

**OTTAWA POLICE SERVICE DISCIPLINE HEARING
IN THE MATTER OF ONTARIO REGULATION 268/10**

**MADE UNDER THE POLICE SERVICES ACT, RSO 1990,
AND AMENDMENTS THERETO;**

**IN THE MATTER OF
OTTAWA POLICE SERVICE**

AND

CONSTABLE HELEN GRUS, BADGE #1631

CHARGES:

1. DISCREDITABLE CONDUCT

**RULING ON PROPOSED EXPERT WITNESSES
FOR DEFENCE**

Before: Superintendent (Retired) Chris Renwick

Counsel for the Defence:
(Applicant) Ms. Bath-Shéba van den Berg
Mr. Blair Ector

Counsel for the Prosecution:
(Respondent) Ms. Angela Stewart
Ms. Bonnie Cho

Decision Date: November 26, 2023

Overview

Constable (Cst.) Helen Grus is before this Tribunal charged with one count of Discreditable Conduct under the *Police Services Act*. The hearing commenced on August 8, 2022, and remains in progress, with additional dates set for January 8-11, 2024.

Cst. Grus is represented by Ms. Bath-Shéba van den Berg and Mr. Blair Ector. The Ottawa Police Service (OPS) is represented by Ms. Vanessa Stewart and Ms. Bonnie Cho.

On July 24, 2023, the Defence advised the Tribunal of their intent to call five expert witnesses to give evidence at the Hearing. The *Statutory Powers and Procedure Act (SPPA)* is vague when it comes to rules governing expert witnesses and both parties agreed that some parameters must be established. In the August 9, 2023 written Decision on Notice of Filing Evidence and Applicant by Cross-Application, this Tribunal's decision was to adopt the Ontario Civilian Police Commission (OCPD) Rules of Practice for expert witnesses.

From September 29 to October 2, 2023, the Tribunal received the curriculum vitae, Terms of Reference, and expert reports of the five proposed expert witnesses: Dr. James Thorpe; Dr. Gregory Chan; Dr. Eric Payne; Mr. Shawn Buckley; and Staff Sergeant (S/Sgt.) Retired Peter Danyluk.

On October 11, 2023, Ms. Stewart advised that the Prosecution would not be challenging the qualifications of the medical doctors but would challenge the qualifications and admission of the opinion evidence of S/Sgt. Danyluk and Mr. Buckley. Ms. Stewart confirmed that the Prosecution would not be calling expert witnesses in response.

In an October 13, 2023 email to Defence, I advised that I remain with strong reservations on the relevancy of the medical doctors' proposed evidence and that I would require pointed submissions on relevancy before deciding if the three medical experts would be summoned as witnesses.

Submissions

Ms. van den Berg provided oral submissions on the relevancy of the five proposed expert witnesses at the November 1, 2023 in-person session of the Hearing. A Defence Book of Authorities was entered (Exhibit #60). This was followed by oral submissions by Ms. Stewart and various case law was received and entered as exhibits. (Exhibit #s 51, 52, 57, 58, 59.)

Ms. van den Berg submitted that the *PSA* charge is a regulatory offence therefore is considered a strict liability offence. There is no onus for the Prosecution to prove *mens rea*, only to prove the actions were without due care and attention. This leaves open a

defence that the Respondent Officer used reasonable care, based on the balance of probabilities and the conduct is to be assessed using the reasonable person standards. (*R. v. Sault Ste. Marie* (SCC, 1978) and *R. v. Heap* (Alberta Court of Justice, 2023)). The fundamental principles of reasonable care are: What is reasonable depends on the circumstances; reasonable care requires action (positive steps taken); and must relate to the specifics and not a general notion of reasonable actions. If what Cst. Grus had done was what a reasonable police officer would have done in the same circumstances, then she has a defence and her acts or omissions are innocent.

Ms. van den Berg submitted that it is the Defence's position that Cst. Grus took positive steps to inform her chain of command. She had prepared some research to reach a professional finding of criminality up until the point of her suspension which prevented her from taking further steps. (*R. v. Gonder* (Yukon Territory Territorial Court, 1981.))

Ms. van den Berg submitted that the Prosecution has introduced a *mens rea* component or a "mental element" component in its position that Cst. Grus engaged in the prohibited act for personal reasons. This is key and relevant for the three medical experts as they will provide testimony to establish that their expert beliefs are similar to Cst. Grus' beliefs, therefore negating the notion that her beliefs were personal. It would also support the defence of an honest belief.

