman should be restricted to giving opinion evidence on de-escalation techniques

In *R. v. Sekhon*, 2014 SCC 15, at para. 46, Moldaver J. for the majority, underscored the importance of ensuring that expert evidence remains within its proper scope:

> Given the concerns about the impact expert evidence can have on a trial — including the possibility that experts may usurp the role of the trier of fact — trial judges must be vigilant in monitoring and enforcing the proper scope of expert evidence. While these concerns are perhaps more pronounced in jury trials, all trial judges — including those in judge-alone trials — have an ongoing duty to ensure that expert evidence remains within its proper scope. It is not enough to simply consider the Mohan criteria at the outset of the expert's testimony and make initial ruling as to the admissibility of the evidence. The trial judge must do his or her best to ensure that, throughout the expert's testimony, the testimony remains within the proper boundaries of expert evidence.
>
> The admissibility inquiry is not conducted in a vacuum. Before deciding admissibility, a trial judge must determine the nature and scope of the proposed expert evidence. In doing so, the trial judge sets not only the boundaries of the proposed expert evidence but also, if necessary, the language in which the expert's opinion may be proffered so as to minimize any potential harm to the trial process. **A cautious delineation of the scope of the proposed expert evidence and strict adherence to those boundaries, if the evidence is admitted, are essential.** The case law demonstrates that overreaching by expert witnesses is probably the most common fault leading to reversals on appeal.

In *R. v. Bingley*, 2017 SCC 12 ("*Bingley*"), counsel for Cst. Smyth references para. 17, which concludes the following discussion on admissibility beginning at para 13:

> 13 The modern legal framework for the admissibility of expert opinion evidence was set out in *Mohan* and clarified in *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23, [2015] 2 S.C.R. 182 (S.C.C.). This framework guards against the dangers of expert evidence. It ensures that the trial does not devolve into "trial by expert" and that the trier of fact maintains the ability to critically assess the evidence: see *White Burgess Langille Inman*, at paras. 17-18. The trial judge acts as gatekeeper to ensure that expert evidence enhances, rather than distorts, the fact-finding process.

> 14 The expert evidence analysis is divided into two stages. First, the evidence must meet the four *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*, at para. 24.
>
> 15 If at the first stage, the evidence does not meet the threshold *Mohan* requirements, it should not be admitted. The evidence must be logically relevant to a fact in issue: *R. v. Abbey*, 2009 ONCA 624, 97 O.R. (3d) 330 (Ont. C.A.), at para. 82; *R. c. J. (J.)*, 2000 SCC 51, [2000] 2 S.C.R. 600 (S.C.C.), at para. 47. It must be necessary "to enable the trier of fact to appreciate the matters in issue" by providing information outside of the experience and knowledge of the trier of fact: *Mohan*, at p. 23; *R. v. D. (D.)*, 2000 SCC 43, [2000] 2 S.C.R. 275 (S.C.C.), at para. 57. Opinion evidence that otherwise meets the *Mohan* requirements will be inadmissible if another exclusionary rule applies: *Mohan*, at p. 25. The opinion evidence must be given by a witness with special knowledge or expertise: *Mohan*, at p. 25. In the case of an opinion that is based on a novel scientific theory or technique, a basic threshold of reliability of the underlying science must also be stablished: *White Burgess Langille Inman*, at para. 23; *Mohan*, at p. 25.
>
> 16 At the second stage, the trial judge retains the discretion to exclude evidence that meets the threshold requirements for admissibility if the risks in admitting the evidence outweighs its benefits. While this second stage has been described in many ways, it is best thought of as an application of the general exclusionary rule: a trial judge must determine whether the benefits in admitting the evidence outweigh any potential harm to the trial process: *Abbey*, at para. 76. Where the probative value of the expert opinion evidence is outweighed by its prejudicial effect, it should be excluded: *Mohan*, at p. 21; *White Burgess Langille Inman*, at paras. 19 and 24.
>
> 17 The expert opinion admissibility analysis cannot be "conducted in a vacuum": *Abbey*, at para. 62. Before applying the two-stage framework, the trial judge must determine the nature and scope of the proposed expert opinion. **The boundaries of the proposed expert opinion must be carefully delineated to ensure that any harm to the trial process is minimized**: see *Abbey*, at para. 62; *R. v. Sekhon*, 2014 SCC 15, [2014] 1 S.C.R. 272 (S.C.C.), at para. 46.

