

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

FINAL WRITTEN SUBMISSIONS OF CST. JOSEPH SMYTH

Before Commissioner Leo Barry

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PART I

APPLICABLE LEGAL PRINCIPLES

(1) Brief Summary of the Facts

1. On April 3, 2015 Cst. Joe Smyth was the supervisor of the Protective Services Unit (PSU), an RNC unit whose mandate was to provide close protection services and gather intelligence in ensuring the security of the Premier and other elected officials. Cst. Smyth had been a member of the PSU since late 2011.

RNC Policy and Procedure Manual dated June 5, 2013 regarding Protective Services Unit Exhibit CIDDD P-0131

2. On that same date Donna Ivey, a communications specialist in the Premier's office, forwarded what she referred to as a Tweet of concern to Cst. Smyth. This Tweet of concern was sent from an account registered as DonahueDonDunphy (@sculpen). This Tweet, which was directed towards Premier Paul Davis and Minister Sandy Collins, stated:

*Donahue2DonDunphy @sculpen @SandyRCollins
@PremierOfNL @ShermanDowney won't mention
names this time, 2 prick dead MHAs might have good
family members I may hurt #nlpoli*

A copy of this tweet is contained in CIDDD Exhibit P-009

E-mail exchange between Donna Ivey and Cst. Joe Smyth on April 3, 2015, contained in CIDDD Exhibit P-0073

3. Cst. Smyth indicated that while he did not consider the tweet a threat he felt it was of a disconcerting nature and required some level of follow-up. On Saturday, April 4, 2015 Cst. Smyth reviewed the Tweet of Concern in its entire context, followed by an examination of approximately a 12 month history of the @sculpen twitter account. Based

on his assessment of the initial tweet and a series of other disconcerting comments contained within the account history, Cst. Smyth determined that the next appropriate course of action would be to identify the individual responsible and conduct a home visit as part of a threat assessment. Cst. Smyth eventually spoke to Tom Mahoney, the Executive Director of Workplace NL, who was able to provide some information to confirm the user's identity.

4. As will be reviewed in more detail throughout this Brief, Cst. Smyth conducted relevant background checks en route to Mitchell's Brook on April 5, 2015 and determined that Mr. Dunphy had no history of violence and posed a low risk to Cst. Smyth's personal safety. Cst. Smyth attended at Mr. Dunphy's home and when he was not there visited his next door neighbours, who turned out to be Mr. Dunphy's brother and sister in-law. While he obtained relevant information from Richard and Debbie Dunphy none of the information caused Cst. Smyth to revise his opinion as to his personal risk.
5. When he left Richard and Debbie Dunphy's house Cst. Smyth noticed that there was a vehicle in Donald Dunphy's driveway. He attended at Mr. Dunphy's residence and was invited in. The circumstances of Cst. Smyth's interaction with Donald Dunphy in the home will be reviewed in more detail throughout this Brief but the end result was that Mr. Dunphy pointed a rifle at Cst. Smyth, forcing him to draw his firearm. Cst. Smyth fired four shots which resulted in Mr. Dunphy's death.

(2) Chronology of Events

6. The following is a brief outline of the chronology of events in this matter:

April 3, 2015 – Tweet of concern is forwarded by Donna Ivey to Cst. Joe Smyth

April 4, 2015 – Cst. Joe Smyth reviewed Donald Dunphy's Twitter account, spoke to Tom Mahoney at Workplace NL, determined Mr. Dunphy's address and made the decision to visit him the next day

April 5, 2015 – Cst. Smyth, while travelling to Mitchell's Brook, contacted the RNC Communications Center and the Holyrood RCMP to have background checks conducted

April 6-10, 2015 – Cst. Smyth provided a statement to the RCMP and engaged in 2 video re-enactments at Mr. Dunphy's home

April 8, 2015 – Retired Justice David Riche was hired by the RCMP as an independent observer

January 29, 2016 - The RCMP investigation was forwarded to ASIRT (Alberta Serious Incident Report Team) for review

September 13, 2016 - The RCMP announced that there were no reasonable grounds to lay a charge

September 16, 2016 - Retired Justice David Riche gave numerous media interviews and made public comments which raised concerns about the RCMP investigation and the conduct of Cst. Smyth

September 23, 2016 - The Inquiry was announced, the Terms of Reference were released, and Justice Leo Barry of the NLCA was appointed Commissioner

October 19, 2016 – The standing application was held

January 9, 2017 – The taking of evidence began

March 10, 2017 - After hearing from more than 50 witnesses the calling of evidence was completed

(3) The role of a public inquiry in this present case

7. As outlined by Cory J. in *Phillips v. Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)* [1995] S.C.J. No. 36 two of the main purposes of the public inquiry in Canadian law are to uncover “the truth” and to help “restore public confidence not only in the institution or situation investigated but also in the process of government as a whole” (paragraph 62).

8. Along similar lines, Professor Ratushny makes the following comments on the basic function of a commission of inquiry at p. 162 of his textbook:

A commission of inquiry has no authority to decide legal rights or obligations; the fact-finding function of a commissioner has an intrinsic value quite apart from that of serving as the foundation for determining rights or obligations. The public is entitled to know why its supply of drinking water became dangerous, causing illness and death in the community. It wants to know why a mine explosion occurred that killed workers in the community. It must know how and why our criminal justice system could convict and imprison someone for a heinous crime that he did not commit.¹

9. Similarly, in this present case, the public is entitled to know what happened on April 5, 2015 which led to the death of Donald Dunphy. Since the date of Mr. Dunphy’s death the

¹ Ed Ratushny, “The Conduct of Public Inquiries: Law, Policy and Practice”, Irwin Law, 2009

following types of questions have reverberated in the public arena for which answers are sought:

- (1) Why did Donald Dunphy's tweets require police investigation?
- (2) Was it appropriate for Cst. Joe Smyth to go alone to Donald Dunphy's house on Easter Sunday, 2015?
- (3) What happened in Mr. Dunphy's house which led to his death?
- (4) Did the RCMP conduct a proper investigation?

10. In his closing comments on March 10, 2017 Commissioner Barry stated that he was acutely aware of the human element and that this inquiry involved human beings whose lives have been significantly affected. While Cst. Smyth in no way wishes to diminish the effect of her father's death on Meghan Dunphy he also points out that this event has had a devastating effect on him, his family, his career and reputation. Cst. Smyth has been vilified in social media and has been called a cold-blooded murderer and an assassin for the Premier. All aspects of Cst. Smyth's life have been microscopically examined at this Inquiry. It is crucial, therefore, that Cst. Smyth's conduct be examined fairly and that applicable legal principles be respected and properly applied.
11. The Commissioner has stated on a number of occasions that he will have to assess the credibility of Cst. Smyth. In his decision on the admissibility of expert evidence dated February 13, 2017 the Commissioner stated at p. 10: "I will be arriving at my own independent conclusion as to whether Cst. Smyth's description of what occurred is plausible".

12. In assessing Cst. Smyth's credibility and before making any adverse findings of fact it is crucial that the assessment of credibility be conducted using the appropriate burden of proof which, in Cst. Smyth's position, is the balance of probabilities. It is also crucial that the Commissioner distinguish inference from speculation and conduct his assessment of credibility applying the same factors as if he was sitting as a trial judge.
13. Former Supreme Court of Canada Justice Frank Iacobucci describes the situation faced by the police officer who kills a person in crisis and these words are applicable to any police officer involved in the fatal shooting of a civilian:

18. Finally, front line police officers operate in a society that sends seemingly contradictory messages about police encounters with people in crisis. A police officer who dies at the hands of a person with mental illness is hailed as a hero. Yet when a police officer kills a person in crisis (usually to avert being killed himself or herself), the officer may be vilified. This is not to say that officers do not sometimes make errors in these encounters - clearly they do. Errors are part of the human condition. The point is that, even when officers do not make errors and are fully justified in having used force against a person in crisis, they tend to be subject to a level of criticism that few others in society must bear. One result is, I believe, a level of skepticism among police when people outside the organization suggest that there is room for the police to improve.²

(4) The importance of hindsight

14. A key issue, which has been emphasized by counsel for Cst. Smyth in his cross-examination of witnesses throughout this Inquiry, is that Cst. Smyth's conduct cannot solely be examined through the lens of hindsight. The question the Commissioner has to answer is not whether Cst. Smyth acted properly based on what we know today but whether the steps he took on the date in question were reasonable based on the standards

² Justice Frank Iacobucci, "Police Encounters with People in Crisis", An Independent Review conducted for the Toronto Police Service in July 2014, at pp. 61-62

and circumstances which existed on that date, having regard to Cst. Smyth's training, experience and accepted police practices. Cst. Smyth's conduct cannot be held to a standard of perfection but reasonableness must be the guiding approach.

15. The problem with hindsight is aptly described by Justice Archie Campbell in his article on the Bernardo review where he stated:

HINDSIGHT

Of all a commissioner's temptations the most insidious is hindsight. It is easy, knowing now that Bernardo was the rapist and the killer, to focus unduly on the significance of early references to his name. Knowing what we now know, the name Bernardo leaps off the old tip sheets and supplementary reports. But at the time, with thousands of suspects, many of them much better than Bernardo, he was just one name among many. The same is true of the search of the murder house. Knowing now that the tapes were hidden above a particular ceiling pot light in the upstairs bathroom, it is easy to be critical of the searchers for not checking that particular pot light more thoroughly.³

16. Justice Iacobucci, in his report prepared for the Toronto Police Service, emphasizes the importance of perspective and states at p. 59:

B. The importance of perspective

6. *There is danger in a review of this type, of being unrealistic.*
7. *Encounters in which police use lethal force against a person in crisis often take place in the space of seconds, in a rush of emotion, adrenaline, and fear. Those who review such encounters after the fact, on the other hand, have the benefit of time, information, detachment, and hindsight.*
8. *It is critically important not to ignore this fundamental difference in perspective. I have therefore sought, as best I can, to understand what it is like to be the police officer, or to be the person in crisis, in the highly charged moment of a potentially violent encounter. Without that*

³ Justice Archie Campbell, "The Bernardo Investigation Review", in *Commissions of Inquiry: Praise or Reappraise*, eds. Allan Manson and David Mullen, Irwin Law, 2003 in Chapter 13, pp. 395-397

perspective, one cannot fully appreciate what causes fatal encounters, or be well situated to try to prevent them.

17. Along similar lines Professor Ratushny writes at p. 362 of his textbook that “inappropriate reliance on hindsight may also drive findings out of perspective and may be unfair when assessing individual conduct”. Cst. Smyth asks the Commissioner to keep in mind the abovenoted comments on hindsight and perspective when assessing his conduct on the date in question.

(5) The importance of the Terms of Reference

18. As Professor Ratushny states in his text, a commissioner must be independent and impartial as it is the commissioner’s independence from government which is one of the most important features of a public inquiry. If public confidence is going to be regained then an independent commissioner must conduct an inquiry guided by the principles of efficiency, openness, transparency and thoroughness. A commissioner is not bound by the ordinary rules of evidence but the guiding principle must be that of fairness. The public inquiry is generally described as being inquisitorial in nature, as opposed to adversarial.

Ratushny, *supra*, at pp. 157-158

19. As described by Professor Ratushny the “entire life of an inquiry is dictated by the terms of reference, which are legally binding”. The terms of reference establish the jurisdiction of the commission of inquiry and set the boundaries of that jurisdiction which dictate what the commission can and cannot do. Commissioner Barry has on numerous occasions emphasized the importance of the terms of reference.

Ratushny, *supra*, at p. 130

20. In the present case the Terms of Reference directed the Commissioner to make the following inquiries:
- (1) the circumstances which led to Cst. Smyth's attendance at Mr. Dunphy's residence on the date in question – Terms (3) (1) (a), (b), (c), (d), (e) and (h);
 - (2) the circumstances which led to the fatal shooting of Mr. Dunphy – Terms (3) (1) (a), (f), (g);
 - (3) the part social media played in the circumstances of Mr. Dunphy's death, if any – Term (3) (1) (i);
 - (4) whether there were any material deficiencies in the investigation into Mr. Dunphy's death – Term (3) (1) (j).
21. S. (3) (1) (k) of the Terms of Reference empowered the Commissioner to make recommendations which he considers necessary and desirable relating directly to matters of public concern. Although the Terms of Reference empowered the Commissioner to engage in a wide-ranging review, the Inquiry focussed on the circumstances relating to Mr. Dunphy's death and potential recommendations and improvements which could hopefully assist in preventing such tragedies from occurring in the future.

(6) No findings of civil or criminal responsibility

22. Term 4 of the Terms of Reference states:

Conclusion or recommendations limited

4. The commission of inquiry shall not express any conclusion or recommendation regarding the civil or criminal responsibility of any person or organization.

23. One of the main distinctions between a public inquiry and a criminal trial is the nature of the process. The public inquiry is an inquisitorial process which is not bound by the normal rules of evidence and the seeking of the truth is the primary goal. A criminal trial is an adversarial process where a person accused of a criminal offence is protected by the presumption of innocence and the requirement that the Crown must prove its case beyond a reasonable doubt. In a criminal trial the rules of evidence are applied and the trial judge plays a different role than a Commissioner in an Inquiry.
24. The following are other key differences between a criminal trial and a public inquiry:
- (1) the Crown represents the State interest in a criminal trial whereas in a public inquiry the deceased's family and community groups can be provided with counsel who cross-examine witnesses and present evidence;
 - (2) Crown counsel in a criminal trial performs more of an advocacy role than Commission counsel in a public inquiry, who play an investigative role in the gathering and presentation of evidence;
 - (3) unlike a criminal trial the person who is the subject of the inquiry is a compellable witness and he or she can be compelled to provide evidence (i.e., phone records, banking records, written notes) without the necessity of a warrant;

(4) in a public inquiry there are few limitations on examination and cross-examination of the person who is the subject of the inquiry other than the principles of fairness dictate;

(5) in a criminal trial an accused person is protected by the *Charter* whereas in a public inquiry the guiding principle is that of fairness.

25. It is crucial, therefore, where a person has been, is, or could be the subject of a criminal investigation, that a Commissioner strictly adhere to the admonition not to make findings of civil or criminal responsibility. However, that line may be blurred at times as pointed out by Professor Ratushny at p. 27 of his text:

It is important to emphasize that commissions of inquiry have no authority to make decisions, apart from fact finding. They simply investigate and report. Their reports usually include recommendations but these recommendations are not binding and governments may simply choose to ignore them. Commissions may not make findings of criminal responsibility or civil liability. Provided they do not go that far, they may reach conclusions about whether the conduct of an individual was improper. They may not impose any sanctions for such improper conduct.

However, a finding of misconduct by a commission, in itself, may be a serious consequence for the individual affected. It could reflect badly on the individual's personal and professional reputation, with corresponding adverse consequences. The stature of commissioners and the other features discussed above mean that the public is likely to accept commission findings and opinions as authentic. That is why commissions must conduct their inquiries according to law and, particularly, the principle of fairness, even though they do not make legally binding decisions.

See also Canada (Attorney General) v. Canada (Commission of Inquiry on the Blood System in Canada - Krever Commission) [1997] S.C.J. No. 83, per Cory J. at paragraph 34

26. One of the results some members of the public want to see come out of an Inquiry like the present is the “blaming” of those responsible. One of the headings used by Justice Campbell in his article on the Bernardo review is “Scapegoats and Villains”. Perhaps it is a natural human tendency that the public wants someone to be held accountable. The concept of blaming is explored in an article by MacKay and McQueen wherein they state:

An integral part of this growing demand for accountability is the concept of blaming. When things go wrong, people want to know whom to blame for the state of affairs. This is particularly true in respect to commissions of inquiry where the government or one of its agencies is the most likely candidate for blame and accountability. There have been very few high-profile inquiries that do not involve some level of government and allegations of wrongdoing or negligence on the part of public officials. This fuels a demand from both the media and the general public to point the finger of blame.

.....

A final possible explanation for the emphasis on blaming may be a desire to achieve retribution for wrongdoing, the epitome of individual accountability. Again, the actual outcomes of public inquiries do not unequivocally support this rationalization. This may suggest that what the public wants, and what public inquiries aim to achieve, is the public shaming of those found to have acted inappropriately, rather than their tangible punishment.⁴

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27. Another factor which must be kept clearly in mind when making findings at a public inquiry is the difference between individual failings and systemic problems. In his article on the Bernardo review Justice Campbell stated at pp. 399-400:

It is often the case that systemic failures, as opposed to individual mistakes, are the real cause of public disasters and the most appropriate focus of public inquiries. The public identification of individual mistakes or wrongdoing, while important, does not necessarily address the underlying problem. And unless the underlying problem is addressed, the same mistakes or wrongdoing will likely occur again if the system that permitted them is not fixed.

