

**IN THE PROVINCIAL COURT OF NOVA SCOTIA**

**Citation:** Hyde (Re), 2010 NSPC 21

**Date:** February 10, 2010

**Registry:** Halifax

**Re An Inquiry Under the *Fatality Investigations Act*, S.N.S. 2001, c. 31 into the death of Howard Hyde**

**DECISION ON MEDIA ACCESS TO EXPERTS' REPORTS**

**Judge:** The Honourable Judge Anne S. Derrick

**Heard:** By written submission

**Decision:** February 12, 2010

**Counsel:** Charles Broderick, Acting Inquiry Counsel

Edward Gores, Q.C., and Dana MacKenzie,  
counsel for the Attorney General

Kevin C. MacDonald, Counsel for Joanna Blair and Dr.  
Hunter Blair

David Roberts, Counsel for the Nova Scotia Government

and General Employees' Union

Sandra MacPherson, Q.C., and Elizabeth Buckle,  
Counsel for the Halifax Regional Police

Rory Rogers, and Matthew Pierce, Counsel for Capital  
District Health Authority

Thomas Donovan, Q.C., and Loretta Manning, Counsel  
for Dr. Janet MacIntyre

Michael Wood, Q.C., and Jennifer Ross, Counsel for Dr.  
Stephen Curry

Blair Mitchell, and Marion Ferguson, Counsel for the  
Schizophrenia Society of Nova Scotia

Carol Tooton, Executive Director of the Canadian Mental  
Health Association, and Simon Li and Mallory  
Treddenich, *pro bono* students at law, for the Canadian  
Mental Health Association

By the Court:

[1] The Canadian Press (CP) has requested a copy of the report of Dr. Christine Hall who testified at the Inquiry on February 1 and 2, 2010. Dr. Hall was qualified to give opinion evidence in excited delirium and sudden in-custody death. At the Inquiry she was examined and cross-examined on her opinions and the report she prepared for the Inquiry, dated June 25, 2009. That report was entered as Exhibit 247.

[2] Since making its initial request for a copy of Dr. Hall's report, the Canadian Press has asked that it also be provided with a copy of the report of Dr. Joseph Noone who testified at the Inquiry on February 3. Dr. Noone was qualified to give opinion evidence in the realm of emergency and forensic psychiatry and the clinical aspects of violent behaviour. Dr. Noone's report dated May 31, 2009 has been entered as Exhibit 251.

[3] The CP request for Dr. Hall's report was made informally to the Inquiry by a representative of the news organization. I did not require CP to provide a formal application supported by an Affidavit and asked only for an initial letter and then clarification on the issue of the use to which CP intended to put the reports. CP responded through Inquiry Counsel that it wanted the reports "for background only to explore excited delirium."

[4] The original request for Dr. Hall's report, the further request for Dr. Noone's report and the indication from CP as to the use to be made of the reports were communicated to counsel for the parties and Ms. Tooton representing the Canadian Mental Health Association. Counsel and Ms. Tooton were asked to indicate their clients' positions on the CP request and I received a response from everyone on the issue. I concluded it was not necessary to conduct an oral hearing on the issue and CP did not request one.

[5] The position of the parties to the CP request was unanimous. There was universal support, including from Inquiry Counsel, for the position set out by the Nova Scotia Government and General Employees' Union (NSGEU). The NSGEU

submitted that these expert reports, and any others to be tendered as Exhibits at the Inquiry, should be made available by the Inquiry for viewing by the news media but should not be released for publication, in whole or in part, by the media. The NSGEU advanced three grounds for its position:

- 1) The NSGEU noted that the Inquiry previously affirmed the importance of maintaining control of its exhibits. That control would be surrendered if experts' reports were released for possible publication.
- 2) The experts who appear at the Inquiry have expertise in certain, defined areas. They are subject to cross-examination on their qualifications following which they are qualified by the Inquiry to give opinion evidence in the defined areas of their expertise. In some cases, the NSGEU submitted, opinions have been offered that are outside the experts' area of expertise. The NSGEU noted that counsel are able to deal with these issues through cross-examination and submissions concerning the admissibility of some or all of the reports and the weight to be accorded to them. However, the NSGEU submitted, if experts' reports are released for publication, notwithstanding the Inquiry's determinations concerning weight or admissibility, the public would receive a distorted version of the evidence.
- 3) The NSGEU submitted that "release of expert reports for publication is not necessary to maintain the Inquiry's statutory and constitutional obligations to conduct an open hearing. The public and the media have

full and unprecedented access to the Inquiry [through the live streaming of the proceedings on the internet.] The hearings are open to the media and representatives of the media should have the opportunity to view Inquiry exhibits, including expert reports.” The NSGEU submitted that the requirement to conduct an open Inquiry “does not extend to allowing the publication of documentary exhibits which may be qualified by other evidence or eventually found to be wholly or partially inadmissible.”

[6] I was also advised that the approach proposed by the NSGEU is consistent with the manner in which the Nunn Commission of Inquiry dealt with media access to its exhibits. In my decision *Re An Inquiry Under the Fatality Investigations Act, S.N.S. 2001, c. 31 into the death of Howard Hyde, (2009 NSPC 32)*, I had noted another precedent on media access to exhibits: the Braidwood Inquiry in British Columbia operated an extensive website but did not post the exhibits tendered in its proceedings on the site. In the fatality inquiry into the deaths of Huu Dinh Pham and Adam Stanley Miller, the inquiry provided the media with access to the exhibits for the duration of the inquiry for the purpose of facilitating the reporting of the inquiry on the condition that no copies would be made of the documents and photographs provided. (*Pham (Re), [2004] A.J. No. 245 at paragraph 71*) The Pham fatality inquiry was not webcast.

