

FEDERAL COURT

BETWEEN:

CANADIAN COALITION FOR FIREARM RIGHTS, LAURENCE KNOWLES,
MACCABEE DEFENSE INC., MAGNUM MACHINE LTD., RODNEY GILTACA,
RYAN STEACY and WOLVERINE SUPPLIES LTD.

APPLICANTS

and

ATTORNEY GENERAL OF CANADA

RESPONDENT

**APPLICATION UNDER Sections 18 and 18.1 of the Federal Court Act, RSC, 1985,
c. F-7**

**NOTICE OF OBJECTION TO PROPOSED EXPERT WITNESS
(made pursuant to Rule 52.5)**

TAKE NOTICE that the Applicants, Canadian Coalition for Firearm Rights, Laurence Knowles, Maccabee Defence Inc., Rodney Giltaca, Ryan Steacy and Wolverine Supplies Ltd., object to the Respondent's proposed expert witness, Murray Smith ("Mr. Smith"), and to the Affidavit of Murray Smith, affirmed October 9, 2020.

The grounds for this objection are:

1. Mr. Smith is not an impartial, independent and objective witness;
2. Mr. Smith does not have the necessary qualifications to provide expert evidence;
3. Mr. Smith is an advocate for the Respondent; and
4. Such further and other grounds as counsel may advise and this Honourable Court may permit.

The particulars of the grounds for objection are as follows:

1. On September 11, 2020, the Applicants filed a Notice of Motion seeking injunctive relief (the “**Injunction Application**”). In support of their Injunction Application, the Applicants filed 12 Affidavits.
2. The Injunction Application seeks, *inter alia*:
 - (a) An interlocutory injunction staying or suspending the effect of the *Regulations Amending Regulations Prescribing Certain Firearms and Other Weapons, Components and Parts of Weapons, Accessories, Cartridge Magazines, Ammunition and Projectiles as Prohibited, Restricted, or Non-Restricted: SOR/2020-96* (the “**Regulation**”) and consecutively the *Order Declaring an Amnesty Period (2020)*, SOR/2020-97 (the “**Amnesty Order**”) until the Application for Judicial Review of the Regulation (the “**JR Application**”) has been heard and fully determined;
 - (b) An interlocutory injunction directing that the Royal Canadian Mounted Police Specialized Support Services Unit (the “**RCMP SFSS**”) must cease designating firearms as restricted or prohibited in the Firearms Reference Table (“**FRT**”), or otherwise, until the JR Application has been heard and finally determined; and
 - (c) Declaring that any designations of firearms made by the RCMP SFSS as restricted or prohibited, or as “variants” of other restricted or prohibited firearms, made since or purportedly pursuant to the Regulation, are suspended and are of no force or effect until the JR Application has been heard and finally determined.
3. In response to the Injunction Application, on October 9, 2020, the Respondent filed two Affidavits, the Affidavit of Adrienne Deschamps and the Affidavit of Mr. Smith.
4. Mr. Smith’s Affidavit states that he is providing an expert opinion in respect of the Injunction Application, on the following areas:

- (a) The FRT;
 - (b) The definition of “variant”, how the RCMP determines variant, and the use of the term variant by gun retailers and gun owners;
 - (c) How muzzle energy thresholds and bore diameters are measured by the RCMP for the purposes of *Criminal Code* definitions;
 - (d) Non-prohibited firearms that are available for hunting and sporting use; and
 - (e) Examples of firearms used in mass shooting events in Canada that are prohibited by the Regulation.
5. The Applicants object to Mr. Smith being qualified as an expert witness for the following reasons:
- (a) Mr. Smith is not an impartial, independent and objective witness;
 - (b) Mr. Smith does not have the necessary qualifications to provide expert evidence on all purported areas of expertise;
 - (c) Mr. Smith is an advocate for the Respondent; and
 - (d) Such further and other grounds as counsel may advise and this Honourable Court may permit.

(the “**Objection**”)

6. The basis for the Objection is set out herein.
7. The Applicants propose that the Objection be heard at the same time as the hearing of the Injunction Application.

A. Mr. Smith is not an Impartial, Independent and Objective Expert Witness

8. Expert evidence serves an important function. It is intended to assist the Court by enabling “the trier of fact to appreciate the matters in issue due to their technical nature”.¹
9. However, to discharge this duty, the proposed expert must be impartial, independent and objective.

Underlying the various formulations of the duty are three related concepts: impartiality, independence and absence of bias. The expert’s opinion must be impartial in the sense that it reflects an objective assessment of the questions at hand. It must be independent in the sense that it is the product of the expert’s independent judgment uninfluenced by who has retained him or her or the outcome of the litigation. It must be unbiased in the sense that it does not unfairly favour one party’s position over another.²

10. This responsibility and duty of impartiality is expressly set out in the Code of Conduct for Expert Witnesses contained in the *Federal Courts Rules*³, which requires that:
 1. An expert witness named to provide a report for use as evidence, or to testify in a proceeding, has an overriding duty to assist the Court impartially on matters relevant to his or her area of expertise.
 2. This duty overrides any duty to a party to the proceeding, including the person retaining the expert witness. An expert is to be independent and objective. An expert is not an advocate for a party.
11. Mr. Smith cannot be admitted as an expert witness due to his prior and ongoing employment relationship with the Respondent which gives rise to an express bias and partiality. Mr. Smith has either been directly employed or hired as a consultant with the RCMP since 1977. Notably, from 2008 until May 20, 2020, he held the position of the Manager of the RCMP SFSS.⁴ Since June 8, 2020,⁵ Mr. Smith has