⁴ A. Wayne MacKay and Monica G. McQueen, “Public Inquiries and the Legality of Blaming” in *Commissions of Inquiry: Praise or Reappraise*, eds. Allan Manson and David Mullen, Irwin Law Inc., 2003 at pp. 250-251

It is a mistake for a Royal Commissioner or public inquiry to focus exclusively on the search for scapegoats when the failure is really an institutional failure in the sense of a lack of appropriate systems, a lack of reasonable resources, a flawed institutional culture, or a breakdown in the machinery of accountability. It is just too easy to say it's the fault of Constable X or Detective Sergeant Y and then to think that you have solved the problem or answered the real question remitted to you. If human error or unprofessional conduct is found, there is, of course, an obligation to say so. But these problems do not go away simply because individuals have been implicated. These problems only go away when people change their systems, their attitudes, and the way that they do business. The issues are best dealt with by encouraging people to go down a path where they can change the things that went wrong. In Bernardo, that path turned out to be a path of systemic change based on communication, co-operation, training, co-ordination, and more effective use of forensic science. That is what we tried to do in our recommendations.

(7) Burden of proof

28. Prior to making any adverse findings of fact against witnesses at this Inquiry the burden of proof which applies must be clearly defined. It is Cst. Smyth's position that the applicable burden of proof in these circumstances is the balance of probabilities, the onus of proof is a civil proceeding. Cst. Smyth suggests that this same burden should apply in a public inquiry.

F.H. v. McDougall [2008] S.C.J. No. 54, per Rothstein J. at paragraph 40

Turner v. Newfoundland and Labrador (Legal Aid Commission) [2014] N.J. No. 385 (LeBlanc J.) at paragraph 8

29. The position suggested by Cst. Smyth in the preceding paragraph is recommended by Professor Ratushny at p. 383 of his textbook:

In contrast, a commissioner may take the initiative to go where the evidence leads and pursue new lines of investigation. There is no legal onus of proof on the parties to a commission of inquiry and no standard of proof by which evidence must be evaluated.

This gives the commissioner freedom to report her findings on the basis of whatever standard she considers most appropriate. Commissioner

O' Connor reached various conclusions with a range of qualifications from "probability" to "remote possibilities". Reporting on "remote possibilities" still may help to shed light on what happened without determinative conclusions.

These observations do not apply when the findings reflect adversely on an individual. Such findings must be made in accordance with the principle of fairness. Where adverse findings potentially affect professional reputations, the standard of proof in a civil case should be applied. This is the standard of proof on a balance of probabilities. The evidence must be clear, convincing, and cogent and must be scrutinized with care, taking into account the seriousness of the potential findings. This civil standard should be appropriate to withstand scrutiny under the principle of fairness on judicial review.

30. In reaching his conclusions the Commissioner, as if he were a trial judge, must scrutinize the relevant evidence with care to determine whether it is more likely than not that an alleged event occurred.

F.H., supra, at paragraph 49

(8) Assessment of circumstantial evidence

31. There has been much circumstantial evidence presented at this Inquiry. The weight to be accorded such evidence depends on the strength of the inference that can be drawn from it. In discussing circumstantial evidence Sopinka, Lederman and Bryant state at pp. 69-70:

S. 2.80 A fact in issue cannot always be proved by direct evidence. A witness cannot always be called to prove the facts from personal observation, nor can a document always be introduced which directly establishes the fact. The facts in issue must, in many cases, be established by proof of other facts. As many courts have noted, criminals are not likely to commit their crimes within the sight of witnesses and it would be a great blow to the administration of the criminal justice system if such evidence was not admitted. If sufficient other facts are proved, the court may "from the circumstances" infer that the fact in issue exists or does not exist. In such a case, proof is said to be circumstantial.

Sopinka, Lederman and Bryant, *The Law of Evidence in Canada* (4th ed., Student Edition), Lexis Nexis Canada, 2014

32. The authors go on to state at pp. 72-73:

S 2.85 Each piece of evidence need not alone lead to the conclusion sought to be proved. Pieces of evidence, each by itself insufficient, may however when combined, justify the inference that the fact exists.

33. The comments of Professor Ratushny at p. 163 of his textbook outline how facts are to be determined at a public inquiry:

A commissioner does not merely “find” facts. All of the facts must be assessed individually and collectively, including their interrelationship. The commissioner must analyze the primary facts and then draw conclusions about what happened, how it happened, and why it happened. These conclusions and the reasons for reaching them, as articulated in the commissioner’s report, then become a part of the public record, available for all to see.

34. Cst. Smyth emphasizes that allegations of misconduct or adverse findings of fact or credibility must be proven on the balance of probabilities, with the requirement that the evidence to support the same must be “clear, convincing and cogent”.

(9) Inference versus speculation

35. It is accepted that in drawing an inference a trial judge must rely on facts established by the evidence. Reference is made to the comments of Lord Wright in *Caswell v. Powell Duffryn Associated Collieries Ltd.*, [1940] A.C. 152 (H.L.) at 169-70 which are often cited as authority for this long-standing principle:

The Court therefore is left to inference or circumstantial evidence. Inference must be carefully distinguished from conjecture or speculation. There can be no inference unless there are objective facts from which to infer the other facts which it is sought to establish. In some cases the other

facts can be inferred with as much practical certainty as if they had been actually observed. In other cases the inference does not go beyond reasonable probability. But if there are no positive proved facts from which the inference can be made, the method of inference fails and what is left is mere speculation or conjecture.

36. These issues of inference/speculation and application of the burden of proof are especially important where serious allegations have been made against Cst. Smyth by Meghan Dunphy. As an example, Cst. Smyth refers to the following exchange between the Commissioner and Counsel for Ms. Dunphy:

Mr. Simmonds: If indeed we're saying Officer Smyth's rendition is not the truth, not correct-

The Commissioner: Right. Right.

Mr. Simmonds: That something else took place.

The Commissioner: Right.

Mr. Simmonds: And that indeed Mr. Dunphy never pulled a gun on him, that the gun was brought out in possibly one of the ways that we spoke of.

The Commissioner: Well there, the problem I have there is just visualizing the different scenarios and whether it's a reasonable inference, you know, the police officer would have left the firearm close enough to be-

Mr. Simmonds: But-

The Commissioner: - to be -

Mr. Simmonds: No, but he-

The Commissioner: Right.

Mr. Simmonds: - didn't have to leave it close enough. The firearm could have been on the mantelpiece, the firearm could have been - after the end of this, if things went wrong and if the stick entered into it and it was a lapse in judgment, if it was something that concerned - and that's how Mr. Dunphy got shot, the gun could have been placed there. What we're saying is you don't get-

The Commissioner: He could have gone in, be told, and be told by Mr. Dunphy yes, I have a gun, it's over there behind the couch.

Mr. Simmonds: He gets it.

The Commissioner: Constable Smyth, Constable Smyth goes over-

Mr. Simmonds: Gets it out.

The Commissioner: - takes the firearm, and goes back away from the exit and leaves the firearm back by the mantel somewhere.

Mr. Simmonds: Leaves it somewhere. I don't know where. But what I'm saying-

The Commissioner: (Inaudible) the furthest place away-

Mr. Simmonds: What I'm saying is –

The Commissioner: - from Mr. Dunphy would have been by the mantel arguably or the television of whatever, go ahead.

Mr. Simmonds: I can tell by the look on your face you're saying that that's just not a believable scenario.

The Commissioner: Well, that's the sort of thing that I'm going to have to consider and I'm giving you a chance to show me why I'm wrong in considering it.

Mr. Simmonds: And what I'm saying is you can't come to the inference that Mr. Dunphy should have been able to get it up quick enough to shoot him, because we're maintaining Mr. Dunphy, who had no history of violence of this type, who indeed, had nothing to make him particularly angry that day, who indeed had just come home and was expecting a friend up, and the friend could have arrived right in the middle of this confrontation-

The Commissioner: So he didn't, there was no, there was no pulling of the gun at all. That's your position there.

Mr. Simmonds: Yes.

Exchange between Commissioner Barry and Counsel for Meghan Dunphy on February 3, 2017, Vol. 16, pp. 124-125

37. The Commissioner's comment on February 23, 2017 distinguishing between possible and probable is especially important in this Inquiry. Anything is possible - the question the Commissioner must examine is whether it is reasonably probable. Counsel for Cst. Smyth has raised the issue of speculation on numerous occasions and referred to the deleterious and damaging effect such unfounded speculation has had, and continues to have on Cst. Smyth personally, and on the public perception.

(10) Assessment of credibility

38. At this Inquiry, as in any civil or criminal trial, the Commissioner has to engage in an assessment of credibility. The Commissioner, like a trial judge, must apply common sense, common human experience and logic in performing this task. Reference is made to the following comments of LeBlanc J. in *Turner, supra*, at paragraphs 10 and 13:

10 As to the assessment of a witness's testimony, I am guided by the comments of O'Halloran, J. in Faryna v. Chorny, [1952] 2 D.L.R. 354, [1951] B.C.J. No. 152 (B.C.C.A.), at paragraph 11, where it is stated as follows:

*The credibility of interested witness, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. **The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.***

.....

13 Here, unless otherwise indicated, the civil onus of proof requires a consideration of what is it that is more probable than not, and not specifically any finding that a particular witness has not told the truth. Professional reputations being as they are require me to make this comment. (emphasis added)

39. The following comments of LeBlanc J. in *Turner, supra*, at paragraph 16 may also be of assistance in assessing credibility:

16 Generally speaking, again, in assessing credibility of all the witnesses, I have considered their interest in the outcome of this case, their ability to know about the specifics of the evidence they referred to, the length of time that has passed since the relevant events, their own apparent biases, motives and beliefs and their actions at the time of relevant events and their ability and willingness to respond when giving their testimony.

40. In *F.H., supra*, Rothstein J. stated in paragraph 58:

58 As Rowles J.A. found in the context of the criminal standard of proof, where proof is on a balance of probabilities there is likewise no rule as to when inconsistencies in the evidence of a plaintiff will cause a trial judge to conclude that the plaintiff's evidence is not credible or reliable. The trial judge should not consider the plaintiff's evidence in isolation, but must look at the totality of the evidence to assess the impact of the inconsistencies in that evidence on questions of credibility and reliability pertaining to the core issue in the case.

41. In *F.H., supra*, Rothstein J. stated in paragraph 86 that in civil cases in which there is conflicting testimony the judge must decide whether a fact occurred on a balance of probabilities.

42. In the context of assessing credibility of witnesses at a public inquiry Professor Ratushny at p. 382 referred to the process utilized by Commissioner Kaufman in the Morin Inquiry:

Commissioner Kaufman explained that the standards he adopted in assessing credibility were analogous to those used by a trial judge in a criminal case: "These include the demeanour of witnesses, the plausibility of evidence measured both internally and in relation to other evidence, prior statements or testimony, and the motivations and possible unconscious biases of parties". He also took into account criminal records and other discreditable conduct as well as evidence of good character.

(11) The RCMP decision not to lay charges

43. In finding that no reasonable grounds existed to lay a criminal charge against Cst. Smyth the RCMP investigative report concluded:

The RCMP investigation was comprehensive in nature, as outlined above. Investigators obtained many statements in order to gain understanding and insight into the event. Due to the fact that there were no independent witnesses, investigators relied heavily on forensic analysis. The combination of the work of the Chief Medical Examiner's Office, the RCMP Forensic Identification Section, RCMP Forensic Laboratory, RCMP Subject Matter Expert for Use of Force, RCMP Crime Analysis Section and an external/independent review of the shooting evidence by Bulletproof Forensic Consulting, led to no evidence that disputes the statements of Cst. SMYTH.

Cst. SMYTH describes discharging his weapon four times. All ammunition casings and projectiles were located. Donald Dunphy was found seated in the chair, as described by Cst. SMYTH, with a long barreled gun at his feet, a gun that both his daughter and brothers admit he had in his possession. There was no evidence found that a struggle occurred at the scene. There was no evidence at the scene that casts any shadow or doubt over the version of events offered by Cst. SMYTH.

It is the findings of the RCMP investigative team that Cst. SMYTH was lawfully in the execution of his duties as a Peace Officer when, confronted by the threat of grievous bodily harm or death by Dunphy, he used the appropriate level of force to defend his life. There is no evidence to support any criminal charges in this matter.

RCMP Investigation Report, CIDD Exhibit, P-0003 at p. 35

44. While this Inquiry has examined the RCMP investigation in detail and while the Commissioner may find problems with certain aspects of the investigation no evidence has been presented which questions the conclusion reached in September 2016. As will be reviewed, both ASIRT and Gareth Jones concluded that, although there were problems with the RCMP investigation, it cannot be said that they reached the wrong conclusion. After hearing two months of evidence Cst. Smyth suggests that there is nothing which

refutes his testimony as to what occurred in the room with Donald Dunphy and that there is significant forensic evidence which confirms his version of events. In short, Cst. Smyth seeks a finding by the Commissioner that his version of events as to what occurred in Donald Dunphy's house on Easter Sunday 2015 is accepted.

PART II – THE DECISION TO VISIT DONALD DUNPHY’S HOME

(1) Why did Donald Dunphy’s tweets require police investigation?

(2) Was it appropriate for Cst. Joe Smyth to go alone to Donald Dunphy’s house on Easter Sunday 2015?

(1) Is free speech absolute?

45. In *Hill v. Church of Scientology of Toronto* [1995] S.C.J. No. 64 Cory J. examined the tension between recognizing the importance of free speech and protecting the reputation of the individual. Cory J. stated in paragraph 102 that “freedom of expression has never been recognized as an absolute right”.

46. In *Grant v. Torstar Corp.* [2009] S.C.J. No. 61 Chief Justice McLachlin reiterated the principle outlined in *Hill* and stated in paragraph 2 that one limitation on free expression is the law of defamation. Elected politicians have to be able to withstand a high level of public criticism and scrutiny but they also have to be able to operate on the basis that their personal safety is protected. While individuals may be able to attack politicians and say “nasty” things they cannot be allowed to intimidate, threaten or harass politicians or their families so as to make them feel unsafe.

47. Just as the balance has to be struck between the importance of free speech and defamation so must a balance be struck between the right to criticize elected officials and the right of elected officials to be able to feel safe doing the jobs they were elected to do.

48. While politicians have always been perhaps subjected to an intense level of criticism in this province (i.e., radio talk shows have been an institution in this province for decades) the situation has intensified with the dawn of social media platforms such as Facebook and Twitter. The concern for the protection of public officials has led to the formation of specialized units such as the PSU in our province and JOPIS in Ontario.
49. Although used in a different context reference is made to the comments of Justice Binnie in paragraph 2 of *WIC Radio Ltd. v. Simpson* [2008] S.C.J. No. 41 and it is suggested that the personal safety of elected officials and their families cannot be “treated as regrettable but unavoidable road kill on the highway of public controversy”. In other words, there have to be limits on what people can say or the police will have to get involved at times.
50. Tom Mahoney, the Executive Director of Workplace NL, stated that part of the problem, from his perspective, “is that sometimes people sitting in their own homes, expressing themselves, don’t necessarily realize the consequences of their actions”. Mr. Dunphy’s use of Twitter is perhaps an illustration of Mr. Mahoney’s comments. As stated by Cst. Smyth, it was not Mr. Dunphy’s use of Twitter that was a problem but it was his inappropriate comments that were problematic.

Testimony of Tom Mahoney on January 10, 2017, Vol. 2, pp. 37-38

Testimony of Cst. Joe Smyth on January 17, 2017, Vol. 5, p. 27

51. Social media may be a new form of communication, but it is a form of communication nonetheless. The police are obligated to consider and examine comments made via such platforms in the same way they would written letters or the spoken word. The

proliferation of social media commentary may result in a cavalier attitude among some individuals, but the onus is on police to protect the safety of elected officials.

52. In the Citizen's Representative Report into Mr. Dunphy's dealings with the Workers' Compensation/Workplace NL dated March 10, 2017⁵ Barry Fleming, Q.C., makes the following comments at p. 30:

The Evolution of Mr. Dunphy's Online Protests

Evidence varies on when Mr. Dunphy's online presence first achieved notoriety for its criticism of public bodies and elected officials (his Twitter account was taken down after his death and therefore could not be tracked back during this investigation). However, his vocal and palpable criticisms of Workplace NL did not begin in earnest until Mr. Dunphy signed up for the Twitter social media platform using the Twitter handle "@sculpen" where he described himself as:

My real name is Don Dunphy a crucified injured worker from NL Canada where employers treat injured like criminals.

