

RNC issues with the Coleman - Massine Report

1. On 27 February the RNC filed a notice and application for disclosure. The application for disclosure has been withdrawn and will not be pursued, nor do any of the issues with the Coleman - Massine Report have anything whatsoever to do with or reflect upon inquiry counsel.
2. The notice indicated that the RNC will be challenging the qualifications of Coleman and Massine; and will be arguing that their report or portions of it are inadmissible because of their lack of qualification, because they determine ultimate issues, take issue with and/or determine Cst. Smyth's credibility, and overall their report lacks objectivity and independence.
3. The RNC still intends to challenge the qualifications of Coleman with respect to threat and risk assessment as performed by units such as the PSU. If the Commissioner finds that Coleman is not qualified in this area, the RNC will be requesting that that portion of the report be removed.
4. Coleman repeatedly raises issues regarding Smyth's credibility. And, while some of this can perhaps be explained away, there are certain statements that the RNC feel should be removed from the report. In questioning and, in particular, determining Smyth's credibility, Coleman is usurping the function of the Commissioner and answering the ultimate issue. His comments and findings are irrelevant and highly prejudicial.
5. In questioning, let alone deciding Smyth's credibility, Coleman loses all objectivity and independence; and this undermines his entire "expert opinion."
6. If the Commissioner decides that 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. If, however, the Commissioner decides that he will allow Coleman to give

opinion evidence in this area, then there are some comments in the report that the RNC feels should be removed.

7. In the Commission's 26 November 2016 correspondence, Coleman was requested at paragraph 2 (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.

8. It was the understanding of the RNC that Coleman was being called to give opinion evidence on de-escalation techniques and not threat and risk assessment in preventative policing units such as the PSU. He is not being asked to comment on the evidence (why would he be) and certainly not to give his "expert opinion" on Smyth's credibility.
9. The RNC is not challenging Coleman's general qualifications regarding de-escalation. However, his "expertise" in this area seems to be with people who are mentally ill or in crisis and there is no evidence that Donald Dunphy has a mental illness or that he was in crisis. To the contrary, both are refuted by his doctor and daughter; and if there was a crisis when Smyth visited Dunphy's residence, it occurred very quickly and was of a very short duration. This, however, goes to the weight to be given Coleman's "opinion" regarding the incident though not necessarily regarding de-escalation techniques in general.
10. In this portion of the report (the first 14 pages), Coleman repeatedly uses certain words or phrases in a rhetorical fashion that comment upon Smyth's evidence and question directly or indirectly, though perhaps not in every case, Smyth's credibility. The objectionable words and phrases are: apparently, asserts, assuming, it seems, maintains that and when

he says something is interesting. There are also other ways in which he questions Smyth's credibility.

11. Everybody knows that the only evidence of what transpired between Donald Dunphy and Smyth is the evidence of Smyth. It only need be stated once in the entire report. The fact that these qualifying words and phrases are used so frequently in only 14 pages (some 24 times) raises the obvious concern that throughout Coleman is questioning Smyth's credibility.
12. On page 9, in the 5th paragraph beginning "One explanation," Coleman argues that Smyth is presenting a spurious argument. This is an outright accusation that Smyth is being deceitful.
13. In the 6th edition of the OED (p 2979) the principle meaning of spurious is superficially resembling or simulating something, but lacking genuine character or qualities; not true or genuine; false, counterfeit.
14. Coleman refers to Smyth's failure to take notes on pages 7, 8, 9 and 10. The Commission has already heard ample evidence to date that Smyth did not have his notebook with him, that this was contrary to RNC policy, that no police officer who testified and was asked has condoned this and Smyth himself has indicated he accepts the criticism although some of it can be explained.
15. Coleman repeatedly uses the phrase with quotation marks "typed notes" which repeatedly questions the propriety of what Smyth did. It was his report and not his notes, and Coleman for some reason does not accept this fact and questions it.
16. On page 7, third paragraph, Coleman states "Apparently, Cst. Smyth did not use his police notebook for the risk assessment and investigation of Mr. Dunphy." The word apparently carries the connotation that things are apparent as opposed to real. Coleman is questioning Smyth's evidence in this regard. Coupled with other comments he makes regarding Smyth's report, the implication being that Smyth chose not to make notes.

17. The word apparent (OED, p 101, 4th meaning) is seeming; that appears to the mind or senses, as distinct from (but not necessarily opposed to) what really is. Often contrasted with **real**. The word apparently (OED, p101) has the meaning seemingly; in external appearance; as far as one can judge; (parenthetically or modifying a sentence) it would seem (that); (as a comment on a statement or reply to a question) so it appears.