The issue in *Bingley* was whether the witness, a "drug recognition expert" or “DRE”, had special expertise as required by the fourth *Mohan* factor. The basic requirement of expertise for an expert witness is that the witness has expertise outside the experience and knowledge of the trier of fact. It was concluded that the witness did. A DRE receives special training in how to administer a 12-step drug recognition evaluation and in what inferences may be drawn from the

factual data noted. It was for this limited purpose that the DRE was permitted to assist the court by offering expert opinion evidence.

Analysis

I believe that the law as set out in *Day* and *Gallant* must now be viewed in the context of the more recent cases from the Supreme Court of Canada, particularly *White Burgess; Mouvement laïque québécois v. Saguenay (City)*, 2015 SCC 16, [2015] 2 S.C.R. 3 ("*Saguenay*"); and *Bingley*.

White Burgess makes it clear that once an expert witness attests to an ability and a willingness to accept the duty owed to the court to be impartial, independent and unbiased, the party challenging admissibility has the burden to raise a "realistic concern" that the expert is unable or unwilling to comply with that duty. If a realistic concern is raised, then the burden shifts back to the party seeking to rely on the expert evidence to raise on a balance of probabilities that the expert is capable of complying with his or her duty to the court.

Although some uncertainty exists because of the reference by Binnie J. in *J-L.J.*, confirmed by Cromwell J. in *White Burgess*, at para. 45, that expert evidence should "not be allowed too easy an entry" by letting frailties goes to weight rather than admissibility, Cromwell J. holds for the Court in *White Burgess* at para. 49, that the threshold requirement "is not particularly onerous and it will likely be quite rare that a proposed expert's evidence would be ruled inadmissible for failing to meet it".

This low threshold for admissibility for expert evidence was confirmed in *Saguenay*, at para. 106, where Gascon J. for the Court applied the test of "whether the expert's lack of independence renders him or her incapable of giving an impartial opinion in the specific circumstances of the case".

In *Bingley*, McLachlin C.J. for the majority, at para. 13, confirmed the "modern legal framework for the admissibility of expert opinion evidence" was set out in *Mohan* and clarified in *White Burgess*.

In the present case, Dr. Coleman attested to his ability and willingness to accept his duty to the Inquiry to be impartial, independent and unbiased. The parties challenging admission of his evidence, the RNC and Cst. Smyth, have failed to raise any realistic concern that he is unable or unwilling to comply with that duty. Let us consider the submissions made by each party.

Cst. Smyth's Concerns

Counsel for Cst. Smyth stresses the fact that *White Burgess* has confirmed that the independence and impartiality of an expert bears not just on the weight but also on the admissibility of the evidence. Counsel omitted to note that the Court in *White Burgess* accepted that the test for admissibility is "not particularly onerous" and it will be "quite rare" and only in "very clear" cases that expert evidence will be completely inadmissible and excluded at the threshold stage. Also, the Court established that, once the admissibility threshold has been met (by the expert attesting that he or she is able and willing to be fair, objective and non-artisan), the party challenging admissibility must identify a "realistic concern" that the expert is unable or unwilling to comply with the duty owed to the court.

Counsel for Cst. Smyth relies upon what counsel regards as "pejorative" and "inflammatory" language used in Dr. Coleman's report, alleged negative comments regarding Cst. Smyth's credibility, supposed "undue denigration" of Cst. Smyth's professional training and experience as showing a bias against Cst. Smyth. Counsel specifically refers to terms like "it is

interesting to note", "according to Cst. Smyth", "it is important to note" used throughout the report as implicitly questioning Cst. Smyth's credibility.

Counsel for Cst. Smyth also noted what he saw as "specific examples of inappropriate language":

- "Not good police practice"
- "This is a spurious argument"
- "Assuming this is a valid concern"
- "Certainly not how the writer would expect a 14 year police officer to behave"
- "the writer finds that difficult to understand"

The following are noted as "blatant" examples where Dr. Coleman impugns Cst. Smyth's creditability:

1) p. 8 – "one is left wondering about his statement that he wouldn't have attended had he been advised of additional CPIC information";
2) p. 9 – "In summary, this exchange is disturbing and, arguably, indicative of a somewhat aggressive approach to the meeting with Mr. Dunphy. What is not clear is if he at some point in his later conversation with Mr. Dunphy raised the matter of arresting Mr. Dunphy or apprehending him under the Mental Health Act";
3) p. 12 – "According to Cst. Smyth, at times Mr. Dunphy was incoherent. This suggests that he might have been confused and stressed such that he might not have fully understood the situation";
4) p. 13 – "However, we are told, the result was that Mr. Dunphy became sufficiently agitated to raise a rifle from beside his chair";