53. At p. 34 of his Report Mr. Fleming stated:

It would seem that Workplace NL was surprised by the vitriolic nature of the criticism. Save for some notation about him being frustrated, in one case documenting profanity, Mr. Dunphy's online presence, and the antagonism associated in it, were out of character as compared to his personal dealings with staff over the years. That is to say Mr. Dunphy was not the subject of any "flagging" or previous employee safety or client relations concerns. It was understood that Mr. Dunphy occasionally called open line radio programs as an injured worker, but he was no different from other injured workers who periodically call these programs to air their grievances.

⁵ Office of the Citizens' Representative, "Report on the History and Treatment of Donald Dunphy by Workplace NL", March 10, 2017

(2) Friday, April 3, 2015 – The Tweet of concern

54. After receiving the Tweet of concern from Ms. Ivey a number of e-mails were exchanged between Cst. Smyth and members of the Premier's staff in an attempt to identify the owner of the Twitter account. Cst. Smyth indicated that the tweet itself was one in a string of tweets which, when read together, did not constitute a threat. However, Cst. Smyth felt that the disconcerting nature of the tweet required follow-up.
55. Ms. Ivey testified, and Cst. Smyth confirmed, that her role was to alert the PSU if any communication came to her attention which caused her concern. It was not her job to interpret the communication but simply to pass it on to the PSU for review and they would determine what actions were required, if any. Ms. Ivey did not interpret the Tweet of concern as a threat but she simply passed it on to the PSU as she was instructed to do.

Testimony of Donna Ivey on January 9, 2017, Vol. 1, pp. 150-160 and testimony on January 10, 2017, Vol. 2, pp. 13-14

(3) The Protective Services Unit

56. Prior to 2012 when the Protective Services Unit was formally created the RNC had provided close protection (personal bodyguard) services to Premiers of the province since the 1980's. Cst. Joe Smyth was assigned to Protective Services duties in February, 2011 and served full-time in the PSU under Premiers Dunderdale, Marshall and Davis until the Donald Dunphy shooting on April 5, 2015. In 2012, when the unit was formalized, there were 4 full-time members in the PSU, 3 RNC officers and 1 RCMP officer. Cst. Smyth was assigned as the unit supervisor in January 2013 and remained in that position until April 5. At that time Cpl. Doug Noel of the RCMP was the only other full-time member.

Members of the Premier's Protective Detail from 2010 - present, CIDDD Exhibit P-0621

57. The role of the Protective Services Unit was twofold:

3.0 Mandate of Protective Services Unit

3.1 To provide close protection services for the Premier of Newfoundland and Labrador and other designated dignitaries. Specific close protection roles include bodyguard, secure transport and advance security/liaison officer.

3.2 To gather intelligence on persons and groups of interest, demonstrations and any other matter that could potentially cause direct or indirect harm to the Premier or the Office of the Premier or to any other elected Government Official.

RNC Policy and Procedure Manual, CIDDD Exhibit P-0031

58. Cst. Smyth's training for this assignment, as of April 3, 2015, included:

- training in intelligence-gathering in the Criminal Intelligence Unit, including the utilization of open sources, police databases and confidential informants;
- in 2009 Cst. Smyth attended a 2 week criminal intelligence course in Nova Scotia;
- in 2012 Cst. Smyth attended a 2 week VIP Protection course in Orillia, Ontario, which was taught by the OPP;
- in 2012 Cst. Smyth attended a 5 day course in St. John's which was taught by Insp. Mark Beaulieu of the B.C. Institute of Justice. This course specifically examined the conducting of a threat assessment. The manual utilized, Managing Targeted Violence, was referred to throughout Cst. Smyth's testimony.

Testimony of Cst. Joe Smyth on January 16, 2017, Vol. 4, pp. 25-40

Managing Targeted Violence Manual, CIDDD Exhibit P-0218

59. Cst. Smyth testified that different Premiers had used the PSU differently and by April 3, 2015 the PSU consisted of only 2 full-time members, Cst. Smyth and Cpl. Doug Noel of the RCMP. At the time of the Donald Dunphy incident Cst. Smyth was the Acting Sergeant in charge of the PSU. While April 3 was a scheduled work day for Cst. Smyth he had no specific requirements so he took the day off as a statutory holiday. Cst. Smyth was on duty over the weekend but Cpl. Noel was not scheduled to return to work until April 6, 2015.

Testimony of Cst. Joe Smyth on January 17, 2017, Vol. 5, p. 1 and p. 6

(4) Saturday, April 4, 2015

60. On Saturday, April 4, 2015 Cst. Smyth spent approximately 1 hour reviewing Donald Dunphy's Twitter account. While Mr. Dunphy's home address had not yet been verified Cst. Smyth testified that there were comments in the Twitter account which caused him concern and suggested potential violent ideation by the user. It was obvious to Cst. Smyth that the owner of the account had a long-standing grievance with Workers' Compensation and he used strong language to express his concerns, often directly towards elected officials. However, Cst. Smyth did not find anything in the Twitter account which constituted a criminal threat.

Testimony of Cst. Joe Smyth on January 17, 2017, Vol. 5, p. 24

61. Cst. Smyth outlined the steps that he took on Saturday, April 4 in trying to identify Mr. Dunphy and determine what approach he should take:

- (1) his review of Mr. Dunphy's tweets showed comments which Cst. Smyth felt were aggressive in nature;
- (2) he checked with the Premier's office to see if they had any Open Line transcripts as Cst. Smyth had been informed that Mr. Dunphy was an injured worker who often called Open Line;
- (3) he had a conversation with Owen Toddhunter of the RNC Communications Center on April 4;
- (4) he did ICAN searches on Paddy Daly, Open Line host, and Ralph Tucker, the chair of Workers' Compensation Board of Directors, in an attempt to obtain contact information on Mr. Dunphy;
- (5) he sent an e-mail to Ralph Tucker wherein he referred to Mr. Dunphy's "disconcerting comments";
- (6) he eventually spoke to Tom Mahoney, the Executive Director of Workplace NL, who indicated that Mr. Dunphy had a long-standing grievance although no specific threats had been made;
- (7) according to Cst. Smyth, the information that Mr. Mahoney provided added to the need to visit Mr. Dunphy;
- (8) since he was not completely sure what Mr. Dunphy meant by his comments he needed to find out from Mr. Dunphy himself, especially where he clearly intended for the Premier and Minister Collins to see what he was saying.

(5) Sunday, April 5, 2015 (Easter Sunday)

62. Cst. Smyth testified that he had completed approximately 15 home visits during his time in the PSU. While there was no policy in place as to when an officer should do a home visit alone Cst. Smyth testified that he would consider a number of factors, including the availability of resources, the risk factor to the officer and the potential impact on the person being interviewed. He estimated that ½ of the home visits he completed were by himself. On April 5, 2015 Cst. Smyth testified that he had not determined any heightened risk which required a second officer.

Testimony of Cst. Joe Smyth on January 16, 2017, Vol. 4, pp. 89-91

63. Cst. Smyth, with his wife and child, stayed at a friend's cabin in the Whitbourne area on Saturday night. The next morning, after breakfast, Cst. Smyth drove to St. John's where he picked up his use-of-force equipment and a black SUV used by the PSU. This SUV is an unmarked police vehicle. While on his way to Mitchell's Brook, Cst. Smyth called the RNC Communications Center and asked for a motor vehicle registration search and various background checks to be conducted on Mr. Dunphy. These requested checks included a Canadian firearms registry search and a criminal record check, which would disclose any warrants, weapons offences and any history of violence - all of which were negative. The primary reason for obtaining this information was for his own personal risk assessment relating to Mr. Dunphy given that it may speak to past behaviour. During the Inquiry process Cst. Smyth subsequently learned that CPIC had contained a Caution for Violence in relation to Mr. Dunphy. This would have been another factor for him to consider but he was not made aware of this particular detail on April 5, 2015.

Testimony of Cst. Joe Smyth on January 17, 2017, Vol. 5, pp. 44-54

64. Cst. Smyth asked Cst. Cox of the Holyrood RCMP to conduct a PROS (RCMP Internal Database) search. Cst. Smyth thought that Cst. Cox told him about the uttering threats charge but he learned of it again from Debbie Dunphy. Cst. Cox indicated that he had no personal recollection of past dealings with Mr. Dunphy. The firearms searches done by both the RNC and the RCMP were negative. The fact that Mr. Dunphy was a medical marijuana user did not heighten Cst. Smyth's level of concern. Cst. Smyth stated that he did not check in with the RNC Communications Center when he arrived at Mr. Dunphy's residence because that was utilised more for front-line officers and emergency operations. Cst. Smyth had followed standard practice for an investigator by previously informing the communications center of his general destination and duties.

Testimony of Cst. Joe Smyth on January 17, 2017, Vol. 5, pp. 56-62

65. Cst. Smyth declined Cst. Cox's offer to accompany him. Cst. Smyth testified that he decided to visit Dunphy since that was, in his opinion, the best way to interpret the tweet of concern and ascertain Mr. Dunphy's intention. He did not think it necessary for his own safety to have a second officer accompany him and he felt that a uniformed police officer in a marked police car may not help him in his interactions with Mr. Dunphy. Cst. Smyth went to Mitchell's Brook in an unmarked police vehicle (black SUV), wore plain clothes and carried his sidearm under his jacket and out of sight as required by policy.

Testimony of Cst. Joe Smyth on January 17, 2017, Vol. 5, pp. 25-26

66. Much has been made over the fact that Cst. Smyth decided to visit Mr. Dunphy even though he did not interpret Mr. Dunphy's tweets as a threat. On numerous occasions Cst. Smyth was asked why other police officers said that Cst. Smyth told them he was investigating threats against the Premier if he did not think there was a threat. Cst. Smyth testified that he used the word threat to simplify what he was doing. For example, Cst. Smyth admitted that he probably told Cpl. O'Keefe that he was investigating threats against the Premier.

Testimony of Cst. Joe Smyth on January 17, 2017, Vol. 5, pp. 34-36

67. Cst. Smyth testified that he would have approached the matter differently if a definitive threat had been made. Also, if he thought the comment was an actual threat he would have notified the Premier. He testified that if he was going to arrest Mr. Dunphy he would have taken another officer. He visited him on Easter Sunday because that was his regularly scheduled shift and he had an obligation to follow up in a timely manner. Cst. Smyth said there was no urgency, a term which in police language means I do not go home until the job is done. However, Cst. Smyth testified that the matter needed to be followed upon as soon as practicable.

Testimony of Cst. Joe Smyth on January 17, 2017, Vol. 5, pp. 21-22, 37-39

(6) Tom Mahoney – Executive Director of Workplace NL

68. Tom Mahoney is the Executive Director of Workplace NL (formerly the Workers' Compensation Commission) and at the time of his testimony had been employed in that capacity for 12 years. Mr. Mahoney has a Ph.D. in law from the University of Manchester in the U.K. Mr. Mahoney was responsible for corporate security at

Workplace NL which involved determining if there were any threats to staff. Mr. Mahoney testified that risk assessment was a big part of his previous job. Mr. Mahoney testified that in the 12 years he had been at Workers' Compensation there were 3 occasions where individuals were charged and convicted of making threats to staff members.

Testimony of Tom Mahoney on January 10, 2017, Vol. 2, pp. 19-20

69. Mr. Mahoney stated that he was familiar with Donald Dunphy through social media and Open Line but, more particularly, Mr. Dunphy's tweets were brought to his attention in December 2014 and February 2015. Mr. Mahoney asked Workplace NL investigators to monitor Mr. Dunphy's Twitter account to see if there was any evidence of escalation.

Testimony of Tom Mahoney on January 10, 2017, Vol. 2, pp. 22-24

70. The initial tweet which was brought to Mr. Mahoney's attention was outlined in an e-mail from Carla Riggs to Tom Mahoney and Craig Noseworthy on December 12, 2014. This tweet stated:

My fucking workers comp injured workers roof blew of last night & I'm in a drained swimming pool not a house this morning, hope all Whscc Die

E-mail entered into evidence as CIDDD Exhibit P-0085

71. Under questioning by Commission Counsel Mr. Mahoney stated that he would describe Mr. Dunphy's interaction with Workplace NL as "low risk for a specific threat to our staff".

Testimony of Tom Mahoney on January 10, 2017, Vol. 2, p. 29

72. Mr. Mahoney testified that on April 4 at approximately 3:30 p.m. he received a phone call from the Chair of the Board of Directors, Ralph Tucker, who referred to an e-mail from Cst. Joe Smyth trying to find information on a Don Dunphy who “has made some disconcerting comments via social media directed towards elected officials”. Shortly after 4:00 p.m. Mr. Mahoney called Cst. Smyth and confirmed Mr. Dunphy’s contact information. Mr. Mahoney also informed Cst. Smyth that Workplace NL was monitoring Mr. Dunphy’s tweets. Mr. Mahoney indicated that he would place Mr. Dunphy on the lower end of the spectrum for risk. Cst. Smyth concluded the conversation by saying that he would have to pay Mr. Dunphy a visit.

Testimony of Tom Mahoney on January 10, 2017, Vol. 2, pp. 32-33, pp. 37-38 and e-mail is CIDDD Exhibit P-0088

73. Under cross-examination by Counsel for Meghan Dunphy, Mr. Mahoney was asked to review the string of tweets from April 3, 2015. Mr. Mahoney indicated that this was the first time he had seen the tweets. When asked for his interpretation of the tweets the following exchange occurred:

Ms. Breen: Okay. Had you had a copy of the tweet or had you been provided with that at that time, do you feel that you would have the authority to release Mr. Dunphy’s personal information to Constable Smyth?

Mr. Mahoney: Yes.

Ms. Breen: How so?

Mr. Mahoney: Two reasons; one, I do believe that the thinking that I had was that there was an investigation ongoing and I was being contacted by the police. So that was the law enforcement proceeding, not that I needed to be satisfied that the police officer had made a determination about what was appropriate.

My concern about this, in hindsight, is that this is using an "I" statement. And that's a little different than what I was saying was said earlier to our organization, meaning an "I" statement, meaning the individual. The author of this is saying I may hurt. That is expressing an intent, a behavioural intent.

When we looked at the tweet that was sent to my organization it was more of a general statement: I hope you all die.

Ms. Breen: *Right.*

Mr. Mahoney: *That was a hoax statement. When you see I may hurt, that's a statement more indicative of intentionality. And I think that this would have just probably re-enforced the reason to which I provided the information.*

Again, I want to state that it was limited to the contact information which I was asked. There was nothing else asked of me. But I do believe if I had to read this, or if I had to been told that, it would have just re-enforced the reasons for which I provided the information under section 39.

Ms. Breen: *And Mr. Mahoney, I accept your answer; however, would you not agree that the context of this tweet and this comment, I may hurt, leading up through the tweets, clearly indicates that there was no threat by Mr. Dunphy?*

Mr. Mahoney: *I'm sorry Ms. Breen. I'm not privy to what it is that you're saying that says clearly. I think that what I would suggest to you, if I had received this tweet, this probably would have been a circumstance where I may have had to call the police to ask them to go attend the person's door. Because this is what I said happens all the time.*

When we have people who make these kinds of statements, this goes beyond the general from my perspective, because it's saying: I may hurt. There's a statement here of intent and maybe even a future intent. So from my perspective, it is this potential future that is of concern. And to tell you the truth Ms. Breen, in my situation I am always asked to look at everything forward, as if I'm looking at it in hindsight.

So, for example, if someone attended our building and drove their van into the front of the building after making a statement: I may come down and drive my van in. I'm looking at that situation saying, listen, I'm going to be asked if this happens, what if anything I did to keep the staff safe. So from my seat in charge of corporate security, I suggest that this type of statement, if it was brought to my attention or if this had to have been a statement about the staff at Workplace NL, and I know it was not, but your

question to me was if I read this and in this context, would that have encouraged me to continue to provide the information or not. I would suggest that it is, from my reviewing of this, in the context in which you provide me now, that I'm saying that I think that this would warrant further follow-up.

Testimony of Tom Mahoney on January 10, 2017, Vol. 2, pp. 51-52

74. Mr. Mahoney indicated that one of the proactive steps that can be taken is to visit an individual. Other than charges being laid Mr. Mahoney was also aware of 3-4 incidents where the police would have been called by Workplace NL and then attended at the door to have a discussion with the person who made the comment. This step was sufficient to resolve the matters Mr. Mahoney was referring to.

Testimony of Tom Mahoney on January 10, 2017, Vol. 2, pp. 58-59

75. When asked about the appropriateness of Cst. Smyth visiting Mr. Dunphy the following comments were made:

Mr. Kennedy: Now, you indicated, Sir, again, it's either in your statement or maybe it's in your interview with Commission counsel, that when Constable Smyth said I'll think I'll pay, or I'll have to pay the man a visit, whatever the words were-

Mr. Mahoney: Yes, yup.

