

**IN THE PROVINCIAL COURT OF NOVA SCOTIA**

**Citation:** Hyde (Re), 2010 NSPC 22

**Date:** February 15, 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 THE ADMISSIBILITY OF DR. MICHAEL WEBSTER'S  
REPORT**

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

**Heard:** By written submission

**Decision:** February 15, 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] Dr. Michael Webster, a psychologist, was contacted by Inquiry Counsel in 2009 for the purpose of providing expert opinion evidence to this Inquiry. In accordance with the Rules of Procedure for the Inquiry, Dr. Webster produced a 13 page report dated May 3, 2009. In his report, Dr. Webster indicated that he had been asked for his opinion “regarding the death of [Howard Hyde.]” I do not have any information about whether Dr. Webster was provided with any greater specificity concerning the focus for his report.

[2] It is my understanding that Dr. Webster was identified originally as someone

with potentially helpful expertise for the Inquiry from his involvement with the Braidwood Inquiry in British Columbia. Dr. Webster gave a presentation at Phase I of the Braidwood Inquiry (*May 13, 2008*) and was examined and cross-examined at Phase II (*May 12 and 13, 2009*). These two phases of the Braidwood Inquiry were described as the “study” commission and the “hearing and study commission” respectively. The “study” commission of Braidwood was mandated “to report on the use of conducted energy weapons (Tasers) in British Columbia, and to make recommendations respecting their appropriate use.” The “hearing and study” commission of Braidwood was “to provide the Dziekanski family and the public with a complete record of the circumstances of Robert Dziekanski’s death and to make recommendations the Commissioner considers necessary and appropriate.”

[3] At Phase II of the Braidwood Inquiry, after Dr. Webster was cross-examined on his qualifications, he was qualified by the Inquiry Commissioner to give expert opinion evidence on “the use of force from a crisis intervention perspective.” (*Braidwood Hearings, Transcript of Dr. Michael Webster’s Evidence, May 12, 2009*)

[4] In addition to other educational qualifications, Dr. Webster has a doctorate in counselling/clinical psychology earned from the University of British Columbia in 1981. In his curriculum vitae, he describes his present position as: “Consulting Psychologist to Law Enforcement Agencies: Private Practice.” He has worked as a psychologist for the Correctional Service of Canada, including on contract from 1989 - 1992 at the Regional Reception Centre Matsqui and as a psychological consultant with the RCMP and FBI. He has also provided training to various police agencies, including the Vancouver Police Department where his focus has been crisis

intervention training. I am aware of Dr. Webster's work with the Vancouver Police Department from a previous witness who testified at this Inquiry, John McKay, a retired Superintendent with the Vancouver Police who was qualified as a use of force expert. Mr. McKay referred to the Vancouver Police Department's crisis intervention model and indicated Dr. Webster was the psychologist who assisted with the training. (*Hyde Inquiry Transcripts, pp. 7771 - 7772*)

[5] In Dr. Webster's May 3 report for this Inquiry, he discussed a number of topics: the role of frame of reference in the human decision-making process; Conducted Energy Weapons - various studies and reports concerning their use and the placement of CEW's on the use of force continuum; excited delirium; and the Halifax Regional Police Service (HRPS) training. Dr. Webster offered a number of opinions specifically relating to how Mr. Hyde was managed by police while in their custody.

[6] In addition to his report of May 3, 2009, Dr. Webster subsequently produced a 2 page letter addressed to Acting Inquiry counsel and dated February 10, 2009. In it Dr. Webster indicated that he has "worked as a police psychologist for over 30 years; with a speciality in crisis management." He stated: "My practice has focused on, and continues to focus on, dealing with situations that involve the application of force....I have spent over 30 years 'training police officers in the use of force.' Those unfamiliar with the dynamics of force tend to view the phenomenon from a physical perspective. I have trained police personnel in the use of the two most frequently used, and most successful force options...presence and communication." I have been advised that Dr. Webster forwarded this letter in response to being provided by Acting Inquiry counsel with the correspondence from counsel for the Halifax Regional Police

detailing HRPS' objections to the admissibility of his report. The report and the issue of Dr. Webster's evidence are the subject-matter of this decision, as I will explain in a moment.

[7] All parties at this Inquiry have a copy of Dr. Webster's report and his letter of February 10. Although I only just saw the report on February 11, 2010, there has apparently been correspondence from certain counsel to Inquiry counsel in 2009 objecting to its contents. I have now also reviewed the correspondence from Sandra MacPherson-Duncan, counsel for the Halifax Regional Police Service, to Inquiry counsel dated November 9 and 16, 2009.