5) p. 55 – he did not learn about a 22 rifle being in the house and "this begs the question did Cst. Smyth ask the right questions";
6) p. 56 – Joe Smyth vs. Sgt. Joe Smyth – "The writer considers that these are important inconsistences to note";
7) p. 57 – "Although, he apparently now says that if he had known [a 'violent' flag existed on CPIC] that he wouldn't have attended alone, whether that would have been the case is subject to speculation";
8) On p. 58 Dr. Coleman writes:

> While the writer has many concerns about Cst. Smyth's preparation for his visit to Mr. Dunphy, his frame of mind and attitude is of perhaps the greatest concern in that it can, and possibly did, influence his actions before and during the interaction with Mr. Dunphy. Some evidence of his attitude can be learned from the text exchange he had with <u>Trevor</u> on the day prior to his visit to Mr. Dunphy. For example, in one text he characterized Mr. Dunphy as "some lunatic." He also indicated to Trevor that "if I have to arrest him I'll be late." Given that post-incident, he has apparently agreed that he considered the Tweets in question were not serious, or words to that effect, it is of concern that he is raising the issue of arrest. Perhaps, more importantly is that if an arrest was an option, why did he go alone?
>
> Even without considering the text exchange, it seems that Cst. Smyth approached the assessment/investigation of Mr. Dunphy casually. Based on materials read and audio listened to, it seems that Cst. Smyth had the attitude that this situation was not a 'big deal'. There is an indication of complacency and, arguable, neglect as well as poor judgement. A key behavioural competency for police officers is that of good judgement. Cst. Smyth failed to demonstrate good judgement. When one adds the text exchange and considers the indication of pre-incident mindset and attitude, it is not difficult to envision that the interaction with Mr. Dunphy might have been more aggressive and disrespectful then we have initially been told.

9) p. 61 – "however, this argument is inconsistent with introducing himself as Sgt. Smyth as he explained in his 'typed notes'. One is left wondering what was initially said by both parties";

10) p. 61 – "Given the marijuana in his house, was he unsure and fearful about Cst. Smyth's real motives at the house".

I do not regard these objections by Cst. Smyth to Dr. Coleman's language as meeting the test of "realistic concern" regarding Dr. Coleman's ability and willingness to meet his duty to the Inquiry of being impartial, independent, and unbiased in his testimony.

First, it is not reasonable to require an expert, who has been retained with the specific mandate to provide an opinion regarding strategies and techniques to be employed by police in situation such as the interaction between Donald Dunphy and Cst. Smyth, to refrain from being critical of Cst. Smyth's conduct, where Dr. Coleman, an experienced police officer, with many years of operational and academic training, believes Cst. Smyth has not met the standard required of a police officer in his situation. The terms of reference of this Inquiry require that I approach the examination of Cst. Smyth's conduct with a critical eye.

Section 3 of the terms of reference requires me to inquire into the circumstances surrounding the death of Donald Dunphy, including why a RNC officer attended at his home, the information relied upon for the officer's actions, the circumstances under which the officer fired the fatal shots, and the facts surrounding any relevant police operation on the day of Mr. Dunphy's death. The terms of reference required this Commission to retain experts with appropriate expertise in policing and to have these experts apply a critical eye to Cst. Smyth's conduct in light of what is required of police officers in his position. Dr. Coleman has this expertise and acted reasonably in the course of commenting upon Cst. Smyth's actions.

I do not accept the submissions of Counsel for Cst. Smyth that the language used by Dr. Coleman should be viewed as so pejorative or inflammatory as to raise any reasonable doubt or realistic concern about his objectivity, independence or impartiality. To the extent that this

conclusion differs from the conclusions of the Court in *Day*, I respectfully note that *Day* has been over-taken by *White Burgess*, which I believe I am bound to apply. I do not believe that the sorts of comments by Dr. Coleman in criticizing Cst. Smyth meet the test of the "very clear" and "quite rare" case, noted in *White Burgess*, where expert evidence should be completely inadmissible and excluded at the threshold stage. I also note that in *Day*, the Court permitted the expert to testify, despite excluding the expert report.