Mr. Kennedy: -that he was going to visit Mr. Dunphy, you thought that was an appropriate step?

Mr. Mahoney: It sounded like the next kind of natural step that would take place if I had been the person who contacted the police, yes.

Mr. Kennedy: Because there's disconcerting comments that you interpret could relate to the threats-

Mr. Mahoney: Yes.

Mr. Kennedy: *And so visiting the individual would be a step that, an early intervention step that could prevent escalation.*

Mr. Mahoney: *Yes, and I think that the statement that the officer made to me was in response to me saying that there was relatively low risk of him carrying these threats out down here. So again, that sounded completely congruent with what I would have thought.*

Mr. Kennedy: *And it would have been a step that you would consider yourself?*

Mr. Mahoney: *Correct. I would consider it myself in contacting the police and ask them to attend at the door.*

Mr. Kennedy: *You've also indicated in your testimony here today that Constable Smyth-your impression, or your interpretation, that he was engaged in an investigation that had not made a determination as to whether or not the disconcerting comments were a threat.*

Mr. Mahoney: *And I think that that was very much the nature of the conversation. It was, you know, the word investigation was used several times.*

Testimony of Tom Mahoney on January 10, 2017, Vol. 2, p. 59

76. Counsel for Cst. Smyth reviewed with Mr. Mahoney other tweets which were included in the Workplace NL file:

(1) CIDDD Exhibit P-0109 – Tweet posted on December 11, 2014, “the deputy Premier of NL can’t get Whscc to fix a wrong done to an injured worker in NL Canada, big biz and Whscc rules in NL”;

(2) CIDDD Exhibit P-0110 – pictures of Mr. Dunphy’s house posted on Twitter in December 2014

(3) CIDDD Exhibit P-0111 – pictures of Mr. Dunphy's house posted on Twitter in January 2015 and sent to Paul Davis and Stephen Kent

- Tweet stated "animals in NL Canada have better life then injured workers, animals r healthy can hunt food"

(4) CIDDD Exhibit P-0112 – "the ppl should bring back hot tar feathers for these blind greedy politicians of NL Canada" – February 3, 2015

(5) CIDDD Exhibit P-0113 – Quote posted on Mr. Dunphy's Twitter account on February 16, 2015, "The most dangerous creation of any society is the man who has nothing to lose".

(6) CIDDD Exhibit P-0114 – Pictures of house posted on Twitter on March 3, 2015 with following tweets:

- "its better to shoot yourself if seriously hurt on a job in Newfoundland Canada, cause Whscc in NL will make u suffer more" #nlpoli

- "most greedy Newfoundland business ppl rob ppl blind when they beat up worker on their jobs they give order 2 kill the wounded" #nlpoli

- "Every working person in Newfoundland should carry a gun so that they can shoot themselves if seriously hurt on job" #nlpoli

(7) CIDDD Exhibit P-0115 – Tweets of March 4, 2015

- "mass murder of injured workers by starvation in Newfoundland Canada"

-“death penalty was abolished in Canada for murderers, but Govt’s kept death penalty in place for injured worker” #nlpoli

(8) CIDDD Exhibit P-0109 and P-0116 - Mr. Dunphy also blamed Workers

Compensation for having forced him into bankruptcy twice and for killing his wife in 1990

Testimony of Tom Mahoney on January 10, 2017, Vol. 2, pp. 62-71

77. When asked about Cst. Smyth’s comment that he was going to have to visit Mr. Dunphy, Mr. Mahoney stated:

Mr. Kennedy: *But that he had not made a determination he was going to investigate.*

Mr. Mahoney: *Yeah, he was going to investigate, He was going to further follow-up with the individual, and that was really the way he said it. He didn’t say it in any disparaging terms. He didn’t say that fella or anything that sounded derogatory. He actually made it sound very professional, very sort of matter of course, sort of the next step in the chain of events.*

Mr. Kennedy: *In terms of - actually, on that point. In terms of your dealings with Constable Smyth, you referred to him as being professional. And is there anything else you can say about his demeanor, tone, comments that day?*

Mr. Mahoney: *I think that the things he said were in two themes. One was protective detail, wanting to make sure that there was no risk to the elected officials. And the second theme in our conversation was investigation. And when I hung up the phone from that individual, I guess professionalism probably would have been a word that came to mind as it related to the conversation we had just had at a moment in time on the phone. This is how I perceived it.*

Mr. Kennedy: *And, Sir, in previous years are you - it’s still your job, but you had a lot of training in risk assessments and threat assessments. Did Constable Smyth appear to you to understand what was involved in a threat assessment of risk assessment?*

Mr. Mahoney: Yes, he did.

Mr. Kennedy: So you had no concern about fishing expedition or lack of knowledge or anything like that?

Mr. Mahoney: No, I did not.

Testimony of Tom Mahoney on January 10, 2017, Vol. 2, p. 72

(7) Members of the Protective Services Unit

(i) Cst. Eddie Benoit

78. Cst. Benoit was a member of the PSU from May 2012 - February or March 2014. He had completed the dignitary protective course in Orillia, Ontario in 2012. During his time in the PSU Cst. Benoit worked closely with Cst. Joe Smyth and he described him as being “very professional, very smart, very articulate, very accommodating as a supervisor”. He never saw Cst. Smyth lose his temper or become ill-tempered. Cst. Benoit confirmed his comment to Commission Counsel during his re-inquiry interview “there’s no way, I could picture him not doing anything but de-escalating a situation”.

Testimony of Cst. Eddie Benoit on February 2, 2017, Vol. 15, pp. 2-6, p. 53

79. In fact, what Cst. Benoit saw was the opposite of a police officer who would escalate a situation. He described a home visit with Cst. Smyth to an individual who was causing concern for a Minister. Before this interview rights and caution were given and the interview was recorded because it was a criminal investigation. The individual being interviewed was upset but Cst. Smyth was empathetic and a large part of the interview was spent trying to find a solution to the individual’s problem. Cst. Smyth gave the individual an opportunity to explain and the interview ended well.

Testimony of Cst. Eddie Benoit on February 2, 2017, Vol. 15, p. 9, pp. 56-57

80. Cst. Benoit also testified about a home visit he made to Carbonear while he was a member of the PSU in relation to an individual who had directed certain comments towards a Minister (“I’m coming to get ya”) which Cst. Benoit believed required clarification. Cst. Shannon MacEntagert of the PSU also attended with him. After speaking to the individual no further steps were required. Finally, Cst. Benoit confirmed that working in the PSU was demanding in terms of scheduling and juggling family life and they had to be concerned about burnout.

Testimony of Cst. Eddie Benoit on February 2, 2017, Vol. 15, pp. 21-23, p. 54

(ii) Corporal Doug Noel

81. Cpl. Doug Noel, a 21 year member of the RCMP, began working in the PSU in December 2014 and continued there until February 2016. Cpl. Noel replaced Cpl. Lindsay Anstey of the RCMP and prior to commencing his role in the PSU Cpl. Anstey briefed him on the role and duties of the unit. When Cpl. Noel started work in the PSU there was only him and Cst. Smyth and they usually worked 12 hour shifts independently of each other.

Testimony of Cpl. Doug Noel on February 2, 2017, Vol. 15, pp. 78-82

82. Cpl. Noel described a home visit he conducted by himself some time after Christmas 2015. An individual, who lived in CBS, was concerned about fracking and made comments that people needed to back off. After conducting the regular background

checks (CPIC, PROS, maybe ICAN) Cpl. Noel decided to visit him because the comment was ambiguous. Cpl. Noel explained that the reason he made the home visit was to “get a feel for him”. Cst. Noel stated that there was no history of a long-standing grievance but the individual lived in a nice home and appeared to be a family man with children. The meeting concluded well. Cpl. Noel indicated that he would not check with family members prior to conducting a home visit.

Testimony of Cpl. Doug Noel on February 2, 2017, Vol. 15, pp. 89-92, pp. 150-151

83. Cpl. Noel testified that he never saw Cst. Smyth lose his temper or express impatience. He described Cst. Smyth as being “calm, cool and very thorough”. Cpl. Noel testified that police officers go to people’s houses by themselves all the time and in conducting your risk assessment you must take in the totality of everything you see. Even then, you cannot foresee every situation, such as where an individual pulls a firearm. When it was suggested that Cst. Smyth was not vigilant in conducting his risk assessment Cpl. Noel stated “if he wasn’t vigilant he wouldn’t be here today”. Finally, Commission Counsel reviewed with Cpl. Noel what Cst. Smyth told him about the incident and the version of events provided by Cst. Smyth is consistent with what he told numerous others and as outlined in his police statement and re-enactment.

Testimony of Cpl. Doug Noel on February 2, 2017, Vol. 15, pp. 124-125, pp. 147-153 and pp. 155-156

(8) Acting Inspector Joe Gullage

84. A/Insp. Gullage is a 40 year RNC veteran and has been an Acting Inspector in the Intelligence and Organized Crime Unit of the Criminal Investigation Division since

October 2014. In his current position eight RNC units report to him. In his testimony A/Insp. Gullage outlined for the commission the background of the Protective Service Unit (PSU). He testified that the PSU dated back to the 1980's but it was not until 2012 that it became formalized under Premier Kathy Dunderdale when two RNC officers were assigned. Under Premier Dunderdale the PSU expanded from two to four assigned officers.

Testimony of Acting Inspector Gullage on February 23, 2017, Vol. 29, p. 45, pp. 49-50, p. 58

85. On cross-examination by Counsel for Cst. Smyth, A/Insp. Gullage confirmed that he had supervised Cst. Smyth for approximately three years while Cst. Smyth was assigned to the CIU and during that time he had the opportunity to observe and get to know Cst. Smyth. He testified that he always found Cst. Smyth "...to be professional, articulate, hard-working, very knowledgeable, always when I was away [sic] to help individuals." He further testified that he has never saw Cst. Smyth behave any other way but calm and reasonable in his approach to work and the people he interacted with. With respect to his suitability to working with the PSU, A/Insp. Gullage stated the following:

Mr. Kennedy: And Sir, how would you describe Constable Joe Smyth's suitability to be the officer in charge of the Protective Services Unit back in 2012, 2013?

A/Insp. Gullage: Personally, I thought he was an ideal fit.

Mr. Kennedy: And why would he be an ideal fit?

A/Insp. Gullage: He had experience in intelligence-led policing; he was professional; he was articulate; he knew how to communicate with people professionally, and when you're dealing with the elected officials of the province there's a certain amount of respect that goes with it and he'd shown that to me on my level and I had no reason to believe he wouldn't on another level.

Testimony of A/Insp. Gullage on February 23, 2017, Vol. 29, pp. 94-95

86. A/Insp. Gullage explained to Commission Counsel that there is document RNC officers use as a guideline in evaluating what level to rate a threat when doing a risk assessment and threat assessment. This guideline rates a threat from extreme high, high, medium and low but does not give procedure or policy on how to deal with each level of threat. Using the guideline A/Insp. Gullage stated that he would not have viewed Mr. Dunphy's tweets as a threat but "...there are a couple of comments there that would cause me to – some concern that I would need to clarify."

Threat Levels provided by Joe Gullage, CIDDD Exhibit P-0564

Testimony of A/Insp. Joe Gullage on February 23, 2017, Vol. 29, pp. 62-64

87. With respect to Cst. Smyth attending the home of Mr. Dunphy on April 5, 2015 in order to gather more information from Mr. Dunphy about what he meant by his tweets, A/Insp. Gullage testified that he had "...no problem whatsoever with what Constable Smyth done." A/Insp. Gullage further confirmed on cross-examination by Counsel for Cst. Smyth his agreement with the decision to not call ahead in advance of the visit:

Mr. Kennedy: Mr. Simmonds asked, well why didn't he call ahead or why wouldn't he contact someone, is it not correct, Sir, in the policing world, the investigation of threats that a risk assessment, that often times you want to go and see the person in their environment without advance notice to get a true picture?

A/Insp. Gullage: No question especially where you don't know the individual if it was an individual you had known, you know, had some previous dealings with, that you knew the individual then it's a little bit different, in this case, he didn't know him.

88. He testified that Cst. Smyth's actions were akin to engaging in proactive policing as opposed to reactive policing:

Mr. Kennedy: Very much in terms of intelligence led policing and proactive policing that was something that he demonstrated a significance interest in wasn't it?

A/Insp. Gullage: He did, yes.

Mr. Kennedy: And that's essentially what you're doing when you're going out and looking, talking to an individual prior to something happening that's pro-active or intelligence led policing isn't it?

A/Insp. Gullage: That is correct.

Mr. Kennedy: As opposed to investigating after the fact, which is re-active policing?

A/Insp. Gullage: That's correct.

Testimony of Acting Inspector Joe Gullage on February 23, 2017, Vol. 29, p. 92, pp. 94-95

(9) Dr. Terry Coleman

89. Dr. Terry Coleman currently works as a public safety consultant and has a background both in academics and policing. From 1969 to 1996 he was an officer with the Calgary Police Service where he achieved the rank of Inspector. From 1997 to 2007 Dr. Coleman was the Chief of Police of the Moose Jaw Police Service. Dr. Coleman was qualified to give opinion evidence at the Inquiry regarding appropriate de-escalation strategies and measures to be taken to ensure officer's safety to be employed by police in situations such as that encountered by Constable Smyth in his interaction with Donald Dunphy.

Testimony of Dr. Coleman on March 8, 2017, Vol. 38, p. 20, p. 22, p. 27

Curriculum vitae of Terry Coleman, CIDDD Exhibit P-0772

90. At the request of the Commission, Dr. Terry Coleman co-authored a report with Sgt. Mike Massine. Dr. Coleman divided his opinion into two parts. The first part was a personal risk assessment and the second part focused on strategies such as de-escalation and defusing a situation. With respect to the first part, Dr. Coleman testified that he was of the opinion that Cst. Smyth's personal risk assessment fell short of a thorough assessment in regard to his personal safety. Factors that led to his conclusion included conducting necessary checks while he was on the road, attending Mr. Dunphy's residence by himself, failing to take into account warning signals, such as the sign, the disrepair of the home, and the security cameras. Dr. Coleman's report placed extensive emphasis on the lack of notes.

Report with Redactions - Commission of Inquiry into the Death of Donald Dunphy dated February 26, 2017 prepared by Mike Massine and Terry Coleman, CIDDD Exhibit P-0773

Testimony of Dr. Coleman on March 8, 2017, Vol. 38, pp. 37-38

91. In his testimony Dr. Coleman raised concerns about the fact that Cst. Smyth conducted his searches, both RNC (ICAN) and RCMP (PROS), while he was en route to Mitchell's Brook as opposed to completing the searches before he left St. John's. Dr. Coleman agreed under cross-examination that Cst. Smyth made the appropriate searches but he felt that the timing of the searches indicated that Cst. Smyth was in a hurry to get to Mitchell's Brook. Dr. Coleman also took issue with the fact that the visit was completed on a public holiday. He stated that it was not necessary to go that day. However, numerous police officers gave evidence which disagreed with Dr. Coleman and agreed that Cst. Smyth made the right decision in visiting Mr. Dunphy and that it did not make any difference that it was Easter Sunday.

Testimony of Dr. Coleman on March 8, 2017, Vol. 38, p.102-103

92. On cross-examination by Counsel for Cst. Smyth, Dr. Coleman stated that in his experience as the chief of police in Moose Jaw it was not very often that a home visit was done by only one officer as there was a contract for two man patrols. He also testified that this is regular practice in many places like Calgary and Toronto. Dr. Coleman testified that he felt it was inappropriate for Cst. Smyth to attend Mr. Dunphy's residence alone. However, Dr. Coleman confirmed that he did not reach out to the RNC or do any research on what the policy and procedure is in this province. He stated, "I don't know whether they double crew or not. It'd be unusual if they didn't." Dr. Coleman's experience and practice is in contrast to what occurs in Newfoundland and Labrador. The Commission has heard from numerous police officers who have testified about resourcing issues and confirmed that officers regularly conducted home visits by themselves.

Testimony of Dr. Coleman on March 8, 2017, Vol. 38, pp. 94-97, p.106

93. Dr. Coleman emphasized throughout his report that Cst. Smyth did not have adequate notes. On cross-examination, when pressed by Counsel for Cst. Smyth about what notes had to do with the personal safety of an officer, Dr. Coleman could not answer the question but made comments like it demonstrated to him "...a lack of paying attention to some detail and some structure." Despite being asked this same question on numerous occasions Dr. Coleman failed to articulate the link between the lack of notes and officer safety.