[7] On February 9 at the conclusion of the day’s proceedings I advised counsel that I was denying the CP request for copies of the doctors’ reports. I asked Inquiry Counsel to communicate the following to the CP representative who initiated the request: “I have decided that the Inquiry will provide access to CP to these reports at

the hearing offices at a time convenient to the Inquiry. No copies will be provided and no photographs or dictation of the contents of the reports will be permitted. CP can review the reports on site at the Inquiry offices.”

[8] As I indicated to counsel at the Inquiry and asked CP to be advised, I am satisfied that my decision appropriately balances the principle of open proceedings, the constitutional rights of the media and the right of the Inquiry to control its exhibits. The following is an elaboration of these reasons.

[9] I previously held in *Re An Inquiry Under the Fatality Investigations Act, S.N.S. 2001, c. 31 into the death of Howard Hyde, 2009 (NSPC 32)* that the media and general public are not entitled, pursuant to freedom of expression guarantees, to access court exhibits for unregulated and unlimited use. I acknowledged that section 2(b) guarantees do play a role in the determination of access to exhibits tendered into evidence in a court proceeding and noted that a court’s jurisdiction over its own records is “anchored in the vital public policy favouring public access to the workings of the courts.” (*CTV Television Inc. v. Ontario Superior Court of Justice, [2002] O.J. No. 1141 (Ont. C.A.)*)

[10] To be factored into the analysis of whether to grant access to an exhibit or not is the Inquiry’s obligation to exercise “supervisory and protecting power over its own records.” It has long been established that denying access will be appropriate where “the ends of justice would be subverted by disclosure or the judicial documents might be used for an improper purpose.” (*Nova Scotia (Attorney General) v. McIntyre, [1982] 1 S.C.R. 175 at page 9*)

[11] Although decided without reference to section 2(b) of the *Charter*, the Supreme Court of Canada decision in *Vickery v. Nova Scotia Supreme Court (Prothonotary)*, [1991] S.C.J. No. 23 is helpful in that it identified four significant factors to be assessed when deciding whether access to exhibits (including the ability to copy and disseminate) should be permitted: (1) the nature of the exhibits as part of the court record; (2) the right of the court to inquire into the use to be made of access, and to regulate it; (3) the fact that the exhibits, having been produced at trial and open to public scrutiny and discussion, means the open justice requirement has been met; and (4) the fact that different considerations may govern when the proceedings have concluded and the discussion is removed from the hearing context.

[12] As I stated in my earlier decision, the majority in *Vickery* made some important observations:

- Exhibits are not the property of the court. Others will have a proprietary interest in them. “Once exhibits have served their purpose in the court process, the argument based on unfettered access as part of the open process lying at the heart of the administration of justice loses some of its preeminence.” (*paragraphs 20 - 23*)
- The court is the custodian of the exhibit and “fully entitled” to regulate the use to which the exhibit is to be put by the access-seeker “by securing appropriate undertakings and assurances if those be advisable to protect competing interests...the court must “protect

[someone with a legitimate competing interest] and accommodate the public interest in access.” (*paragraphs 24 - 25*)

- The open justice requirement is met by production at trial of an exhibit and its exposure to public scrutiny and discussion. Privacy rights may be surrendered during a court proceeding, but they are not “surrendered for all time.” (*paragraphs 26 - 29*)
- Public access to and reporting of proceedings is a price to be paid in the interests of ensuring accountability of those engaged in the administration of justice. “The subsequent release of selected exhibits is fraught with risk of partiality, with a lack of fairness.” (*paragraphs 30 - 31*)

[13] The risks posed by the unfettered dissemination of documentary exhibits include, as identified by the NSGEU, risks of unfairness and the potential for misrepresentation of evidence occasioned by the Inquiry losing control over its exhibits. An expert’s report does not reflect the nuances, elaborations or clarifications of the opinion evidence offered by the expert to the Inquiry as the expert, in the course of the Inquiry’s proceedings, will have been examined and cross-examined on his or her report and the opinions contained in it. Furthermore, the experts prepared their reports before the Inquiry began to hear evidence and consequently were asked questions that drew content from the testimony that has been heard in the proceedings to this point. Relinquishing control over the report creates the potential that the report will be represented or treated as the complete expression of the expert’s opinion when

it is the expert's testimony in its entirety, including his or her answers to questions about the contents of the report and testimony provided by other witnesses that form the evidence the Inquiry will be considering. De-contextualization of the expert's opinion is therefore one of the risks that is limited by the Inquiry maintaining control over its exhibits.

[14] It is also material that the experts' reports were prepared at the request of the Inquiry for the use of the Inquiry and to ensure counsel had notice of the opinions being expressed by the experts. No permission was obtained from the experts for the release of these reports to the media.

[15] This Inquiry has benefitted from being webcast, extending its public and media access far beyond what is usual for court proceedings. Drs. Hall and Noone were examined extensively by counsel on their expert opinions and this evidence was available through the internet. The ability for the media and the public to follow the expert evidence has not been restricted to only reporters and citizens able to attend the proceedings in person. Especially given this unprecedented access to the Inquiry's hearings, the denial of the CP request for a copy of the experts' reports does not compromise the media's constitutional entitlements or the public nature of this Inquiry. The availability of the reports for viewing at the Inquiry's temporary offices supports the media's vital role in informing the public on the proceedings and strikes the appropriate balance between the need for the Inquiry to control its exhibits and protect the integrity of its proceedings, and the right of public access to the evidence being considered by the Inquiry.