

**IN THE MATTER OF The**  
**Commission of Inquiry Respecting**  
**the Death of Donald Dunphy**

**AND IN THE MATTER OF**  
**an Application by Cst. Joe Smyth**  
**to exclude the report of Dr. Terry Coleman**

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**BRIEF OF LAW FILED ON BEHALF OF**  
**CONSTABLE JOE SMYTH**

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### **The Admissibility of Expert Evidence – Objectivity and Impartiality**

In a decision dated February 13, 2017 Commissioner Barry found that the two-step test outlined in *White Burgess Langille Inman v. Abbott and Haliburton Co.* [2015] S.C.J. No. 23 applies at a public inquiry.

*White Burgess* also confirms that the role of an expert is to provide independent, objective evidence to the Court (paragraphs 26-32). In *White Burgess, supra*, Cromwell J. stated at paragraphs 40 and 45:

*40 I conclude that the dominant approach in Canadian common law is to treat independence and impartiality as bearing not just on the weight but also on the admissibility of the evidence. I note that while the shareholders submit that issues regarding expert independence should go only to weight, they rely on cases such as INCO that specifically accept that a finding of lack of independence or impartiality can lead to inadmissibility in certain circumstances: R.F., at paras. 52-53. (emphasis added)*

.....

#### *(c) Conclusion*

*45 Following what I take to be the dominant view in 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). (emphasis added)*

See also *Mouvement laïque quebécois v. Saguenay (City)*, [2015] 2 S.C.R. 3 at paragraph 106

In *Gallant v. Brake-Patten* [2012] N.J. 132 (NLCA) Hoegg J.A. stated at paragraph 86:

*86 When expert evidence is challenged on the basis that it is biased or partial, it is important to identify the nature of the alleged bias or partiality. Legal advocacy, containing legal analysis and argument, legal interpretations and conclusions, which masquerades as expert evidence is*

*distinctly different from expert evidence which is alleged to be biased or partial on the basis of the expert witness having a connection to a party or an issue in the case.*

The type of bias being alleged by the Applicant in this present case is of the first type identified by Hoegg J.A. and not related to the fact that the expert was hired by the Commission or had contact with Commission counsel.

### **Dr. Terry Coleman**

In a Retainer Letter dated November 26, 2016 Dr. Terry Coleman was retained by the Commission to review the relevant documentation and evidence regarding the interaction between Donald Dunphy and Cst. Joseph Smyth “regarding strategies and techniques to be employed by police in such situations”.

In an e-mail dated December 7, 2016 Commission counsel stated that Dr. Coleman, who has expertise in the area of police interaction with vulnerable people, will assist the Commission in the area of de-escalation and crisis management.

A report which was co-authored by Dr. Coleman and Sgt. Mike Massine dated February 26, 2017 was provided to counsel via Kiteworks on that same date.

### **The Applicant’s position**

The Applicant is challenging Dr. Coleman’s opinion based on the lack of qualifications and lack of objectivity. It is the Applicant’s position that Dr. Coleman’s opinion:

- (1) demonstrates, through the pejorative language used, a bias against Cst. Smyth;
- (2) comments negatively on Cst. Smyth’s credibility (a role for the trier of fact) and unduly denigrates his professional training and experience;
- (3) ventures significantly into an area outside Dr. Coleman’s expertise, as it relates to the conducting of a threat assessment in the context of the protection of public officials;

- (4) uses inflammatory and prejudicial language of the type that should not be contained in the report of an independent, objective and impartial expert;
- (5) the report is replete with speculation.

The Applicant also emphasizes that in the determination of admissibility the Commissioner must apply the principle of fairness, which is a recurring theme in public inquiries. Cst. Smyth had the right to expect that any expert hired by the Commission would be fair and objective in his or her assessment of the evidence. One problem is that any report prepared by an expert hired by the Commission can be expected to be given greater credibility by the public on the basis that the Commission would only hire top experts. Therefore, the principle of openness has to be balanced against the principle of fairness.

While the Commissioner cannot control what an expert writes he must scrutinize such report with the principle of fairness in mind.

### **Examples in the Report**

*In Day v. Karagianis* [2008] N.J. No. 252 (NLCA) Rowe J.A. confirmed the decision of a trial judge to exclude an expert's report and reviewed the trial judge's reasons in paragraph 6:

*6 The principal witness for Ms. Day was Dr. Eleanor Stein. On motion of the Defendants, the Trial Judge ruled as follows (2005 NLTD 21):*

*[12] I find that [Dr. Stein's expert] Report is inadmissible as evidence in whole or in part because 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.*

*[13] Although the Report is inadmissible as evidence, this ruling does not preclude the Plaintiff from calling Dr. Stein to testify at this trial...*

The following are examples of language used in the report which bring into question Dr. Coleman's objectivity:

- (1) Terms like "It is interesting to note, "according to Cst. Smyth", "It is important to note", are used on numerous occasions, thereby implicitly questioning Cst. Smyth's credibility;
- (2) Specific examples of inappropriate language used include:
  - "Not good police practice" – p. 8, p. 10, p. 11
  - "This is a spurious argument" – p.9
  - "Assuming this is a valid concern" – p. 9
  - "Certainly not how the writer would expect a 14 year police officer to behave" – p. 8
  - "the writer finds that difficult to understand" – p. 9;
- (3) When examining the "lunatic" texts with Trevor Dr. Coleman accepts the interpretation that reflects poorly on Cst. Smyth without examining other possible explanations (i.e., private conversation between 2 friends which was not to be taken literally) – p. 8.

On numerous occasions throughout his report Dr. Coleman comments on the propriety of the threat assessment undertaken by Cst. Smyth, as opposed to a personal risk assessment, or confuses the two concepts which the Applicant submits are two separate areas of expertise (the personal risk assessment in the conducting of a criminal investigation versus the conducting of a threat assessment in the context of the protection of public officials).

- p. 4, paragraphs 2-4
- p. 6, paragraphs 4-5
- p. 9, paragraphs 4-6
- p. 10-11, pp. 55-57, pp. 60-61

The following are blatant examples where Dr. Coleman impugns Cst. Smyth's credibility:

- (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 inconsistencies to note”;
- (7) p. 57 – “Although, he apparently now says that if he had known (about CPIC flag) 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 Trevor on the day prior to his visit to Mr. Dunphy. For example, in one text he characterised 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, arguably, 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.** (emphasis added)*

- (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”.

### **Order Requested**

In conclusion, the Applicant requests:

- (1) the Report of Dr. Coleman be excluded from evidence;

*Day v. Karigians, supra*

- (2) the offending portions of the Report be redacted;

*Gallant v. Brake-Petten* at paragraph 88

- (3) Dr. Coleman not be allowed to give any opinion approaching the ultimate issue of credibility;

*R. v. J.-L.J.* [2000] S.C.J. No. 52 at paragraph 37

(4) Dr. Coleman be restricted to giving expert opinion evidence on de-escalation techniques.

*R. v. Bingley* [2017] S.C.J. No. 12 at paragraph 17

*R. v. Sekon* [2014] S.C.J. No. 15 at paragraphs 46-47

DATED at St. John's, NL, this 7th day of March, 2017.



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