[8] Ms. MacPherson-Duncan indicated in her letter of November 9 that she would be objecting to "the qualifications and report of Dr. Mike Webster as he is neither an expert in use of force nor the psychology surrounding the use of force." She went on to say that Dr. Webster's report "does not deal with anything within his area of expertise" and that furthermore, "...his report expresses a biased political view which has no place in an expert's report."

[9] Once it became known to me that the Halifax Regional Police were intending to oppose the admissibility of Dr. Webster's report, I convened a meeting on February 10 with all counsel to discuss how to address the issue. It was decided that the admissibility issue should be dealt with as soon as possible and not left to when Dr. Webster is scheduled to attend at the Inquiry on February 24. I was informed that the Nova Scotia Government and General Employees' Union (NSGEU) would be supporting the submissions of the HRPS on the inadmissibility of Dr. Webster's

report. We scheduled February 16 as the date for the hearing of these submissions. All other parties have indicated they are not taking a position on the issue. In light of the fact that Acting Inquiry counsel has not been dealing with this issue until very recently, I have indicated I do not expect a submission from him. It is obvious from the fact of the original invitation to Dr. Webster to attend as a witness at the Inquiry, that Inquiry counsel regarded him as having something of value to offer.

[10] I have now reached my own conclusions about Dr. Webster's potential contribution to this Inquiry. I have concluded that his report will not assist me. I think it would be difficult for him to qualify as an expert in respect of certain opinions he expressed. As I am not going to admit his report into evidence, I will not engage in an analysis of it for the purpose of addressing the objections raised in Ms. MacPherson-Duncan's letter of November 16, 2009. I will add that it is relevant to my decision on Dr. Webster's report that at the time it was prepared, the Inquiry had not heard a single witness. The Inquiry has now heard a considerable amount of evidence with the result that certain issues are in sharper focus.

[11] However it is my view that Dr. Webster can likely be qualified to give opinion evidence on "the use of force from a crisis intervention perspective" - the basis for his opinion evidence at Braidwood - and as an expert in "the psychology of conflict" which is another area he referred to in the Braidwood Inquiry as an area of his expertise. In preparing to deal with the issue of Dr. Webster's report, I read his evidence at Braidwood (which is available on the Braidwood Inquiry website), having invited counsel to do the same. I found this useful in identifying areas that Dr. Webster appears qualified to speak about with some authority based on his education

and experience. I have also found it useful to review the testimony of John McKay, who testified before this Inquiry on December 7 and 8, 2009. As I have noted, Mr. McKay, a recently retired senior police officer of the Vancouver Police Department, worked with Dr. Webster on training members of the VPD. Mr. McKay spoke in his evidence specifically about some of the areas that Dr. Webster has expertise in.

[12] At this point I want to reference the statutory and procedural framework governing the receipt of evidence by this Inquiry. The *Fatality Investigations Act*, S.N.S. 2001, c. 31 provides in section 31(1) as follows:

Subject to subsection (2), a judge may admit in evidence at a fatality inquiry

- (a) any oral testimony; or
- (b) any document or other thing,

that is relevant to the purposes of the fatality inquiry but shall refuse to admit in evidence all or part of any oral testimony or any document or other thing if the judge is satisfied that the oral testimony, document or other thing or part of it is vexatious, unimportant or unnecessary for the purpose of the fatality inquiry.

[13] The Rules of Procedure for the Inquiry provide in section 15 entitled “Evidence” as follows:

- (1) The Inquiry Judge may admit as evidence Affidavits, Statutory Declarations or other evidence made or taken under the laws of Canada that may be applicable in any case in which the Inquiry considers it fit and proper to have such evidence presented, and whether such evidence is sworn or unsworn. The Inquiry Judge may admit transcripts of related proceedings and statements of individuals whether or not such individuals are available for examination and cross-examination.
- (2) Without restricting the generality of subsection (1), the Inquiry may admit such written, oral or other evidence as the Inquiry may in its discretion deem relevant, whether or not the admission of such evidence is in accordance with the normal rules of evidence.