Ms. van den Berg further submitted that the three medical experts would offer the Tribunal to hear evidence on the issue of Covid-19 vaccines and their adverse effects. The doctors can speak to evidence that is similar to the research that was before Cst. Grus when she held the belief that there was potentially criminal negligence causing death or breach of public trust.

Ms. van den Berg submitted that Dr. Thorpe is an obstetrician-gynecologist (OB-GYN) who has worked with women and pregnancies in Florida. He is a very qualified medical doctor that can speak to a reasonable and probable linkage between vaccinations of pregnant women and infant deaths. She submitted that Dr. Payne is a pediatrician who would provide an expertise on the adverse reporting system and some opinion on enlarged hearts and infant deaths. Finally, Dr. Chan is a family doctor who has an expertise on the adverse effects of vaccinations and flaws with the reporting system.

Ms. van den Berg submitted that she would ask the same five key questions to each medical expert to establish that Cst. Grus' beliefs coincide with their professional beliefs, establishing that this was not a personal endeavor by Cst. Grus.

Ms. van den Berg submitted that Mr. Buckley is an expert in health regulatory law, one of the few in Canada. He would provide expert testimony on legal aspects of clinical trials and the opinion that the Public Health Agency of Canada made the decision in 2021 to authorize a Pfizer vaccine for pregnant and breast-feeding women while still under trial. He would provide a regulatory opinion to the Tribunal.

Ms. van den Berg submitted that S/Sgt. Danyluk will provide expert opinion on the police chain of command--what it is and how it is enforced. He will also provide opinion evidence on the role and scope of police discretion. She submitted that S/Sgt. Danyluk is former military and published a book on ethics.

Ms. van den Berg submitted that proper procedure for this Tribunal to proceed is to hold a *voir dire* for each of the proposed experts before determining relevance. Citing *R. v. D.D.* (SCC, 2000), *R. v. Mohan* (SCC, 1994), and *White Burgess Langille Inman v. Abbott and Haliburton Co.* (SCC, 2015), Ms. van den Berg submitted that each case allowed the judge to hear from the experts, including cross-examination, before a determination was made on whether the witness would be allowed. In *R. v. Mohan*, the four criteria of relevance, necessity, absence on an exclusionary rule, and expert qualification can then be assessed and applied.

Ms. van den Berg cited *R. v. Abbey* (Ontario Court of Appeal, 2009) which lays out that the trial judge, at the conclusion of the *voir dire*, must identify and determine the nature and scope of the proposed expert evidence before deciding admissibility. Ms. van den Berg further submitted that, as contained in the ruling of *Timpauer v. Air Canada et al* (Federal Court of Canada, 1986), it was deemed wrong for the Board to deny expert witnesses without reasons. It was the duty of the Board to hear witnesses and then, and only then, decide if the intended evidence is admissible or not.

Ms. van den Berg submitted that notwithstanding the above case authorities, the Defence appreciates that the Tribunal has the authority to make its own rules, however it is best practice to have the proposed expert witnesses take the stand in a *voir dire* before admissibility is determined. Ms. van den Berg submitted that the Defence is open to the Tribunal limiting the scope and setting parameters to exactly what the experts can provide opinion.

Ms. Stewart submitted that all relevant evidence is admissible and when proper qualification occurs, opinion evidence on matters of specialized knowledge may be permitted. (*White Burgess Langille Inman v. Abbott and Haliburton Co.* (SCC, 2015.)). Ms. Stewart further submitted that, as spoken to in *R. v. Abbey* (Court of Appeal for Ontario, 2009), it is fundamental to the adversary process that witnesses only testify to what they observed. This exclusionary rule is for the Hearing Officer not to be swayed by the opinions of witnesses. Ms. Stewart submitted that this process or test is extremely important. The proliferation of expert evidence is a threat to the proceedings and expert witnesses are not permitted to hijack proceedings and usurp the trier of fact.

Ms. Stewart submitted that the threshold test found in *R. v. D.D.* (SCC, 2000) exists to ensure that mere relevance of helpfulness is not enough to admit an expert's opinion. The submission by Defence that the evidence of the three medical doctors will be "helpful" does not meet the test.

Ms. Stewart submitted that logical relevance is a low threshold. The medical expert evidence is not logically relevance, and this is different from legal relevance. There needs to be an evaluation of the probative value of the evidence.

Ms. Stewart submitted that *R. v. Abbey (Court of Appeal of Ontario, 2009)*, paragraph 95, speaks to the trial judge's assessment of proffered opinion evidence falling somewhere between what is essential to fact finding and what is unhelpful. Ms. Stewart submitted that this rule exists to ensure unhelpful evidence does not go into the record and trying to prevent a situation of "trial by expert". The decision maker must consider other factors of the trial process.