Testimony of Dr. Coleman on March 8, 2017, Vol. 38, pp. 114-115

Report with Redactions - Commission of Inquiry into the Death of Donald Dunphy dated February 26, 2017 prepared by Mike Massine and Terry Coleman, CIDDD Exhibit P-0773, pp. 8-10, pp. 56-57

94. Dr. Coleman agreed that the tweet of concern from Mr. Dunphy could be interpreted as a threat to government officials and was worthy of investigation. Although critical of various actions Cst. Smyth took with respect to officer safety, when asked on cross-examination by Counsel for Cst. Smyth about Cst. Smyth's actions when he was presented with a rifle pointed at him, Dr. Coleman stated "... I don't disagree with the action that was taken by Constable Smyth on that day."

Testimony of Dr. Coleman on March 8, 2017, Vol. 38, p. 120

Report with Redactions - Commission of Inquiry into the Death of Donald Dunphy dated February 26, 2017 prepared by Mike Massine and Terry Coleman, CIDDD Exhibit P-0773, p. 3, p. 9

(10) Dr. Stephen Hart

95. Dr. Stephen Hart, a professor at Simon Fraser University, was qualified to give expert opinion evidence in the area of clinical-forensic psychology, with a special focus on threat assessment, a field also known as threat management, violence risk assessment, and violence risk management. As outlined in his curriculum vitae Dr. Hart has published extensively and advised governmental agencies and police forces throughout the world. Dr. Hart has testified as an expert witness in 4 Canadian provinces and 10 American states.

Dr. Hart's curriculum vitae is entered into evidence as P-0793

96. Dr. Hart was provided with a copy of the report prepared by Dr. Terry Coleman after Dr. Coleman's report was received on February 26, 2017. A Letter of Retainer was sent to Dr. Hart by Counsel for Cst. Smyth on March 2, 2017 which outlined a number of questions which Dr. Hart was asked to review. A Summary of Facts was also provided to Dr. Hart on that same date.

The letter dated March 2, 2017 from Jerome Kennedy to Dr. Hart is entered into evidence as P-0796 and the Summary of Facts can be found at P-0795

97. Dr. Hart provided a report to the Commission on March 3, 2017 and testified before the Inquiry via Skype from London, England on March 7, 2017. One of the areas of confusion which has arisen at this Inquiry is the difference between risk assessment and threat assessment. Various terms have been used such as personal risk assessment, risk assessment, threat assessment and threat management. Dr. Hart testified, as outlined in his report, about the principles and guidelines used in conducting a threat assessment in the context of the protection of public officials. Dr. Hart testified that Protective Service Units are involved in a specialized area of policing. At p. 5 of his Report Dr. Hart stated:

In the context of the protection of public officials, the situation is much the same: Violence risk assessment and threat assessment are used interchangeably, but some prefer the term threat assessment as evaluations typically are conducted in dynamic, information-poor environments to assist operational decision making.

One point is worth clarifying here. A common misconception is that threat assessment in the context of the protection of public officials refers to the evaluation of utterances that communicate intent to harm those officials. Instead, threat assessment refers to the evaluation of a situation in which there is potential for harm to public officials, which may or may not involve utterances that communicate intent to harm those officials. (emphasis added)

Report of Dr. Stephen Hart dated March 3, 2017, entered into evidence as P-0794

98. One of the key positions outlined in Dr. Hart's report, which was repeated in his testimony, is that a "threat" is not required for a threat assessment to begin, as outlined in the preceding paragraph.
99. The second question examined by Dr. Hart was the use of the term threat assessment in the context of criminal investigations as opposed to its use in the context of the protection of public officials. In the latter context the protection of public officials focuses on the future with a view to preventing the commission of an offence. Threat assessment involves a type of proactive policing as opposed to the reactive aspect of a criminal investigation. In other words, criminal investigations focus on past offences while the protection of public officials focuses on the future. On this point Dr. Hart states at p. 5 of his Report:

In the context of criminal investigations, the primary concern is to determine whether an offence has occurred and, if so, to gather sufficient evidence to clear that offence through arrest, charge, or conviction. The possibility that violence may occur during criminal investigations is a secondary concern, and one that arises in a minority of cases. Put simply, criminal investigations focus on past offences; their ultimate success is judged in terms of clearance rate, not the rate of new violence during the investigation.

The situation is reversed in the context of protection of public officials. Here, the primary concern is to determine whether there exists some potential for violence against public officials and, if so, to develop plans to mitigate that risk. The possibility that an offence may have occurred in the past is a secondary concern, and one that arises in a minority of cases. Put simply, protection of public officials focuses on the future; their ultimate success is judged in terms of prevention of violence against public officials, not on the clearance rate for offences that may have been committed. (emphasis added)

See also Testimony of Dr. Stephen Hart on March 7, 2017, Vol. 37, pp. 101-102

100. The third question posed to Dr. Hart was whether Mr. Dunphy's tweets demanded follow-up. In his Report Dr. Hart stated at p. 6:

In light of the foregoing, as well as the content of Mr. Dunphy's tweets it is my opinion that:

- i. Cst. Smyth should have reviewed and triaged Mr. Dunphy's tweets. He did so.*
- ii. Cst. Smyth should have triaged Mr. Dunphy's tweets as positive. That is, Cst. Smyth should have concluded the tweets indicated Mr. Dunphy was experiencing violent thoughts and were recklessly or deliberately intimidating or fear-inducing utterances, and therefore that there were reasonable grounds to believe that Mr. Dunphy posed a risk of violence toward public officials. He did so.*

101. Dr. Hart elaborated upon his report during his testimony by stating as follows:

Mr. Kennedy: *So perhaps the, Dr. Hart, you've heard that's a question that's arisen in the public is why would Constable Smyth follow-up on tweet of concern that he did not consider to be a threat?*

Dr. Hart: *Well, the basic concern that we have is that not everybody who makes a threat actually poses a threat. That's the way it's usually phrased. And not everybody who poses a threat makes a threat, the conversely. So whether or not people actually make an overt threat, whether they have that utterance that communicates an intent to harm is really a matter that's not of sole concern.*

What we're really interested in is investigating when it appears that people may be having a movement towards violence or starting to have ideation and be moving towards intent to commit violence. And one of the primary things that we look at there is the extent to which people seem to be concerned with or preoccupied with thoughts of death, self-harm, persecution and risk to themselves, to their own safety.

So any time people make inappropriate comments that are concerned with or over concerned with themes of death and harm, then that's one of the things that would typically trigger further investigation, that that is a positive triage and the need to conduct further investigation.

Mr. Kennedy: *Sir, did you view Mr. Dunphy's tweets, that string of tweets that was attached to the summary of facts. Did you view that as a threat or if – and if not, how did you view it?*

Dr. Hart: No, I did not view it as a threat. In my view there was nothing in the tweets, the various communications that Mr. Dunphy engaged in, that would be considered clearly a threat according to the Criminal Code or according to various kinds of occupational health and safety regulations or things like that. They were statements of concern because of the reference to things like death.

So, really, any time somebody sends a strange message where there's even an offhand comment to something like if this keeps going on I'm going to kill myself or this is the kind of thing that gets people shot or things like that, then we would typically become concerned that there was some need for follow up.

It doesn't mean that the person poses a risk or has ever made a threat. What it means is more threat assessment is required.

Testimony of Dr. Stephen Hart on March 7, 2017, Vol. 37, pp. 103-104

102. A little later in his testimony Dr. Hart stated:

Dr. Hart: Thank you. The ones that would have concerned me specifically are first of all; there's a reference to the fact that politicians should be tarred and feathered, now on its own, that's the kind of dramatic statement that might be occasionally people might make in the throes of anger or say it's three of four o'clock in the morning and you're the president of the United States and you might make an off-hand comment like that, but if the next ones that are concerting to me, the statement, the most dangerous creation of any society is a man who has nothing to lose. That indicates to me the sum of what we might call nihilistic ideation, that is a sense of somebody who started to feel that he's got no connection to the world, he's feeling alienated and really that he has nothing to live for and therefore nothing to lose.

The next one is: the use of the term murder and shooting – now they murder us and it is better to shoot ourselves, I am not interpreting that as a threat to hurt somebody else at all, but any time somebody starts to make public statements that include dramatic and violence – or, dramatic language with themes of violence. That's something to follow up on.

So, those would be the things that would've concerned me, If it was, again, only the first one of (inaudible), that would've been enough on its own to make me very concerned. But, the other ones would've indicated to me that this required follow-up with some priority. What I would call moderate-priority.

.....

Dr. Hart: Certainly. So, that triage or that initial quick assessment based on limited information is designed to try to figure out; are there reasonable grounds to be concerned that the person may be a risk for violence. That is; is there anything going on that's worrisome – that's reasonably worrisome. And, in – so, positive means the answer to the question is yes. So, what I'm saying in that answer 3. ii. is that; Constable Smyth should have done a quick evaluation to figure out whether there were concerns. He did that. But, the more importantly, the content of the tweets indicates to me two things that we would've find to be concerning. One of them is; violent thoughts – that is he got violent themes in his communications over a period of time. And then the second thing is; the way that those things were communicated may be considered intimidating or fear-inducing. That is not overt or explicit threats. But, statements that anybody ought reasonably to know might cause somebody to be a little bit freaked out.

So those two things together indicate that there's follow up indicated and because of the violent thoughts I would have considered it both positive and moderate priority.

Testimony of Dr. Stephen Hart on March 7, 2017, Vol. 37, p. 105

103. Unlike the position outlined in Dr. Coleman's report Dr. Hart's position as outlined in p. 6 of his Report was that Cst. Smyth travelling to Mr. Dunphy's home in an unmarked vehicle and in casual clothes by himself was a reasonable course of action. Dr. Hart went on to state at p. 7 that:

- (1) the level of risk posed by Mr. Dunphy was low to moderate;
- (2) Cst. Smyth properly gathered additional information;
- (3) Cst. Smyth properly selected assessment tactics of low to moderate intensity and intrusiveness.

See also testimony of Dr. Stephen Hart on March 7, 2017, Vol. 37, pp. 106-108

104. On the propriety of Cst. Smyth visiting Mr. Dunphy's house by himself Dr. Hart stated at p. 7 of his report:

The final part of this question makes specific reference to Cst. Smyth's decision to visit Mr. Dunphy's house to interview him. Home visits are a very common tactic used by threat assessment professionals, including those in law enforcement and corrections. They may provide important information regarding a person's social adjustment, private life, and mental state that are relevant to threat assessment. For example, people may keep materials in plain sight in their homes that reveal they are preoccupied or obsessed with a public official, or that they have conducted surveillance of the public official's residence or place of work. It is my experience that when there is no indication that a case is high risk, or when resources are scarce, home visits are often done by threat assessment professionals working alone.

In light of the foregoing, it is my opinion that:

- i. It was reasonable and appropriate, and consistent with standards of practice in the field, for Cst. Smyth to decide to visit Mr. Dunphy's house to interview him, and to do so alone.*

105. In concluding his testimony Dr. Hart stated:

Mr. Kennedy: *Sir, in terms of the personal risk assessment that was conducted by Constable Smyth got referred to in the summary of facts. Do you have any opinion in terms of the job he was doing that day in the context of the protection of public officials as to whether or not that personal risk assessment was sufficient and appropriate?*

Dr. Hart: *To me, in the context of conducting a threat assessment the personal risk assessment seemed to be quite appropriate. It was – it would be my assumption that many police officers in the same situation would have ended up doing the same thing. There was no indication that there was a high risk, there was no indication that the risk was high either in terms of likelihood, or immense, or severity but there was a need to follow up on and so there was an attempt to try to investigate.*

Mr. Kennedy: *Sir, in terms then of the steps taken by Constable Smyth – in this case – in terms of the threat assessment and in the context of the protection of public officials and the personal risk assessment that goes with that, what is your final opinion to the Commissioner, not your final opinion, your opinion to the Commissioner?*

Dr. Hart: My opinion is that in light of all the circumstances that the steps taken by Constable Smyth to (inaudible) so reports to him, the Tweets that were forwarded to him, the triage that he did, the further investigative steps up to and including going to the home and entering the home all would have been consistent with the standards of practice in the field or the types of activities that a reasonable police officer would have engaged in given the nature of the job.

Testimony of Dr. Stephen Hart on March 7, 2017, Vol. 37, pp. 116-117

(11) OPP Report - Sgt. Patrick Lenehan

106. Sgt. Patrick Lenehan, a member of the Ontario Provincial Police since 1996, is a sergeant in the Justice Officials Protection and Investigations Section of the OPP (JOPIS). This section was created in 2009 and, as outlined in Sgt. Lenehan's report dated February 27, 2017, consists of members representing the OPP, Ottawa, York and Hamilton Police Services.

The curriculum vitae of Sgt. Lenehan is entered into evidence as P-0956, his Report dated February 27, 2017 is CIDDD Exhibit P-0784 and the Summary of Facts provided to him is CIDDD Exhibit P-0807

107. At p. 2 of his Report Sgt. Lenehan outlined the role of JOPIS. At pp. 3-5 of his Report Sgt. Lenehan outlined the facts which he had been made aware of. Sgt. Lenehan offered the following definitions of "Threat Assessment" and "Risk Assessment":

*The first is "**Threat Assessment**": A threat assessment is conducted by trained professionals in the field of Criminal Behaviour Analysis. This assessment is based on one person and their propensity for Targeted Violence towards another specific individual.*

*The second is a "**Risk Assessment**": A risk assessment is the initial process that an investigator conducts in order to determine if there are enough risk factors to warrant a threat assessment.*

When an investigator receives a call in the protection field the first task undertaken should be to conduct a risk assessment on the individual involved.

When Sgt. SMYTH received the "tweet of concern" authored by Don DUNPHY through Ms. IVEY, Sgt. SMYTH commenced the initial stages into his "Risk Assessment".

Report of Sgt. Lenehan, CIDDD Exhibit P-0784 at p. 7

108. Sgt. Lenehan reviewed the background checks conducted by Cst. Smyth and concluded that Cst. Smyth conducted a thorough risk assessment regarding the "tweet of concern". Sgt. Lenehan stated that the goal in any type of preliminary investigation is to determine if the individual has any propensity for violence. Based on Cst. Smyth's initial findings this did not appear to be the case.

Report of Sgt. Patrick Lenehan, CIDDD Exhibit P-0784 at p. 7-8

109. Sgt. Lenehan's opinion was that the strategy adopted to visit Mr. Dunphy's residence was appropriate for the following reasons:

In cases such as DUNPHY where there is minimal documentation of past behaviours to assess the risk level, one would reasonably consider conducting an interview with DUNPHY. An interview would allow Sgt. SMYTH to obtain DUNPHY'S tone and intent behind his tweet messages and would allow Sgt. SMYTH to engage in conversation to determine any sort of grievance directed at any particular person or organization that DUNPHY may hold. An interview can become extremely beneficial for the risk assessment in that it allows the investigator to determine many risk factors. In this particular case Sgt. SMYTH elected to visit DUNPHY'S residence which I believe was the right strategy given the circumstances.

Report of Sgt. Lenehan, CIDDD Exhibit P-0784 at p. 8

110. Sgt. Lenehan also outlined a number of reasons why a home visit would be beneficial:

- (1) the interviewer could determine if the subject's thought processes were rational, whether or not there was some underlying mental illness and whether the subject was quick to anger;
- (2) it is important to see how the subject lives, if they have the means to carry out a threat, the type of environment in which the subject lives and seeing how a subject takes care of his residence can provide information about their mental state or physical ability;
- (3) the interview allows the investigator to build a relationship with the subject.

Report of Sgt. Lenehan, CIDDD Exhibit P-0784 at p. 8

111. On the sufficiency of the background checks and searches completed by Cst. Smyth and the decision not to accept Cst. Cox's offer to accompany him Sgt. Lenehan stated:

In Sgt. SMYTH's case, I believe he had gathered all information possible prior to attending DUNPHY's residence. All police database systems were queried and additional evaluation of previous tweets was completed. Sgt. SMYTH conducted a check with the Firearms Registry and contacted the police of jurisdiction who were only able to provide dated information relating to prior unrelated threatening occurrence. No local or criminal record was found. Sgt. SMYTH contacted the WHSCC, where he learned Mr. MAHONEY had some concerns, though the extent of those concerns are not identified to me. Sgt. SMYTH attempted a phone call to DUNPHY residence prior to attending, but I'm not aware why the phone call was unsuccessful. Sgt. SMYTH met all considerations that any officer, much the same as any patrol officer attending a call, should take into account prior to responding to a residence. Given the resulting information garnered through the background checks conducted, there is nothing reasonable to suggest that DUNPHY posed any risk to Sgt. SMYTH's safety.

An offer for a uniform backup officer from PC COX was politely declined as Sgt. SMYTH did not have any reasonable concerns for his safety.