[14] The legislation and the rules that apply to the conduct of this Inquiry therefore permit the receipt of Dr. Webster's opinions on issues within his expertise. As a psychologist who has assisted in the training of police in relation to use of force and crisis intervention he would appear to satisfy the requirement that an expert witness possess "special knowledge and experience going beyond that of the trier of fact." (*R. v. Marquard*, [1993] 4 S.C.R. 223 at paragraph 35)

[15] The leading case on the admissibility of expert opinion evidence is *R. v. Mohan*, [1994] 2 S.C.R. 9 which stipulated that such evidence will only be admitted where it is:

- (a) Relevant;
- (b) Necessary to assist the court;
- (c) Not subject to any exclusionary rule; and
- (d) Proffered by a properly qualified expert.

[16] While I do not accept that the requirements of *Mohan* and related cases emerging from the criminal trial context should be applied reflexively to strictly limit the nature and scope of opinion evidence heard at a fatality inquiry, I believe it is important to apply a fairly rigorous standard to the admissibility of expert evidence before me. It is my view that the integrity of the Inquiry's work and the credibility of its findings and recommendations would not be served by too relaxed an approach to the evidence it considers. However I would not want to short-change the Inquiry by refusing to admit evidence that appears to be relevant and could be of assistance. From what I can deduce by reading Dr. Webster's testimony from Braidwood, I cannot see

how his evidence would be “vexatious, unimportant or unnecessary”, as prohibited by the *Fatality Investigations Act*. There is considerable reason to think that Dr. Webster’s evidence, focused on issues that have been addressed at this Inquiry already, is likely to satisfy the *Mohan* standard.

[17] I note that the HRPS has not taken the position that expert opinion evidence from a psychologist in relation to the issue of use of force is unnecessary in this case. Indeed, they have offered their own proposed expert to testify at the Inquiry, an issue that can be resolved under the Rules of Procedure if the HRPS decides to formalize a request to have another expert called to testify.

[18] In respect of Dr. Webster’s potential to assist the Inquiry, I have concluded that I should set out the areas I am interested in hearing from him on. I note that even in the criminal context, a judge has considerable latitude in fashioning the approach to the expert evidence to be received: the *Abbey* decision from the Ontario Court of Appeal indicates that the “trial judge may admit part of the proffered testimony, modify the nature or scope of the proposed opinion, or edit the language used to frame that opinion.” (*R.v. Abbey*, [2009] O.J. No. 3534, paragraph 63) This discretion is to be exercised, in the criminal trial process, in advance of determining admissibility. (*Abbey*, paragraph 62)

[19] As I will indicate in somewhat better detail, I am not foreclosing examination by counsel for the parties of Dr. Webster’s qualifications or his opinions, or submissions on the issues of admissibility or weight with respect to those opinions. Having spent the past weekend studying this issue, including carefully reviewing Ms.

MacPherson-Duncan's written submissions of November 16, the evidence I have heard at the Inquiry from John McKay, Dr. Webster's evidence at Braidwood and my mandate, I have concluded it is not a fruitful use of the Inquiry's and counsel's time and resources to be entertaining submissions on the inadmissibility of Dr. Webster's report when it does not appear to me that it offers a focus on what is most relevant to this Inquiry. However it appears probable to me that Dr. Webster has expertise that should assist my understanding of certain issues I am considering.

[20] To be clear, it is my intention to have Dr. Webster interviewed by Acting Inquiry Counsel in accordance with my direction as contained in this decision to ensure a focus on relevant topics and so that all parties have notice of what his evidence will address; that during the interview and his testimony before the Inquiry he will not be referred to nor will he be referring to his report; and that counsel will be permitted to examine him on his qualifications. I will consider any objections to his opinions - which could go to admissibility or weight - however may defer deciding these issues, should they arise, until I am ready to do so. This could result in my hearing evidence that is subject to an objection and later deciding whether to consider it or what weight to assign to it.

[21] I am therefore directing Acting Inquiry Counsel to interview Dr. Webster on the following areas and to obtain a transcript or facilitate counsel getting a disk of the interview as quickly as possible:

- Dr. Webster to describe what is meant by a "frame of reference" in the context of the human decision-making process;