¹ *R v Mohan*, [1994] 2 SCR 9, para 26

² *White Burgess Langille Inman v Abbott and Haliburton Co*, 2015 SCC 23, para 32

³ SOR/98-106

⁴ Transcript of Cross-Examination of Murray Smith, October 29, 2020, 14/5

⁵ Transcript of Cross-Examination of Murray Smith, October 29, 2020, 14/10

acted as a consultant providing advice and guidance to the current Acting Manager of the RCMP SFSS.⁶

12. Mr. Smith held the role of Manager of the RCMP SFSS during the time leading up to and when the Regulation was put into effect (May 1, 2020) and subsequent to that date. Mr. Smith has provided advice to the Government about firearm regulation since 1989 and specifically provided input in respect of the Regulation.⁷ The Injunction Application seeks to suspend the very Regulation for which Mr. Smith provided guidance to the Government during its creation and enactment.
13. In addition to suspending the Regulation, the injunctive relief sought includes an order directing that the RCMP SFSS cease designating firearms as restricted or prohibited in the FRT, and declaring that any designations of firearms made by the RCMP SFSS as restricted or prohibited, or as “variants” of other restricted or prohibited firearms, made pursuant to the Regulation, are suspended.
14. As the former Manager of the SFSS and as a current consultant with the RCMP SFSS, Mr. Smith was responsible for overseeing the designation of firearms as restricted or prohibited in the FRT as a result of the Regulation, and was responsible for determining whether additional firearms were “variants” of those specifically enumerated in the Regulation.⁸ Accordingly, the decisions that Mr. Smith made as Manager of the RCMP SFSS are subject to this Court’s review pursuant to the JR Application.
15. Mr. Smith is inextricably tied to the Regulation and the RCMP SFSS decisions which are under review. It is impossible for Mr. Smith to be considered impartial, objective and independent when it is the decisions that he made which are impugned in the JR Application and the Injunction Application.

⁶ Affidavit of M. Smith, affirmed October 9, 2020

⁷ Transcript of Cross-Examination of Murray Smith, October 29, 2020, 66/18-24, 118/1-5, 127/15-23

⁸ Transcript of Cross-Examination of Murray Smith, October 29, 2020, 67/8-68/20; 69/4-12; 91/17-92/8; 94/12-17;

16. Mr. Smith's lack of impartiality and the fact that he is deeply entrenched in both the issues in dispute and the outcome of the Injunction Application, go beyond simply not qualifying him as an expert, but go to the root and weight of his evidence. As was clearly illustrated during this Cross-Examination and as is evident in his Affidavit, Mr. Smith was and remains closely connected to the RCMP SFSS.
17. Furthermore, Mr. Smith was repeatedly instructed to not answer questions during his Cross-Examination as a result of claims of Cabinet Privilege and Public Interest Immunity.⁹ Respectfully, an independent witness should not and would not need to invoke the shield of privilege and immunity. The Respondent has chosen to rely on a witness whose evidence cannot be meaningfully weighed because the Respondent will not allow the witness to explain whether (and, if so, the extent to which) the very subjects in issue engage advice that Mr. Smith provided.
18. As just one example, notwithstanding that he has no legal training, Mr. Smith has offered his personal interpretation of section 87 of the Regulation, suggesting that it has expanded the scope of prohibited firearms. That is his interpretation. Others disagree. In Mr. Smith's view, a firearm owner who is uncertain about the legal designation of their firearm can learn more by, among other things, inquiring of the business that sold them the firearm.¹⁰ Here, Mr. Timmins,¹¹ Mr. O'Dell,¹² and Mr. Singer¹³ have reasonable understandings of the scope of section 87 of the Regulation, which happen to differ from Mr. Smith's views. Those gentlemen would advise Canadians that certain firearms are non-restricted when Mr. Smith would advise them that they are prohibited.
19. Impartial evidence reflects an objective assessment of the relevant issues. Unbiased evidence does not unfairly favour one party's position over another. It is impossible

⁹ Transcript of Cross-Examination of Murray Smith, October 29, 2020, 65/24-67/7; 70/1-19; 101/1-16; 127/21-131/4

¹⁰ Transcript of Cross-Examination of Murray Smith, October 29, 2020, 43/4-44/9

¹¹ Affidavit of Rick Timmins, sworn on September 10, 2020, paras 32- 42

¹² Affidavit of Philip O'Dell, affirmed on September 11, 2020, paras 47- 63

¹³ Affidavit of Wyatt Singer, sworn on August 21, 2020, paras 43-49

for this Court to know whether Mr. Smith's evidence meets those tests. The natural inference, based on Mr. Smith's roles with the RCMP SFSS and his long history of providing advice to the Government about firearm regulation, is that his evidence is unreliable on the basis of partiality and bias. Mr. Smith provided advice to the Government, which is surely reflected in the Regulation and re-designations at issue in this application. When the Applicants sought to probe the extent of that problem, counsel for the Respondent refused to let Mr. Smith answer the questions. It was the Respondent's choice to rely on Mr. Smith. It is unfair to ask this Court to weigh Mr. Smith's evidence as expert evidence while simultaneously depriving the Court of the information that would allow any meaningful assessment of partiality and bias.

20. Instead of an expert witness, Mr. Smith is, at best, a fact witness and, even then, he is a witness who is here to defend his own life's work.
21. For the reasons set out above, the Applicants submit that Mr. Smith cannot be qualified as an expert witness in this Application and that his evidence should be accorded relatively little weight, given Mr. Smith's deep investment in defending the opinions he has proffered.

Date: November 17, 2020



(Signature of solicitor or party)

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To:
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