Since the first days of this Inquiry, I have noted that since there were no eyewitnesses to the death of Donald Dunphy, other than Cst. Smyth, who shot him, it is essential in determining the manner of his death that the explanation given by Cst. Smyth be scrutinized in minute detail to see if there may be inconsistencies or discrepancies which may lead one to question Cst. Smyth's credibility. No party has questioned that this approach must be taken. It would be illogical to conclude that this testing of credibility has to proceed without any reference to poor police practice by Cst. Smyth or without any critical examination of his method of performing his duties.

I recognize that damage may be done to Cst. Smyth's reputation in the course of this Inquiry and he is entitled to be treated fairly. However, I agree with the comments of Justice Cory in *Canada (A.G.) v. Canada (Commission of Inquiry on the Blood System in Canada – Krever Commission)*, [1997] 3 S.C.R. 440 ("*Krever*"), at para. 39, where he adopted the following by Decary, J.A. from the judgement of the court below:

> A public inquiry would be quite pointless if it did not lead to identification of the causes and players for fear of harming reputations…. I doubt it would be possible to meet the need for public inquiries whose aim is to shed light on a particular incident without in some way interfering with the reputations of the individuals involved.

Cory J. added that damaged reputation might simply be “the price which must be paid”. But he stressed the need for procedural fairness, which requires advanced notice and the opportunity to respond.

Cst. Smyth had advance notice that his conduct before, during and after the shooting of Donald Dunphy would be closely scrutinized and criticized where it may have fallen below the standards expected of police officers. Dr. Coleman did not exceed the bounds of appropriate criticism. Cst. Smyth has been accorded a reasonable opportunity to respond. I am not persuaded that Dr. Coleman has been anything other than fair and objective.

Counsel for Cst. Smyth challenges Dr. Coleman for commenting negatively on Cst. Smyth’s creditability. He says this is a role for the trier of fact. There is a difference between giving an opinion directly on an ultimate issue, such as credibility, which may, but not necessarily, be inappropriate and giving an opinion on matters from which an inference as to credibility may be drawn. For the most part, the comments of Dr. Coleman are his drawing the attention of the Inquiry to issues which depend for their resolution upon the position taken as to the credibility of Cst. Smyth alone, with no corroborating facts. This is a legitimate role for Dr. Coleman to play. On a few occasions, Dr. Coleman’s report verges on speculation when he suggests weaknesses in Cst. Smyth’s version of events. As noted previously, I redacted several comments of this nature before the report went into evidence. Specifically, the redactions were:

- “Given his planning and determination to attend Mr. Dunphy’s house that day, one is left wondering about his statement that he wouldn’t have attended had he been advised of the additional CPIC information.” (p. 8)
- “In summary, this exchange [where Cst. Smyth expresses to a friend an intent to arrest Donald Dunphy] is disturbing and, arguably, indicative of a somewhat aggressive

approach to his meeting with Mr. Dunphy. What is not clear is if he at some point in his later conversation with Mr. Dunphy raised the matter of arresting Mr. Dunphy or apprehending him under the Mental Health Act." (p. 9)

- "The attempts to 'read' the situation and take steps to de-fuse/de-escalate should have been such that the situation did not deteriorate as it did." (p. 13)
- "Although, he apparently now says that if he had known that [a 'violent' flag existed on CPIC] he wouldn't have attended alone, whether that would have been the case is subject to speculation." (p. 57)
- From the sentence "There is an indication of complacency and, arguably, neglect as well as poor judgement" delete the words "and, arguably neglect". (p. 58)
- [Regarding the introduction to Mr. Dunphy as "Joe Smyth" or "Sgt. Smyth] One is left wording what was initially said by both parties". (p. 61)
- "Given the marijuana in his house, was he unsure and fearful about Cst. Smyth's real motives at the house?" (p. 61)

Apart from these speculative remarks, I am satisfied that the concerns raised by Cst. Smyth do not warrant excluding Dr. Coleman's report. They are not realistic concerns in the sense used in *White Burgess*.

The RNC's Concerns

The RNC submits, like Cst. Smyth, that the joint report of Dr. Coleman and Sgt. Massine is inadmissible because of Dr. Coleman's lack of qualification with respect to threat and risk assessment as performed by units such as the PSU and because they determine ultimate issues,

take issue with and/or determine Cst. Smyth's credibility, and overall lack objectivity and independence.