Ms. Stewart submitted that to be a properly qualified expert witness, the witness needs to be impartial, independent, and unbiased. In Canadian law, if an expert witness is found not to be impartial then they should be ruled inadmissible. (*White Burgess Langille Inman v. Abbott and Haliburton Co.* (SCC, 2015), paragraph 35). Ms. Stewart further submitted paragraph 37 of the *White Burgess Langille Inman v. Abbott and Haliburton Co.* decision which cites the *Gould v. Western Coal Corp. (ONSC 2012)* decision which states that the witnesses require objectivity and must be neutral. They should not be advocates to one party and "parrot the opinion of the client". Ms. Stewart submitted that, as in *White Burgess Langille Inman v. Abbott and Haliburton Co.*, this Tribunal must undertake the process of impartiality and can do so without hearing from these five witnesses.

Ms. Stewart submitted that the Tribunal must then look at the balancing stage of the analysis and this is where the Hearing Officer weighs the probative value. This is the gatekeeping function that balances the benefits from the risk to determine if the benefits justify the risks. Ms. Stewart submitted that the risks are extreme as it could turn a hearing into something it should not be. When risks outweigh benefits, it should not be admitted.

Citing *White Burgess Langille Inman v. Abbott and Haliburton Co.*, paragraph 18 and onwards, Ms. Stewart submitted that in this case law the Appellants file for the dismissal of an expert report as inadmissible. Ms. Stewart submitted that although it is preferable to proceed by *voir dire*, it is also possible to decide the admissibility without hearing from the witness. It really comes down to the information provided and the Hearing Officer needs to take time to consider the five expert reports submitted by Defence.

Ms. Stewart submitted that this Tribunal cannot be a venue for theories linking vaccines to infant deaths. Ms. Stewart spoke of the National Citizens Inquiry's (NCI) Interim Report, a citizen-led inquiry into Canada's Covid-19 response, in which Mr. Buckley, Dr. Payne, and Dr. Chan provided testimony. (Exhibit #62.) Ms. Stewart submitted that much of the expert reports submitted by Defence are a 'cut and paste' of their reports submitted to the NCI. There was a specific agenda that presented specific viewpoints, similar to the viewpoints of Cst. Grus and supporting her perpetuation of the offence.

Ms. Stewart submitted that Dr. Payne is not qualified, he is not impartial, and his report is not relevant nor necessary to this hearing. It may have been relevant at the NCI but it is not relevant here. There was no *voir dire* at the NCI.

Ms. Stewart submitted that Dr. Chan is not qualified, his report is not relevant, and he is not impartial. Dr. Chan's testimony at the NCI speaks to the importance of documenting adverse effects of Covid-19 vaccinations and this is exactly what Cst. Grus was doing. His opinion as to pregnant women and still births is not relevant to this Tribunal.

Ms. Stewart submitted that Dr. Thorpe's report examines the Covid-19 vaccine and breast-feeding. He did not testify at the NCI. It is not relevant to this Hearing what the conclusions are. The whole basis of the charge is that Cst. Grus had a personal and academic interest, and she used her position to access reports for which she did not have permission.

Ms. Stewart submitted that Mr. Buckley is not qualified, not relevant, and not impartial. He was one of the officials who organized and ran the inquiry. Ms. Stewart submitted that his opinion on the safety of the vaccination and how it was approved in Canada is not necessary for the Hearing Officer to hear. Again, his expert report submitted here is a 'cut and paste' from his report to the NCI. It may have been relevant there but is not relevant for this misconduct hearing. Ms. Stewart submitted that Mr. Buckley is biased and admits to his bias at the Inquiry.

Ms. Stewart submitted that S/Sgt. (retired) Danyluk is not qualified, not necessary, and his evidence is not relevant. He has never been an investigator in the Professional Standards Unit (PSU) and that the designated Hearing Officer is of a higher rank, as required under the legislative scheme, to make the determination of misconduct. Ms. Stewart submitted that S/Sgt. Danyluk has already taken positions in his report that illustrate bias and an expert is supposed to provide unbiased opinions.

In her rebuttal, Ms. van den Berg submitted that her submissions were tailored to relevancy and not to impartiality or qualifications, as instructed by the Hearing Officer, and that the Tribunal should strike out the Prosecution's submissions on impartiality.