Additionally, one should take into account that a uniform officer presence may set more of an authoritative tone that might interfere when attempting to build a relationship with a subject. Some people can be offended that a uniform police car is in their driveway. A uniform presence broadcasts to the neighbours that something is going on and may cause some embarrassment to a subject. Most often, a softer approach with plain clothes officers is preferred when attempting to build a relationship.

Report of Sgt. Lenehan, CIDDD Exhibit P-0784 at p. 9

Testimony of Sgt. Lenehan on March 10, 2017, Vol. 40, p. 9

112. On the decision to visit Mr. Dunphy's home on Easter Sunday, Sgt. Lenehan stated:

Visiting the DUNPHY residence on Easter Sunday would be a judgement on Sgt. SMYTH's part. In my opinion, from a strategic standpoint, in order to address the investigation more timely, Sgt. SMYTH would wish to locate DUNPHY as soon as possible, and often people can be located at their residence during holidays. Sgt. SMYTH's decision to attend the DUNPHY residence, on a holiday, should have no bearing on the situation. Police officers work shift work and on holidays.

Given police insufficient ability to determine an accurate background on DUNPHY from all other resources available, the more timely direct contact with DUNPHY occurred, the more timely and more detailed assessment as of his potential DUNPHY's risk could be completed.

Report of Sgt. Lenehan, CIDDD Exhibit P-0784 at p. 10

113. In concluding his opinion Sgt. Lenehan stated:

It is my opinion that Sgt. SMYTH conducted a thorough risk assessment of DUNPHY given the circumstances. Furthermore, that Sgt. SMYTH engaged in the appropriate steps in attempting to develop a detailed background of DUNPHY. When insufficient information was available, Sgt. SMYTH took appropriate actions to interview DUNPHY to satisfy a thorough risk assessment. With little background information available, it is reasonable and appropriate that an interview to determine the tone and intent of DUNPHY's tweets was necessary, to evaluate any future risk DUNPHY may pose to others, including the Premier or Minister Collins, and to further determine if a long term monitoring strategy would be warranted.

Report of Sgt. Lenehan, CIDDD Exhibit P-0784 at p. 10

114. Under questioning by Commissioner Barry, Sgt. Lenehan said that Mr. Dunphy's comments needed to be looked into and there was enough there that warranted further investigation to determine intent. Sgt. Lenehan was satisfied that it was better to err on the side of caution because if the police did not look into it and something happened then they would be criticized for that.

Testimony of Sgt. Lenehan on March 10, 2017, Vol. 40, pp. 46-47

115. Sgt. Lenehan testified that the fact that Cst. Smyth was on the road during the background checks was not an issue for him as long as he did the checks before attending at Mr. Dunphy's residence.

(12) Conclusion on Questions 1 and 2

116. It is clear that, in accordance with the role and mandate of the PSU, Cst. Smyth had the duty and obligation to follow up on Mr. Dunphy's tweets. The evidence of former members of the PSU and expert witnesses, Dr. Stephen Hart and Sgt. Patrick Lenehan, support Cst. Smyth's decision to visit Mr. Dunphy in a timely manner. The decision to conduct a home visit was consistent with accepted practice in the area of risk assessment and threat assessment and the decision to visit on Easter Sunday by himself was also consistent with accepted police practice. While the public, and the media, may not like the fact that Cst. Smyth visited Mr. Dunphy's house over a tweet on Easter Sunday it was, in fact, Cst. Smyth's duty and obligation to do so. The question which would be the subject of this Inquiry if Cst. Smyth had not visited and something had happened would

be: why didn't Cst. Smyth visit Mr. Dunphy before something happened? As a number of police officers have testified at the Inquiry "you are damned if you do, and damned if you don't".

PART III - THE RCMP INVESTIGATION

(1) First police officers at the scene

(i) Cst. Adrian Cox

117. Cst. Adrian Cox of the RCMP detachment in Holyrood was the first police officer to arrive at the scene. As previously outlined, Cst. Cox had spoken to Cst. Smyth earlier that day. When Cst. Cox arrived at Mr. Dunphy's house he approached a lone male standing in the driveway. This male identified himself as Cst. Smyth and showed his RNC badge which was attached to his belt. Cst. Cox asked if he was alright and what happened. Cst. Smyth stated that he was having a conversation with Mr. Dunphy which became increasingly agitated. Mr. Dunphy reached down and pulled up a firearm and pointed it at him. Cst. Smyth said he put up his hands and said no, no, no. He then drew his firearm and fired 3-4 times.

Testimony of Cst. Cox on February 20, 2017, Vol. 26, pp. 19-20, p. 52

118. Cst. Cox then went to the house and looked inside the window. He saw a male whom he believed to be Mr. Dunphy with his head resting on the back rest. He also saw what appeared to be the barrel of a rifle. Cst. Cox confirmed that Cst. Smyth at no time entered the house after he arrived.

Testimony of Cst. Cox on February 20, 2017, Vol. 26, p. 26

119. Cst. Cox described Cst. Smyth as appearing visibly shaken and he remembered his hands shaking. He was only a couple of feet away from him and did not get a smell of alcohol, or observe any signs of impairment. Cst. Cox confirmed during cross-examination that he

had earlier described Cst. Smyth as looking like he saw a ghost and he accepted that description as accurate. This lack of a smell of alcohol or any signs of impairment, was confirmed by all police officers who had dealings with Cst. Smyth on the date in question. Cst. Cox was only there with him a couple of minutes when he took him to the police car.

Testimony of Cst. Cox on February 20, 2017, Vol. 26, pp. 20-21, p. 51

120. Cst. Cox testified as to the following time frames:

1455 – Cst. Cox arrived

1501 – Cst. Kelly Downey arrived

1502 – Cst. Trevor O’Keefe arrived

Testimony of Cst. Cox on February 20, 2017 at p. 23

121. At 1507 Cst. Cox and Cpl. O’Keefe cleared the house. Cst. Cox confirmed that upon entry into the house the rifle was leaning against the bluish tub as depicted in the photos taken by the crime scene photographer. More specifically, Cst. Cox described the rifle as being propped up against a bluish-colored Rubbermaid tub. The stock was on top of the tub and the barrel was pointing down. Cst. Cox testified that the position of the rifle was ingrained in his mind.

Testimony of Cst. Cox on February 20, 2017, Vol. 26, pp. 24-26

122. Cst. Cox and Cpl. O’Keefe went back outside and accompanied the paramedics, Nancy Lenehan and Kevin Bishop into the residence. Cst. Cox’s notes (or the scene log) indicate

that the paramedics entered the house at 1510 and everyone exited the residence at 1513, a total of 3 minutes. Cst. Cox testified that he stayed with the paramedics and he remembered telling them not to touch anything and to watch where they were going. Cst. Cox also stated that he watched the paramedics closely while they were in the residence.

Testimony of Cst. Cox on February 20, 2017, Vol. 26, pp. 29-30, p. 53

123. Cst. Cox testified that he described the position of the rifle from memory and had only seen photographs depicting the rifle leaning against the bluish Rubbermaid tub the day before his interview with Commission Counsel. Cst. Cox testified that the photographs accurately depicted the position of the rifle when he entered the house and he never moved anything.

Testimony of Cst. Cox on February 20, 2017, Vol. 26, p. 50, pp. 54-55

124. Cst. Cox testified that when he returned to the Dunphy residence several days later to obtain medications he located a live 22 round in an ice cream tub on the round table in front of Mr. Dunphy's chair.

Testimony of Cst. Cox on February 20, 2017, Vol. 26, p. 58

(ii) Cst. Kelly Downey

125. As outlined in the preceding section, Cst. Downey was the second RCMP officer to arrive on the scene. She arrived at 1501. She parked behind Cst. Cox and saw a gentleman standing in the driveway whom she assumed was Cst. Smyth. She had a very short (maybe 1 minute) conversation with Cst. Smyth in the driveway. Cst. Smyth said that he

had identified himself and Mr. Dunphy asked him to come in. The conversation started off as cordial but Mr. Dunphy's demeanour quickly changed and he became agitated. Cst. Downey's conversation with Cst. Smyth did not go beyond Mr. Dunphy becoming agitated and asking Cst. Smyth if he worked for the government as the paramedics arrived.

Testimony of Cst. Downey on January 30, 2017, Vol. 12, pp. 108-109, p. 117

126. Cst. Downey confirmed that Cpl. O'Keefe and Cst. Cox cleared the residence before bringing the paramedics into the house. Cst. Downey also testified that Meghan Dunphy arrived at the scene at approximately 3:35 p.m. and at 4:09 p.m. Cst. Smyth left the scene with Cst. X. She also confirmed that Cst. Smyth was not wandering around the scene.

Testimony of Cst. Downey on January 30, 2017, Vol. 12, p. 119

127. Cst. Downey described Cst. Smyth as being very quiet, being obviously upset and possibly in shock.

Testimony of Cst. Downey on January 30, 2017, Vol 12, p. 107, p. 121

(iii) Cpl. Trevor O'Keefe

128. Cpl. O'Keefe, the senior RCMP officer initially at the scene, testified that when he first saw him Cst. Smyth had a look of disbelief on his face. He said he got the basics from Cst. Smyth – he was in the house when Mr. Dunphy became agitated and shots were fired. Cst. Smyth told him that Mr. Dunphy was deceased. Cpl. O'Keefe also stated that there was no smell of alcohol coming from Cst. Smyth nor did he observe any signs of

impairment. Cpl. O'Keefe was also made aware by Cst. Smyth that Mr. Dunphy pointed a firearm at him.

Testimony of Cpl. O'Keefe on January 26, 2017, Vol. 10, pp. 13-14, pp. 16-17

129. Cpl. O'Keefe testified that while clearing the house he saw a long gun at Mr. Dunphy's feet in front of him. He also testified that there was a strong smell of cat urine and cat feces and he remembered seeing cats in the house. Cpl. O'Keefe described the Dunphy house as the messiest house he had ever been in during his service, with the garbage, dirt and smell of cat urine. He was in the house while the paramedics were examining Mr. Dunphy and he confirmed that nothing was moved. He described the house as "an absolute state". He described the smell of cat urine as overpowering.

Testimony of Cpl. O'Keefe on January 26, 2017, Vol 10, pp. 28-29, pp. 37-38, p. 39, p. 97

130. Cpl. O'Keefe confirmed that Meghan Dunphy and her boyfriend Billy Corcoran, showed up at the scene around 1537. He said he absolutely did not tell Meghan Dunphy that her father was on the floor and a gun beside him.

Testimony of Cpl. O'Keefe on January 26, 2017, Vol. 10, pp. 41-46

131. Cst. X was tasked with bringing Cst. Smyth to the Holyrood detachment but he was not given any instructions other than to bring him to the detachment.

Testimony of Cpl. O'Keefe on January 26, 2017, Vol. 10, pp. 49

132. Cpl. O'Keefe confirmed under cross-examination that Cst. Smyth was co-operative, did not attempt to leave the scene at any time, immediately provided his gun and when asked to sit in the police car did so. Cpl. O'Keefe also testified that Cst. Smyth was not walking all over the place.

Testimony of Cpl. O'Keefe on January 26, 2017, Vol. 10, pp. 92

(iv) Sgt. Dion Foote

133. On Easter Sunday 2015 Sgt. Foote was a corporal at the Holyrood GIS (General Investigation Section). He attended at Mitchell's Brook around 1651 and was asked to assist in keeping the cats away from the area of Mr. Dunphy's body. Sgt. Foote stated that when he opened the door there was an overwhelming smell which was a cross between cat urine, cat feces and other smells. He testified that there could have been 30-40 cats inside the house.

Testimony of Sgt. Dion Foote on January 26, 2017, Vol. 10, p. 112, p. 115

134. Sgt. Foote indicated that he did not touch anything in the house and he did not see the cats knock anything down or interfere with anything. Cpl. Henstridge and Cpl. Burke showed up at the house at 1911 and left at 1917. Also, Sgt. Conahan attended during that time to deal with the marijuana grow operation to ensure its safety. The Forensic Identification officers arrived at 2107 hours and Sgt. Foote was relieved.

Testimony of Sgt. Foote on January 26, 2017, Vol. 10, p. 120, pp. 123-125

135. Under cross-examination Sgt. Foote testified that Mr. Dunphy's hands were positioned as if he was holding something. Sgt. Foote's impression was that Mr. Dunphy's hands were positioned as if he was holding the rifle, which was on the floor in front of the deceased's left foot with the barrel touching the floor and the handle leaning on a plastic storage tub.

Testimony of Sgt. Foote on January 26, 2017, Vol. 10, pp. 140-141

(v) Cst. X

136. On the date of Mr. Dunphy's death Cst. X was a general duty constable stationed in Ferryland. Cst. X attended at Mr. Dunphy's residence where he assisted in directing traffic. Cst. X was asked to transport Cst. Smyth to Holyrood and he left the scene with him at 4:10 p.m. Cst. X was not provided with any details of the case and did not know that Mr. Dunphy was dead although he knew there had been a shooting. Cst. Smyth sat in the front seat of the police vehicle on the way to Holyrood.

Testimony of Cst. X on January 25, 2017, Vol. 9, pp. 117-129

137. Cst. X stated that he had general conversation with Cst. Smyth on the way to Holyrood. He remembers Cst. Smyth saying at one point "all he had time to do was say no, no, no". After reviewing his notes Cst. X confirmed that Cst. Smyth told him there were threats made on social media and he said "no matter how confident you are about defusing a situation, its different when it happens to you". He also stated that Cst. Smyth appeared to be shaken up. At 4:50 they arrived at the Holyrood detachment. Cst. X confirmed that he diverted the conversation away from any discussion about the incident.

Testimony of Cst. X on January 25, 2017, Vol. 9, pp. 130-141

(2) What occurred at the Holyrood Detachment

(i) Staff Sgt. Kent Osmond

138. Staff Sgt. Osmond was aware that Cst. Smyth was at the Holyrood detachment and that there were several RNC officers present with him. Staff Sgt. Osmond's preference was to get a statement from Cst. Smyth that evening. However, he was informed by Cpl. Monty Henstridge at 1745 that Cst. Smyth was not prepared to give a statement at that time. Staff Sgt. Osmond verified that the RCMP had absolutely no legal grounds to compel Cst. Smyth to give a statement.

Testimony of Staff Sgt. Osmond on February 20, 2017, Vol. 26, pp. 69-71

139. At approximately 1900 Staff Sgt. Osmond had a brief conversation with Cst. Smyth which is described as follows in Staff Sgt. Osmond's handwritten notes and which accurately reflects that conversation:

1900 Approx time – I saw Smyth walking by the board room and spoke briefly. I noted he had changed his clothes and asked him how he was doing. He said he keeps playing it over in his head and wondering why the guy did what he did. Then he wonders if he could have done something different in response. I told him that was a normal reaction in my opinion. He said he wants to provide a statement now, with every bone in his body, but knows his recall will be better tomorrow. I told him he was right and he should go home and be with family and we could talk tomorrow.

Notes of Staff Sgt. Osmond, CIDDD Exhibit P-0583, pp. 5-6

Testimony of Staff Sgt. Osmond on February 20, 2017, Vol. 26, pp. 72-73, p. 161

(ii) Corporal Monty Henstridge

140. Cpl. Monty Henstridge attended the briefing session at the Holyrood Detachment at approximately 5:00 p.m. He was tasked to speak to Cst. Smyth to determine if he was going to provide a statement. In his Supplementary Occurrence Report, Cpl. Henstridge wrote that Cst. Smyth stated that he very much wanted to provide a statement immediately but he would prefer to wait until the next day. Cst. Warren Sullivan of the RNCA indicated that research showed that memory recall was stronger and more accurate the following day and Cst. Henstridge agreed. Cpl. Henstridge testified that he did not attempt to persuade Cst. Smyth to give a statement because the police needed Cst. Smyth's continued co-operation.

Supplementary Occurrence Report of Cpl. Monty Henstridge, CIDDD Exhibit P-0697

Testimony of Cpl. Monty Henstridge on February 23, 2017, Vol. 29, pp. 109-110

(iii) Cst. Smyth's involvement with RNC officers in Holyrood

141. Sgt. Reg Tilley and Acting Inspector Mike Adams arrived together at the RCMP detachment in Holyrood between 3:30 p.m. and 4:15 p.m. on April 5, 2015 with the intention to provide support to Cst. Smyth. They were at the detachment for approximately 20 to 25 minutes before Cst. Smyth arrived. While awaiting Cst. Smyth's arrival, A/Insp. Adams advised several RCMP officers that he and Sgt. Tilley were merely at the detachment to perform a Critical Incident Stress Debriefing with Cst. Smyth and that they were aware it was the RCMP's investigation.