Counsel for the RNC submits that in questioning, let alone deciding Cst. Smyth's credibility, Dr. Coleman loses all credibility and independence and this undermines his entire expert opinion. I have already addressed this issue in discussing Cst. Smyth's concerns. It is illogical to say that Cst. Smyth's credibility cannot be criticized when his version of events it he only one available and the terms of reference of this Inquiry mandate that I seek to determine the circumstances of death. As noted by Justice Cory in *Krever*, it would be pointless to hold an inquiry if possible damage to a reputation from criticism was a ground for excluding expert opinion.

The RNC refers to certain words or phrases used in a rhetorical fashion to comment upon Cst. Smyth's evidence and question his credibility, namely "apparently", "asserts", "assuming", "it seems", "maintains that", and "interesting". The RNC objects to the constant reference to these words and phrases throughout the report and says this is a technique to question Cst. Smyth's credibility. While I agree that the references to the fact that the only statement of what transpired is that of Cst. Smyth need not have been as repetitive, I do not accept that this raises a realistic concern as to Dr. Coleman's objectivity, independence and impartiality. The use of the words noted above is reminders to the reader of the report that underlying the reliability of various statements is the credibility of Cst. Smyth. This is reasonable comment by Dr. Coleman.

Counsel for the RNC takes particular objection to the use by Dr. Coleman of the term "spurious" in characterizing an explanation of Cst. Smyth as to why he did not call in his RCMP PSU partner to provide backup. Cst. Smyth testified it was the officer's day off and he didn't want to burn him out. The RNC submits that, in calling this a spurious argument, Dr. Coleman is

making an outright accusation that Cst. Smyth is being deceitful. Counsel for the RNC refers to various dictionaries which define "spurious" as connoting not true or genuine. In fact the Cambridge English Dictionary online defines "spurious" (of reasons and judgements) as "based on something that has not been correctly understood and therefore false." Merriam-Webster online defines it in part as "outwardly similar or corresponding to something without having its genuine qualities." Collins English Dictionary online defines "spurious" as "something that is spurious seems to be genuine but is false". To say someone has used a false argument does not necessarily mean you question the person's credibility. It is not an accusation that the person is being deceitful. Like the word "apparently" it may carry the connotation that things are apparent as opposed to real.

I believe the comments in *Lederman, Bryan, Furst*, The Law of Evidence in Canada (2014), at p. 837, are applicable here:

> The case law illustrates that there are certain subject matters which go to the very heart of judicial decision-making and courts remain wary of expert witnesses providing advice as to how they should decide issues such as whether a witness is telling the truth or the meaning of English words. Perhaps it is just a matter of sensitivity over the way in which the expert gives his or her evidence. For example, a court would be loath to receive explicit evidence from an expert that an accused is guilty or innocent or that a defendant was negligent or not, or that an individual was insane or not. However, it will readily receive evidence which is not so direct but which, if accepted, inescapably leads to that conclusion.

I am satisfied that the opinions expressed by Dr. Coleman are appropriate, although at times they could have been better worded. They inform this Inquiry about nuances of policing which might not be obvious to a lay person. They help ensure that this Inquiry does not overlook factors significant in assessing the validity of arguments or lines of reasoning raised by police officers or other parties at Inquiry hearings. Dr. Coleman, for the most part, avoids direct opinions regarding the ultimate issue in the Inquiry, the credibility of Cst. Smyth, and instead

addresses inferences which are not so direct but which, if accepted, may lead to a conclusion in that respect. As noted in *Lederman*, this is acceptable expert testimony.

I note that Counsel for the RNC indicates in his brief raising concerns about Dr. Coleman's report, that if it is decided that Dr. Coleman is not qualified to give opinion evidence in the area of threat and risk assessment as it applies to preventative policing in units such as the PSU, most, if not all of the disturbing comments regarding credibility will have been removed. While I do not fully follow the logic of this position, I note that, as set out above, Dr. Coleman was ultimately qualified to give opinion evidence regarding appropriate de-escalation strategies and measures to be employed by police to ensure officer safety in situations such as that encountered by Cst. Smyth in his interaction with Donald Dunphy. Any opinions relating to the PSU would be merely incidental to his report and may be dealt with as a matter of weight.

Conclusion

The reports of Dr. Coleman and Sgt. Massine will go in, subject to submissions as to weight and specific objections to admissibility after questioning, with the redactions previously noted.

Leo Barry
Commissioner

2017-04-05