Ms. van den Berg submitted that the Tribunal could put limitations on the experts and have them sign an oath on their impartiality and that previous testimony at the NCI does not preclude them being expert witnesses here. Bias in the reports can be struck and limits can be placed on the scope of their testimony. As suggested in *White Burgess Langille Inman v. Abbott and Haliburton Co.*, experts may need to be reminded to keep to their area of expertise.

Decision

I have reviewed, in detail, the volume of case law submitted and cited by both counsels and found *R. v. Mohan*; *White Burgess Langille Inman v. Abbotsford and Haliburton Co.*; *R. v. DD*; and *R. v. Abbey* particularly helpful in reaching my decision on the five proposed expert witnesses for the Defence. I will first turn to the four-part criteria contained in *R. v. Mohan*, that of: Relevance; necessity; absence of any exclusionary rule; and a properly qualified expert.

The Defence submissions that the three medical experts are relevant as they will provide testimony to establish that their expert beliefs are similar to Cst. Grus' beliefs that there was potentially criminal negligence or breach of trust occurring. I agree to an extent that the component of relevancy has been established, however it is limited to this narrow role of rebutting the Prosecution's position that Cst. Grus was acting on personal beliefs. I find no relevance of the three medical experts to the four actions that Cst. Grus is alleged to have carried out and thus constituting misconduct.

As to necessity I find that, as the trier of fact, I do not require to hear the proposed medical experts or from Mr. Buckley as a legal expert in health regulatory law. Ample medical documentation has already been submitted (exhibit #50), including the World Health Organization's Covid-19 Vaccine Safety Surveillance Manual, various Covid-19 clinical studies, Pfizer's clinical trial data, and Health Canada documents on Covid-19 vaccines. As the trier of fact, I can also turn to the expert witness documents of the three medical doctors (exhibit #61) and Mr. Buckley to determine consistency with Cst. Grus' informed beliefs. Section 15(1) of the *Statutory Powers Procedure Act* provides this Tribunal authority to receive evidence in this manner, without being given under oath or affirmation. Simply, there is a way forward to consider the alignment of Cst. Grus' views within the medical and legal community without taking the time and resources to qualify, provide scope to, and hear from expert witnesses.

R. v. DD speaks to the notion that mere helpfulness is not enough to admit an expert's opinion and that an expert opinion 'is admissible if exceptional issues require special knowledge outside the experience of the trier of fact'. I find this applicable to the proposed expert evidence of S/Sgt. (retired) Peter Danyluk. Although a respected and knowledgeable former police officer with an established insight on police ethics and chain of command, I find myself, as a former superintendent, sufficiently experienced and capable to apply the proper analysis and weight required in considering misconduct.

Of great concern to me is the bias present in the materials submitted by two of the five potential witnesses and the impact that it could have on this Tribunal. I accept Ms. Stewart's submission that, in Canadian law, if an expert witness is found not to be impartial, then they should be ruled inadmissible. (*White Burgess Langille Inman v. Abbott and Haliburton Co.*).

Dr. Thorpe demonstrates a strong bias in the response to a questionnaire wherein he writes that the OPS should be investigated for their “political prosecution of Det. Grus” and the opinion that “Det. Grus has been targeted for pure political reasons”.

S/Sgt. Danyluk, in written response to a questionnaire, provides his respectful opinion that the disciplinary system is being used against Cst. Grus where leadership should have been applied and there was a failure in not investigating the media leak.

Mr. Shaun was a moderator at the April 26, 2023 National Citizen’s Inquiry who put questions to a witness, former RCMP Corporal Daniel Bulford, on Cst. Grus’ actions and subsequent PSA charges whereas Dr. Payne and Dr. Chan were witnesses at the Inquiry.

I find that all five witnesses have a demonstrated bias and there are inherent dangers in permitting them to provide expert testimony. The Defence has submitted that I place strict parameters to limit the scope of their testimony. I am of the opinion that any benefit to this Tribunal is nullified by the bias. They are not impartial and each has an agenda to put forward which is, generally, anti-vaccination in tone and supportive of the actions of Cst. Grus that has led to the misconduct charge before this Tribunal. I cannot and will not allow this *PSA* disciplinary hearing to become a forum to further the polarizing issue of the risks of Covid-19 vaccinations and the merits or legality of the Public Health Agency of Canada’s Covid-19 policy.

For the above noted reasons, I rule that this Tribunal will not permit Dr. Thorpe, Dr. Chan, Dr. Payne, S/Sgt. (retired) Danyluk, nor Mr. Buckley to appear as expert witnesses and summons will not be issued.

(original signed)

Chris Renwick
Superintendent (Retired)

November 26, 2023.