18. On page 8, at the end of the third paragraph Coleman states:

Cst. Smyth should have been told that CPIC indicated Mr. Dunphy had a VIOLENT caution and record for possession in drugs. Cst. Smyth did not become aware of this until 2016 when he was interviewed in preparation for the Inquiry. He says that had he known, he would not have attended Mr. Dunphy's residence alone. Although this begs to question about the reliability of those conducting CPIC checks, that Cst. Smyth did not record the various checks made by Oram and his notebook or later in his 'typed notes' is interesting.

19. Here Coleman is clearly questioning why Smyth did not record his 1029 check in his notes as if there was an ulterior motive.

20. On page 10, in the first paragraph Coleman questions how Smyth introduced himself. He states "Cst. Smyth apparently had a police badge attached to his belt concealed under his jacket next to his pistol." Here the word apparently is clearly intended to question Smyth's evidence.

21. On page 11, in the last paragraph, Coleman states

Cst. Smyth says he showed his police ID and wallet badge from a distance estimated by Smyth is 10 to 30 feet; however, although his "typed notes" states he introduced himself as Sgt. Smyth, he said when interviewed in 2016 as well as in

his Inquiry testimony that he introduced himself as Joe Smyth of the RNC as opposed to Cst. or Sgt. Smyth.

22. Throughout Coleman is raising issues of credibility. Instead, he should be discussing each option as to how Smyth introduced himself and how each way he (could have) introduced himself may have impacted the situation and improved communication with Dunphy.
23. On page 12 in paragraph 2 Coleman states that “According to Cst. Smyth, it does not appear that he did anything initially that would escalate the situation. Indeed, the opening conversation was reportedly cordial.” Once again, Coleman is questioning Cst. Smyth’s version of events.
24. In the same vein, one specific determination by Coleman, which is of great concern, is found on page 13 in the paragraph beginning with the word “Situations.” Coleman states:

The attempts to ‘read’ the situation and take steps to defuse/de-escalate should have been such that the situation did not deteriorate as it did. Of relevance to this, it does not appear that the RNC has dedicated sufficient attention to the de-escalation of difficult situations. The RNC Use of Force Training Manual has less than one page of its 370 pages that raises the issue of verbal communications/de-escalation. In addition to its brevity, the content is certainly inadequate to teach the necessary skills including by means of well-designed role play scenarios.

The first sentence is a conclusion that Coleman does not have the expertise to state and is potentially an ultimate issue before the Commission. His opinion is irrelevant and highly prejudicial. Coupled with the remainder of the statement, Coleman’s opinion could result in notices of misconduct being issued to Smyth and the RNC, and suggests that both were negligent.

25. Coleman does not clarify or define for the Commission what is meant by or involved in a threat and/or risk assessment. Instead he confuses the matter. This begs the question whether or not he should be allowed to discuss the issue, let alone give an “expert opinion” on it. These confusing comments are found on pages 3 (last paragraph), 9 (twice in the paragraph beginning “The day in question”) and on page 11 in the paragraph that begins with “However, Cst. Smyth chose not to contact Meaghan”.
26. Coleman states on page 62 under section b, Cst. Smyth’s use of lethal force, that “The RNC training concerning use of force within the context of conflict resolution does not meet contemporary Canadian standards.” “He then follows inaccurate and seriously mistaken opinion of Massine with respect to the RNC’s use of force training, etc.”
27. Coleman was not put forward as a use of force expert, nor is he one, and, again, while he may be able to give useful evidence to the Commission regarding de-escalation and conflict resolution in a general sense, “his expertise” appears to be exclusively with people who are either mentally ill or in crisis.
28. In Massine’s portion of the report, beginning at page 14, he questions Smyth’s credibility on pages 14, 33, 41, 42 and twice on page 36.
29. Massine repeats on four occasions that his “expert opinion” is limited by the fact that the only evidence comes from Smyth, something that only needed to be stated once in the entire report and not in the way he does.
30. On page 14 he states:

In order to put Cst. Smyth’s response to the alleged actions of Mr. Dunphy’s behavior in context, this writer feels that it is important to conduct an analysis of Cst. Smyth’s response in relation to the use of force and firearms training he has received from the RNC.