Testimony of Acting Inspector Mike Adams on January 30, 2017, Vol.12, p.9, p.14, p.16

Testimony of Sgt. Reginald Tilley on February 6, 2017, Vol.17, p.8, p.9

142. At approximately 4:35 p.m. Cst. Smyth arrived at the RCMP detachment and was brought upstairs into a room to meet alone with Sgt. Tilley and A/Insp. Adams. Sgt. Tilley described Cst. Smyth as being upset, with shaky hands. Sgt. Tilley testified that when Cst. Smyth tried to relay information of the shooting to him and A/Insp. Adams, he was told to wait until he was interviewed by the RCMP and that they were there solely for moral support. A/Insp. Adams testified that Cst. Smyth said numerous times that he wanted to tell his story but A/Insp. Adams deflected him and told Cst. Smyth that there will be an opportunity with the RCMP and he can tell his story at that time.

Testimony of Sgt. Reg Tilley on February 6, 2017, Vol.17, p.10, p. 12-13

Testimony of A/Insp. Mike Adams on January 30, 2017, Vol.12, p. 27

143. At 5:30 p.m. Constable Warren Sullivan and Constable Scott Harris arrived at the RCMP detachment and they brought food for Cst. Smyth. Cst. Harris and Cst. Sullivan were at the detachment in a supportive role as RNCA (Royal Newfoundland Constabulary Association) representatives. All four RNC officers were in the room speaking with Cst. Smyth. Upon their arrival, Cst. Smyth provided Cst. Harris and Cst. Sullivan with a brief overview of what happened at Mitchell's Brook earlier that day.

Testimony of Sgt. Reginald Tilley on February 6, 2017, Vol.17, p.17

Testimony of Cst. Warren Sullivan on January 31, 2017, Vol.13, p. 4

Testimony of Cst. Scott Harris on January 31, 2017, Vol.13, p. 63, p. 65

144. With respect to giving a statement to the RCMP, Sgt. Tilley testified that he felt Cst. Smyth's mind would be clearer with time removed from the incident and that all the

literature and training he knew about concerning memory recall suggested the same. In his interview with Corp. Henstridge, A/Insp. Adams explained that he advised Cst. Smyth to wait until he settled down before giving his story to the RCMP.

145. In his testimony, Cst. Sullivan confirmed that he also provided Cst. Smyth with advice regarding the timing of the giving a statement to the RCMP. He explained that the advice he gave Cst. Smyth was: "... to wait take some time to debrief himself, to allow the adrenaline to go out of his body, and to get some rest, and after a night's sleep to try to then attempt to go and speak to the RCMP to provide a statement if they required it at that time." Cst. Sullivan testified that the advice given to Cst. Smyth was to wait 24 hours and to get a good night's sleep before providing his statement to the RCMP. In his testimony, he explained that in the RNC's use-of-force training there is a phenomenon referred to as critical stress amnesia, where an officer goes through a survival stress situation. The RNC manual refers to the fact that some memory will be recalled the following day and that the purest recall will be 24 to 48 hours after an incident.
146. Before the RNC officers left the detachment at 6:00 p.m. Cpl. Henstridge was advised that Cst. Smyth would not be giving a statement until the morning or next day. Cst. Sullivan also made Cpl. Henstridge aware of the advice he gave to Cst. Smyth in this regard. Cst. Harris and Cst. Sullivan were at the detachment with Cst. Smyth for several hours. Cst. Smyth heeded the advice of his fellow RNC members and did not provide a statement to the RCMP until the next day. Cst. Smyth's statements to Staff Sgt. Osmond and Cpl. Henstridge have been previously reviewed.

Testimony of Sgt. Reginald Tilley on February 6, 2017, Vol.17, p.11, p. 18, p. 19

Testimony of Cst. Warren Sullivan on January 31, 2017, Vol.13, p.17, p. 19, p. 20

Testimony of Cst. Scott Harris on January 31, 2017, Vol.13, p. 67

(3) The decision for the RCMP to investigate – Chief Superintendent Boland

147. On April 5, 2015 C/Supt. Andrew Boland was the second highest ranking RCMP officer in the province. He was the Criminal Operations Officer (CROPS) and was responsible for overseeing the operations of the RCMP in NL. C/Supt. Boland had been an RCMP officer for 34 years and in 2010 transferred to St. John's. C/Supt. Boland retired in August 2016.

Testimony of C/Supt. Boland on February 15, 2017, Vol. 23, pp. 2-5

148. C/Supt. Boland testified that on April 5, 2015 he was notified by Insp. Jamie Zettler that there had been a fatal shooting in Mitchell's Brook in which an RNC officer had been involved. He was also informed that the members of the Holyrood RCMP detachment had responded to the scene. C/Supt. Boland informed the Commanding Officer of the situation and called Deputy Chief Singleton of the RNC to advise that the RCMP would be conducting the investigation.

Testimony of C/Supt. Boland on February 15, 2017, Vol. 23, pp. 10-12

149. It was C/Supt. Boland's decision not to bring in an outside agency to investigate. C/Supt. Boland testified that he made this decision on the basis that he had every confidence in

the RCMP to conduct an unbiased investigation, the incident occurred in RCMP jurisdiction and the RCMP had the capability and resources to carry out the investigation.

Testimony of C/Supt. Boland on February 15, 2017, Vol. 23, pp. 12-14

150. Nothing occurred over the days that followed to cause him to reconsider this decision although he became aware of issues being raised in the public. As a result of these concerns being raised he decided to bring in an independent observer to ensure that the investigation was done independently and without bias. The involvement of the independent observer will be reviewed later in this Brief.

Testimony of C/Supt. Boland on February 15, 2017, Vol. 23, p. 14, pp. 20-22

(4) Staff Sgt. Kent Osmond – Team Commander

151. Staff Sgt. Kent Osmond, a 26 year old veteran of the RCMP, was Team Commander in the Dunphy case. Prior to this investigation he had been involved in approximately 15 homicide cases, most of which he had been involved in as Team Commander, and he had been a primary investigator in several other homicide cases. The role of a Team Commander is to ensure that the investigative team has the appropriate resources. Although the Team Commander will provide guidance he or she will not review all witness statements and officers' notes. Staff Sgt. Osmond had also been involved in approximately 15 use of force investigations involving police.

Testimony of Staff Sgt. Osmond on February 20, 2017, Vol. 25, pp. 114-122

152. Staff Sgt. Osmond was called at approximately 2:45 p.m. and informed of the shooting in Mitchell's Brook. As the officer in charge of Major Crimes East for the RCMP it was his role to assemble a team to conduct the investigation. At that time Staff Sgt. Osmond had experienced investigators working in his unit, including Cpl. Monty Henstridge and Cpl. Steve Burke. Cpl. Burke was assigned as the primary investigator. Cpl. Dion Foote of Holyrood GIS was ultimately assigned as file coordinator, thereby completing the Major Case Management Command Triangle.

Testimony of Staff Sgt. Osmond on February 20, 2017, Vol. 25, pp. 122-125

153. After assembling the investigative team Staff Sgt. Osmond attended at the RCMP Detachment in Holyrood where a briefing occurred at 1702. At that time the RCMP possessed the following information:

- (1) Cst. Joe Smyth, the RNC officer involved in the shooting, had contacted Cst.

Adrian Cox of the Holyrood RCMP earlier that day and informed Cst. Cox that he would be visiting Donald Dunphy. Cst. Cox indicated that Cst. Smyth told him he was investigating threats to the Premier. Cst. Cox did a PROS search for Cst. Smyth and informed him that there were no convictions for violence. When asked whether he wanted Cst. Cox to accompany him Cst. Smyth said no as he thought, in Cst. Cox's words, that the presence of a uniformed officer and a marked police officer might set Mr. Dunphy off;

- (2) Cst. Smyth, when approached by Cst. Cox at the scene after the shooting, immediately informed him of what happened, as previously outlined;

(3) The first police officers who attended the scene (Cst. Cox, Cst. Downey, Cpl. O'Keefe) and the police officer who drove Cst. Smyth to the Holyrood detachment (Cst. X) had close contact with Cst. Smyth and none of them noticed any smell of alcohol or other behaviours which could indicate the possibility of drugs being involved;

(4) Cst. Cox, after speaking to Cst. Smyth, went to the window of Mr. Dunphy's house and, when he looked in saw Mr. Dunphy sitting the chair, apparently deceased, and he also saw a rifle;

(5) When Cpl. O'Keefe and Cst. Cox went into the house to clear the same they could see that Mr. Dunphy was deceased and that a long barrel firearm was lying against a bluish tub. Both officers confirmed that they did not touch the rifle;

(6) Based on what Cst. Smyth told the responding officers and the presence of the rifle at the scene the investigators concluded that S. 25 of *Criminal Code* (which allows police officers to use justifiable force) could be applicable.

154. Staff Sgt. Osmond was aware of Cst. X's decision not to engage Cst. Smyth in conversation on the way to the Holyrood detachment. Although Staff Sgt. Osmond was aware of criticism of Cst. X's approach he supported Cst. X's decision and highlighted

the need to be cautious when the full facts were not clear, especially early in an investigation.

Testimony of Staff Sgt. Osmond on February 20, 2017, Vol. 26, pp. 68-69

155. Staff Sgt. Osmond, in responding to allegations of giving preferential treatment to Cst. Smyth by not trying to take a statement from Cst. Smyth that night stated that it was important to build rapport with Cst. Smyth, especially where he was the only witness and his co-operation was crucial. Staff Sgt. Osmond testified that he believed their investment in the relationship with Cst. Smyth paid off over time, having regard to the level of co-operation provided. Staff Sgt. Osmond also confirmed that oftentimes the subject of the investigation is the last person to be interviewed but in this case it was important to interview Cst. Smyth early as he was the only witness.

Testimony of Staff Sgt. Osmond on February 20, 2017, Vol. 26, pp. 154-155, p. 158

156. Staff Sgt. Osmond testified that in the previous officer-related use of force investigations the only statements provided by police officers were pre-prepared through lawyers. He had never had a situation where a police officer sat down for a face-to-face interview and Cst. Smyth was the first officer to do that in his experience. Even though there had been some discussion about not holding a second re-enactment due to the potential effect on Cst. Smyth he agreed immediately to participate, despite the concerns of others. Staff Sgt. Osmond also confirmed that he did not receive any letters from a lawyer on Cst. Smyth's behalf during the investigation and the first time he had any contact with a lawyer for Cst. Smyth was during the briefing on the ASIRT Review.

Testimony of Staff Sgt. Osmond on February 20, 2017, Vol. 26, pp. 152-153, p. 155, p. 159

157. Staff Sgt. Osmond confirmed during his testimony that at the scene the RCMP had, (1) no reasonable suspicion to detain Cst. Smyth; and, (2) no reasonable grounds to arrest him. If Cst. Smyth had said that he was not going back to the RCMP detachment that night there was nothing that the RCMP could do. Similarly, there were no legal grounds to detain Cst. Smyth at the RCMP detachment in Holyrood nor even to compel him to meet with the RCMP the next day and give a statement.

Testimony of Staff Sgt. Osmond on February 20, 2017, Vol. 26, pp. 154-155

158. Staff Sgt. Osmond did confirm that he felt Cpl. Burke and Cpl. Henstridge were too friendly in their initial interview with Cst. Smyth and that they provided him with information that should not have been provided (i.e., security cameras not working, bullet in the gun). However, Staff Sgt. Osmond disagreed with AISIRT that Cst. Smyth should have been cautioned during that first interview.

Testimony of Staff Sgt. Osmond on February 20, 2017, Vol. 26, p. 81, p. 101, pp. 136-137 and p. 157

159. Again, in reference to allegations of preferential treatment, Staff Sgt. Osmond that he also bent over backwards to give information to Meghan Dunphy and Staff Sgt. Osmond had never previously provided that much information to a witness. He indicated that in these circumstances he was surprised to receive letters from Meghan Dunphy's Counsel alleging bias and tunnel vision that early in the investigation.

Testimony of Staff Sgt. Osmond on February 20, 2017, Vol. 26, p. 100, p. 157, pp. 164-166

160. Staff Sgt. Osmond testified that it did not take a lot of insight to figure out that the RCMP investigation was going to be closely scrutinized and that there could be an inquiry. However, Staff Sgt. Osmond maintained that this did not change the investigative methodology. The RCMP investigators had to look for evidence to either refute or confirm what Cst. Smyth said. Staff Sgt. Osmond verified that if there had been evidence to lay a charge then he would have done that. Staff Sgt. Osmond also stated that there had been no decision at the time of the April 7, 2015 Press Release not to charge Cst. Smyth with a criminal offence.

Testimony of Staff Sgt. Osmond on February 20, 2017, Vol. 26, p. 156, p. 161-163, p. 169

(5) Cpl. Steve Burke – Primary Investigator

161. Cpl. Steve Burke was the primary investigator in this file. He had been a member of the RCMP for 15 years and joined the Major Crimes Unit in 2009. He left Major Crimes in December 2016. Cpl. Burke had been the primary investigator in two homicide cases in that time frame and had worked on numerous other homicide cases. He testified that in conducting an investigation where a police officer was involved consideration had to be given to s. 25 of the *Criminal Code*.

Testimony of Cpl. Steve Burke on February 7, 2017, Vol. 18, pp. 2-11

162. Cpl. Burke described the Team Commander's role in the Major Case Management Command Triangle as being responsible to obtain resources and to update senior management. The primary investigator controls "the speed, flow and direction" of the

investigation and is in control of the investigation. The file co-ordinator's role is to receive material, assign tasks and prepare the disclosure.

Testimony of Cpl. Steve Burke on February 7, 2017, Vol. 18, pp. 21-23

163. Cpl. Burke testified that he had no concern about the RNC officers meeting privately with Cst. Smyth nor did he make any effort to persuade Cst. Smyth to give a statement that evening. Cpl. Burke admitted that while some could see the RCMP's treatment of Cst. Smyth as preferential it was not something that came into his mind. When asked if certain steps were appropriate Cpl. Burke stated:

Cpl Burke: Yeah, or, you know, if I would have known at the time – it's hard to – you got to put yourself back in the investigation and what you're thinking at that time and the things that were going on, so I can't now speculate what I would have thought of it back then. It's hard to do that.

Testimony of Cpl. Steve Burke on February 7, 2017, Vol. 18, pp. 64-74 and p. 79

164. While perhaps not eloquently expressed the comment of Cpl. Burke highlights the problem with hindsight when asking a police officer if he or she would have done things differently. The reality is that a homicide investigation is a dynamic, fluid affair and an investigation can change quickly. The police have to interview and re-interview witnesses, obtain forensic experts and make decisions quickly because of public pressure to either solve a crime or, as in this case, to attempt to address public concern and/or outrage. In hindsight, very few homicide investigations will survive microscopic scrutiny as to what occurred in the early stages of the investigation.

165. When asked why Cst. Smyth wasn't cautioned before his police interview Cpl. Burke indicated that they were fearful that, if cautioned, Cst. Smyth would not give a statement. This would be a valid concern in most cases of this nature. It was not a concern in Cst. Smyth's case because he was totally co-operative from the start and, in doing so, felt that he could clear his name. Also, Cst. Smyth did not retain counsel to assist him as he wanted to be totally co-operative with the investigators and provide them with all necessary information, especially where Cst. Smyth believed he had acted in defence of his life.

Testimony of Cpl. Steve Burke on February 7, 2017, Vol. 18, p. 104

166. When asked about the newly discovered BBMs (the lunatic message with Trevor) Cpl. Burke did not express concern about this comment as an investigator because that comment could be taken literally or as a figure of speech. When asked about the impact of consultation with Sgt. Tim Buckle in preparing his notes Cpl. Burke also indicated that he was not concerned because they were talking about wording and not changing any of the events.

Testimony of Cpl. Steve Burke on February 7, 2017, Vol. 18, pp. 17-20

167. Under questioning by Counsel for Meghan Dunphy Cpl. Burke indicated that they initially had concerns about Mr. Dunphy's mental state and some of the comments he made on Twitter. Cpl. Burke felt that Mr. Dunphy, based on the condition of the house, had "some issues that needed to be explored". Cpl. Burke also testified that the RCMP did not have any evidence that the gun had been moved that day.

Testimony of Cpl. Steve Burke on February 8, 2017, Vol. 19, pp. 83-87

168. The following are some of the issues explored during cross-examination of Cpl. Burke by Counsel for Cst. Smyth:

(1) Cpl. Burke confirmed that based upon what Cst. Smyth told the responding officers, Cpl. O'Keefe and Cst. Cox, and what they found in the house there was initially no reason to dispute what Cst. Smyth was saying. However, Cpl. Burke confirmed that it did not mean that the police were accepting what Cst. Smyth was saying either;

Testimony of Cpl. Steve Burke on February 9, 2017, Vol. 20, p. 30

(2) Cst. Smyth was totally co-operative with the police throughout the investigation and never refused any requests from them;

(3) the fact that details were given to Cst. Smyth during the police interview was not indicative of preferential treatment as this was not the first time that Cpl. Burke had adopted this type of approach.