- Dr. Webster to discuss use of force as having a psychological aspect. He referred to this in Braidwood (*May 12, 2009, page 54*) where he said “...there’s two parts of use of force. One part is the practical part, and those are the parts you’ve heard here when police people that have been designated as use-of-force experts come and talk to you about. There’s another part and that’s the psychological part, because we are dealing with human beings.”
- Dr. Webster to describe the training he has assisted in providing to members of the Vancouver Police Department on crisis intervention and the techniques used for crisis intervention; what does he teach and how does he teach it? What is the first rule of crisis intervention? What is his opinion about how extensive crisis intervention training should be in a police force and why does he hold that opinion? What should crisis intervention training for police consist of?
- Dr. Webster to provide his comments on the psychological aspects of police/citizen interaction: Dr. Webster discussed this in Braidwood (*May 12, 2009 at page 70*) where he stated: “...the genesis of human behaviour is interactional. It is not dispositional...If [a citizen] has the power to influence the police, then the police have the power to influence [the citizen’s] behaviour as well. Actually, human behaviour is determined interactionally.”

- Dr. Webster to discuss “presence and communication” and what this means in use of force.
- Dr. Webster to discuss the psychological processes that are operating (or not operating as the case may be) when a person is in a state of hyper-arousal. I note that Dr. Webster spoke about this at Braidwood (*May 12, 2009 at pp. 66 - 67*) What are the objectives of crisis intervention where a person is in this state?
- Dr. Webster to describe the continuum that leads from an emotional crisis to a behavioural crisis; the des-escalation of a person emotionally; the role of crisis intervention techniques in de-escalating an emotional crisis. I note that John McKay, in response to questions from counsel for the HRPS, made reference to Dr. Webster’s work in this area. (*John McKay, Transcript of Evidence, p. 8050*)
- Dr. Webster to discuss what he observed from the video evidence about Mr. Hyde being in an emotional crisis and what could have been done, if anything, in those circumstances to have prevented a behavioural crisis from happening, both at HRPS Booking and the Central Nova Scotia Correctional Facility. I note that John McKay offered an opinion on this issue in his evidence. (*John McKay, Transcript of Evidence, p. 8051*)
- Dr. Webster’s opinion on use of force models and his criticism of them. I note he gave evidence concerning this at the Braidwood Inquiry. (*May*

13, 2009, page 37) John McKay stated in his evidence that “use of force models can seemingly place the topic of subject resistance and officer response in a rather simplistic fashion.” (*John McKay, Transcript of Evidence, p. 7792*) I am interested in knowing what a psychologist who trains police officers has to say about this.

[22] I recognize that, notwithstanding my decision not to receive in evidence Dr. Webster’s report, the HRPS and the NSGEU may still wish to challenge Dr. Webster’s qualifications for giving some or any opinion evidence in the areas I have outlined. I have concluded however that I would be unable to make any further determinations in relation to Dr. Webster’s evidence without having him available to be examined and cross-examined. The furthest I feel able to go in resolving the issue of Dr. Webster’s contribution to this Inquiry is what I have decided: that his report should not be admitted and that he should be focused on specific issues that are relevant to the Inquiry in my opinion..

[23] There is a further issue I have not discussed that I was made aware of in the correspondence of Ms. MacPherson-Duncan acting for the Halifax Regional Police Service and at the meeting of counsel I held on February 10. That is the allegation by the HRPS that Dr. Webster’s report expresses bias. Obviously by not receiving his report in evidence, I will not be considering any opinions expressed therein, which include opinions that have been characterized as biased. I do not know if the HRPS will still want to argue that, because of bias, Dr. Webster’s evidence should not be heard even in the areas I have mapped out. I have decided that this is an issue most appropriately dealt with, if at all, in the context of Dr. Webster’s testimony and can

likely only be properly considered by me once Dr. Webster has testified and I have had the benefit of hearing all of his evidence. What I do know at this point is that, although Dr. Webster expressed strong opinions at the Braidwood Inquiry and was vigorously cross-examined by counsel for the police officers at the Inquiry, his evidence was not ruled inadmissible on the basis of any bias or any other ground that I am aware of. Furthermore I have evidence before me that Dr. Webster is used as a training resource by the Vancouver Police Department and has worked with police services and police officers for over thirty years. This does not suggest to me that I should be reticent about hearing from him. To the contrary: the fact that Dr. Webster was accepted as an expert at Braidwood, has trained and worked with police officers for many years and provides training to police that was referred to approvingly by an expert in use of force at this Inquiry indicates to me that I should hear from him. As I have said already, his qualifications and evidence will be subjected to the same scrutiny as other witnesses appearing as experts at this Inquiry. I have confidence that if his opinions are tainted with a bias that would make them unsafe or inappropriate to consider this will be evident to me and identified by counsel.