31. The word allege can have a neutral meaning, namely: to declare upon oath at a tribunal; or bring forward as a legal ground or plea. But its other meanings include: affirm, assert, especially without proof; and to advance an argument or excuse. The word allegedly, the adverb, is used especially in statements for which the author disclaims responsibility. (OED, p56)

32. On page 33 under the heading **Synopsis of Incident**, Massine states:

It should be noted that the only account of the interaction between Cst. Smyth and Mr. Dunphy, leading to the death of Mr. Dunphy, comes from Cst. Smyth. Lacking evidence to the contrary, the writer's assessment and subsequent opinions are based on the information provided by Cst. Smyth as that is his sole source of information of the interaction between Cst. Smyth and Mr. Dunphy.

33. On page 36 Massine states:

It is worth mentioning that the writer saw no mention of a pen belonging to Cst. Smyth being recovered by the investigators.

From his right peripheral vision Cst. Smyth observed what he believed to be the barrel of a rifle being moved toward him. He stated that he simultaneously yelled, "NO," several times while dropping the file folder and possibly the pen that he may have been holding...

34. Finally at page 41 of the report:

Because there is no evidence to the contrary, the writer is of the opinion that Cst. Smyth's application of lethal force (four rounds from his pistol) on Mr. Dunphy was appropriate in the circumstances which Cst. Smyth described.

35. Clearly Massine, like Coleman, is questioning Smyth's credibility and his opinion that Smyth's use of lethal force was appropriate is undermined by the numerous, irrelevant unnecessary and prejudicial qualifications he adds to that opinion. Similarly, he is

questioning whether Smyth is being truthful about using a pen simply because the RCMP did not look for it.

36. On page 38 in the first paragraph after the section beginning with **Opinion as to the Appropriateness**, Massine, like Coleman, is confusing the difference between threat investigations under the Criminal Code and threat and risk assessments in the context of proactive policing in a PSU. This is not something that Massine was asked to do in his letter of engagement and is beyond “his expertise.”

37. In his letter of engagement, Massine was requested paragraph 2 (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.

38. The RNC feels that all of Massine references that raise doubt as to Smyth’s credibility should be removed from the report.

39. Massine’s bases his entire criticism of the RNC’s use of force training on his belief that because the RNC use of the word continuum they do not follow the NUFF. Apart from the fact that it is a questionable basis for his opinions that follow, it is a serious error on his part.

40. The following is from page 151 from the Luther Report (December 2003):

14.1 Training

a. Use of Force Continuum

The Inquiry is satisfied that R.N.C. officers, including the incident officers, have been adequately trained in use of force. The present model, “National Use of Force Model”, was adopted by the R.N.C.

in 2001 with the input of academics and leading police trainers, including Inspector James Carroll.

The training programme of the R.N.C. in this subject area is consistent with Ontario, British Columbia, R.C.M.P., etc. It also adheres to the principles set out by the United Nations in its Code of Conduct for Law Enforcement Officials and Use of Force and Firearms by Law Enforcement Officials.

The expert from the Ontario Police College, Chris Lawrence, did not fault the three incident officers in their response to Darryl Power's threat.

41. Inspector James Carroll was the RNC's use of force trainer at the time and the person who assisted in the training of Sgt. James. Massine's opinion and his history regarding the RNC's use of force manual and training is contrary to the findings of the Luther Report.
42. Counsel for the RNC is of the view that in order to properly deal with these issues, they will have to be brought up in advance, in a viore dire that should be in camera, and counsel needs to be able to cross-examine both "experts."
43. As for how the report is edited, should the Commissioner rule that any portion of it should be edited, counsel suggests that this can be done later after the evidence has been concluded. If, for example, the Commissioner decides that the more significant questioning of Smyth's credibility should be removed, these will not be referred to during examination, will not become public and can be dealt with later. The public's right to know does not mean right away and counsel for Megan Dunphy and the Donald Dunphy Coalition will have access to the remainder of the report.
44. Should the Commissioner determine that Coleman is not qualified to give expert opinion regarding risk and threat assessment in a proactive police unit such as the PSU, then there will be no questions on it at the hearing and the editing can be done later.

45. With respect to the time allotted, counsel for the RNC not only must question Coleman about his qualifications, his threat and risk assessment, and de-escalation, he must also question him on his view of RNC training. Similarly, counsel for the RNC has to question Massine about his qualifications, his use of force opinions and his opinions regarding RNC training. One hour and 25 minutes is most unlikely to be enough time.
46. As for Coleman's opinions regarding the need to better document their training, the RNC accepts that there is need for improvement in that regard.