Testimony of Cpl. Steve Burke on February 9, 2017, Vol. 20, pp. 39-40 and p. 55

169. In an investigation such as the present Cpl. Burke agreed that the fact Cst. Smyth was a police officer probably worked against him. Counsel for Cst. Smyth reviewed the following factors with Cpl. Burke which resulted in pressure being put on the investigators, whether directly or indirectly:

- (1) the fact that a police officer had shot a man in his own home meant that the RCMP investigation would be put under a microscope;
- (2) Meghan Dunphy's counsel was writing letters to his RCMP superiors and politicians accusing the RCMP investigators of tunnel vision and bias;
- (3) the requests to have an out-of-province police force investigate the matter did not go away;
- (4) the involvement of the independent observer proved more of a hindrance than a help;
- (5) there was significant media and public attention;
- (6) there appeared to be pressure from government officials.

Testimony of Cpl. Burke on February 9, 2017, Vol. 20, pp. 46-53

170. Counsel for Cst. Smyth reviewed with Cpl. Burke the different types of forensic and scientific tests that the RCMP had utilized in this case and these included ballistics and firearm tests, a 3D scene recreation, video re-enactments at the scene, the forensic crime scene analysis, attempts to obtain fingerprints, exploration of the use of blood spatter and the polygraph, firearm residue testing and forensic pathology. Cpl. Burke agreed with the

suggestion by counsel for Cst. Smyth that forensic evidence can tell a lot about what did, or did not, happen.

Testimony of Cpl. Burke on February 9, 2017, Vol. 20, pp. 56-57

171. Cpl. Burke testified that the investigators were looking for evidence which either refuted or corroborated what Cst. Smyth said. Cpl. Burke felt that the RCMP did a comprehensive investigation and it was not as simple as Cst. Smyth telling the police a story and them accepting it absolutely. Cpl. Burke reiterated, as outlined in the RCMP report, that they did not find any evidence which disputed Cst. Smyth's statements.

Testimony of Cpl. Burke on February 9, 2017, Vol. 20, pp. 58-60

172. Cpl. Burke testified that he was aware of what he considered to be disturbing comments made by Mr. Dunphy on Twitter in the months preceding his death. He was also aware of Meghan Dunphy's description of how her father could act (i.e., vocal, become animated and use terms like government puppet). Cst. Smyth refers the Commissioner to the following exchange:

Mr. Kennedy: *So. Mr. Simmonds says to you: Well, why would Donald Dunphy take out a gun?*

Well, oftentimes in investigations, Sir, whether it be homicide or just criminal investigations in general, there's not always explanations for why people act the way they do, is there?

Cpl. Burke: *Yes.*

Mr. Kennedy: *So when we have all of these circumstances put here, a volatile individual with a long-standing grievance against an agency who is making comments towards government, you put that in with Colin Dinn's comment, again, very – whatever it meant that let 'em come. Or if they're going to come, let 'em come.*

Cpl. Burke: Yes.

Mr. Kennedy: *I'll be ready for them. Then is that not – does that not make sense that Mr. Dunphy, in fact, on that date in question, acted exactly as Constable Smyth said he did?*

Cpl. Burke: *It didn't case me concern that that was the version that Constable Smyth gave. You know, when I looked at the history of Mr. Dunphy and some of the comments he made, I didn't think it was farfetched to believe that the gun was moved or obtained by Mr. Dunphy.*

Mr. Kennedy: *Yeah. Because what you got to do in an investigation, you also have to apply common sense, don't you?*

Cpl. Burke: Yes.

Mr. Kennedy: *You also have to look at it and say, well, we'll never absolutely know what happened when there's only two people, but what we can try to do is determine as best we can what happened.*

Cpl. Burke: Yes.

Mr. Kennedy: *And in this case you concluded, the investigative team in what your report says, concluded that there was no reason to dispute Constable Smyth's version of events. Correct?*

Cpl. Burke: Yes.

Mr. Kennedy: *This is after a 17-month investigation with a review by outside or an independent team and ASIRT, with intense scrutiny and significant public attention and media attention. Correct?*

Cpl. Burke: Yes.

Testimony of Cpl. Burke on February 9, 2017, Vol. 20, p. 63

173. Cpl. Burke confirmed that he was aware of the staging theory raised by Meghan Dunphy and that this was something that he addressed in his mind throughout the investigation. He also said that the implication left by paramedics that the RCMP had moved the gun

was “not probable”. Cpl. Burke testified that there was no evidence uncovered in the investigation which would indicate that any staging had taken place.

Testimony of Cpl. Burke on February 9, 2017, Vol. 20, p. 75 and pp. 84-85

(6) Cpl. Monty Henstridge – Involvement in the early stages of the investigation

174. Cpl. Henstridge and Cpl. Burke have been criticized for attending at Meghan Dunphy’s house on the night of her father’s death and taking a statement from her. However, Cpl. Henstridge testified that they were trying to gather as much information as they could and Ms. Dunphy could provide information about her father. Meghan Dunphy did not indicate that she did not want to speak to them or at any time request to cut the interview short.

Testimony of Cpl. Henstridge on February 24, 2017, Vol. 30, pp. 7-8, p. 31

175. Cpl. Henstridge admitted that his approach towards Cst. Smyth during the interview process could have been perceived as too friendly. He also agreed that he should not have made supportive statements of Cst. Smyth and provided him with the information that the security cameras were not working.

Testimony of Cpl. Henstridge on February 23, 2017, Vol. 29, pp. 122-126

176. Under cross-examination by Counsel for Cst. Smyth the following points were made:

(1) Cst. Smyth’s visit to Mr. Dunphy on April 5, 2015 was not surreptitious in any way (p. 30);

- (2) investigations are fluid and dynamic affairs which can change in a matter of seconds and therefore require a flexible approach (p. 30);
- (3) in his visit to the scene Cpl. Henstridge saw the rifle leaning against the tub and he saw Mr. Dunphy in the chair, as initially described by Cst. Smyth (p. 32);
- (4) Cpl. Henstridge was aware that although obtaining a statement from Cst. Smyth was going to be crucial to the investigation oftentimes subject police officers do not co-operate with the police investigators (p. 33);
- (5) at the Holyrood detachment Cpl. Henstridge confirmed that they had no reasonable suspicion to detain Cst. Smyth and no reasonable grounds to arrest him (p. 34);
- (6) as the police could not compel Cst. Smyth to provide a statement they needed his co-operation and had to build rapport with him. As opposed to giving preferential treatment the police were engaged in a valid investigative technique to build rapport with Cst. Smyth in order to ensure his co-operation and obtain a statement (p. 35).

Testimony of Cpl. Monty Henstridge on February 24, 2017, Vol. 30, pp. 30-35

177. In concluding his cross-examination of Cpl. Henstridge the following exchange occurred between Counsel for Cst. Smyth and Cpl. Henstridge:

Mr. Kennedy: Sir I now want to and my last couple of questions for you, so you've gathered information about Constable Smyth, you try to gain as much information as you can about Donald Dunphy?

Sgt Henstridge: That's right.

Mr. Kennedy: And Ms. Breen put it to you that any person is capable of deceit, it's a general statement but in a homicide investigation I would suggest it's something that you would always have to be cognisant of, correct?

Sgt Henstridge: Sure yes.

Mr. Kennedy: She also went on to say that things are not always as they seem?

Sgt Henstridge: That's true.

Mr. Kennedy: Again a very basic principle correct?

Sgt Hestrige: Yes.

Mr. Kennedy: That I'm also going to suggest to you Ms. Breen said to you that things are not always as they seem, I'm going to suggest to you that things are also sometimes exactly as they seem?

Sgt Henstridge: Yes.

Mr. Kennedy: In other words, in this case Donald Dunphy pointed a rifle at Constable Smyth and Constable Smyth fired his firearm to protect himself.

Testimony of Cpl. Monty Henstridge on February 24, 2017, Vol. 30, pp. 42-43

(7) Meghan Dunphy

178. Meghan Dunphy, the daughter of Donald Dunphy, was the first witness to testify at the Inquiry. She testified that her mother died at age 3 and her father raised her as a single

parent. She described her father as being really funny and having a big heart. She testified that he was vocal and opinionated and someone who didn't hold back. She also described him as being very sarcastic but he was always laughing and carrying on.

Testimony of Meghan Dunphy on January 9, 2017, Vol. 1, p. 13

179. Ms. Dunphy discussed her father's long-standing grievance with Workers' Compensation, including the negative impact on his life and his inability to make the money that he wanted to make. She stated that her father wrote letters to politicians and government officials, was on Open Line and had a sign on his house. She described her relationship with her father as very close and although they argued a lot he did everything he could for her. She visited him every week and spoke to him on the phone daily. She also described her father as living in a lot of pain.

Testimony of Meghan Dunphy on January 9, 2017, Vol. 1, pp. 13-16

180. When asked if her father had any security concerns Ms. Dunphy stated that he had concerns that people would break in to steal his marijuana and for that reason he had security cameras installed outside his house and he kept a stick in his living room. Ms. Dunphy stated that Mr. Dunphy always kept the stick next to the chair, between the chair and the stereo on the right hand side. The stick had been there for a number of years.

Testimony of Meghan Dunphy on January 9, 2017, Vol. 1, pp. 21-24

181. When asked about a rifle in her father's house Ms. Dunphy stated that she was cleaning up when her father was in hospital in late January, early February 2015 when she found

the rifle behind the couch. The gun was laying flat on the floor and tucked in behind the couch. The rifle was only visible when she moved the couch and it would not have been visible otherwise. She did not know if the gun was loaded or not, never saw any bullets, and never saw the gun again after that date.

Testimony of Meghan Dunphy on January 9, 2017, Vol. 1, pp. 24-27

182. Ms. Dunphy agreed that the state of her father's house was really bad with it being dirty and garbage everywhere. She stated that if her father was sick and drinking Boost he would just throw the empty bottle on the floor. She testified that her father only had 4 cats in the house and the rest of the cats were wild cats which he looked after but were not kept in the house.

Testimony of Meghan Dunphy on January 9, 2017, Vol. 1, pp. 34-36

183. Ms. Dunphy said that her father had 3 brothers but after her grandfather died her father fell out with Dick and Debbie and didn't have much to do with the other two. She testified that her father and Debbie had never gotten along and they had no contact for the last 10 years.

Testimony of Meghan Dunphy on January 9, 2017, Vol. 1, pp. 40-42

184. Meghan Dunphy testified that she was at her father's house the day before he died. She had been away on vacation and he had looked after her house while she was gone. He would stay at her house in the nighttime and go home to his own house in the day. She cannot recall seeing the stick that day but it was normally on the other side of the chair.

However, she testified that she could not say for sure that the stick was not where it was found. She also stated that she saw no sign of the gun. She would not have been looking around carefully and she was used to the mess.

Testimony of Meghan Dunphy on January 9, 2017, Vol. 1, pp. 43-45

185. Ms. Dunphy testified that she had brunch with her father and her boyfriend, Billy Corcoran, at the Woodstock on Easter Sunday. There was nothing unusual about her father's behaviour and she stated that he was not in a bad mood and was not angry. She also testified that there was nothing out of the ordinary in her father's behaviour in the weeks before. In fact, he was looking forward to turning 60 as he would get some more money and he had plans to fix up his house.

Testimony of Meghan Dunphy on January 9, 2017, Vol. 1, pp. 45-48

186. During the next part of her testimony Ms. Dunphy described how she learned that the police were at her father's home and what happened when she arrived. Ms. Dunphy testified that Cpl. O'Keefe told her that her dad was lying on the floor with a rifle beside him. She described her first interview with the police on the night of her father's death and how the police asked her if her father had any mental issues. She also testified about retaining Counsel, asking to see her father's body and how she learned that he father had been shot in the head.

Testimony of Meghan Dunphy on January 9, 2017, Vol. 1, pp. 50-52, p. 57-59

187. Ms. Dunphy described in detail the issue surrounding her father's glasses and how she felt the RCMP did not properly consider the importance of the same. She also described finding the bullet in her father's home in June and Cpl. Burke's comment that the bullet had no evidentiary value. She testified that, in her opinion, the RCMP were not thorough. She also felt that there was not enough communication with the RCMP and this led to frustration on her part.

Testimony of Meghan Dunphy on January 9, 2017, Vol. 1, pp. 66-67

188. Ms. Dunphy also expressed concern about the contents of Cst. Smyth's April 10 e-mail to members of the RNC which was eventually leaked to the media.

Testimony of Meghan Dunphy on January 9, 2017, Vol. 1, p. 84

(8) Forensic Scene Examination

(i) Sgt. Chris Saunders

189. Sgt. Chris Saunders, a 21 year veteran of the RCMP, was a forensic identification specialist with the RCMP at the time of the Dunphy shooting. He was responsible for all Forensic Identification Units in the province and the supervision of the six members in those units. Sgt. Saunders had been acting in this supervisory role for approximately 5 years.

Testimony of Sgt. Chris Saunders on February 13, 2017, Vol. 22, pp. 22-27

190. Prior to April 5, 2015 Sgt. Saunders had attended at approximately 5 shooting scenes. Sgt. Saunders received a call at approximately 1442 hours on that date and was advised

of an officer-involved shooting. He prepared to attend the scene and at 1448 hours called Cpl. Kelly Lee of Clarendville and requested her attendance. Sgt. Saunders arrived at the scene at Mitchell's Brook at approximately 2040 hours.

Testimony of Sgt. Chris Saunders on February 13, 2017, Vol. 22, pp. 27-32

191. Over the next couple of days Sgt. Saunders took numerous photographs, many of which have been referred to during the Inquiry, seized exhibits which became part of the police investigation and prepared a scaled drawing of the scene. Sgt. Saunders also prepared a trajectory analysis. Both the forensic identification specialists noted a void in the floor where an object roughly the shape and size of a rifle could have been laying. When he photographed this area Sgt. Saunders had no knowledge of where Cst. Smyth had said the rifle had come from.

Testimony of Sgt. Chris Saunders on February 13, 2017, Vol. 22, p. 43

See also testimony of Cpl. Kelly Lee on February 21, 2017, Vol. 27, p. 67

192. Sgt. Saunders also used his flashlight to conduct a search of Cst. Smyth's vehicle which was parked in Mr. Dunphy's driveway but did not see anything unusual. Sgt. Saunders confirmed under cross-examination by Counsel for Cst. Smyth that he knew they had to be extra careful in examining the scene knowing that there was a police officer involved.

Testimony of Sgt. Chris Saunders on February 13, 2017, Vol. 22, p. 115 and p. 127

(ii) Corporal Kelly Lee

193. Cpl. Lee attended the scene with Sgt. Saunders and assisted in the taking of photographs, seizing of exhibits and taking of measurements. Cpl. Lee also testified that she recalled seeing a pen near the oval table but could not recall the details. She also confirmed that there was a live round of ammunition in the container with the black lid on the table in front of Mr. Dunphy.

Testimony of Cpl. Kelly Lee on February 21, 2017, Vol. 27, pp. 69-70, p. 81

194. Cpl. Lee testified that on April 10, 2015 she attempted unsuccessfully to obtain fingerprints from the rifle. Sgt. Saunders testified that it was very unlikely to obtain fingerprints from a .22 bullet. Cpl. Lee also testified that the bat was a very poor object for fingerprinting.

Testimony of Sgt. Saunders on February 13, 2017, Vol. 22, p. 92

Ident Continuation Report of Cpl. Kelly Lee, CIDDD Exhibit P-0543, p. 10

Testimony of Cpl. Kelly Lee on February 21, 2017, Vol. 27, pp. 71-74

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195. Both Sgt. Saunders and Cpl. Lee testified about the amount of garbage in the house and the smell of cat urine. Sgt. Saunders testified that he could smell cat urine walking up the driveway and for the 2 days at the residence they could smell cat urine, both inside and outside the residence. In fact, Cpl. Lee said the smell of cat urine was so strong that even though she wore a respirator on her second day at the residence it did not block out the smell. Sgt. Saunders described it as one of the worst houses he had seen and stated that the smell of cat urine was overpowering. Sgt. Saunders also confirmed that one of the

things the police look for in a crime scene is whether anything is out of place. However, this crime scene was so dirty that there was no way to tell what was relevant and what was not. The crime scene itself could be described as contaminated from the start.

Testimony of Sgt. Saunders on February 13, 2017, Vol. 22, p. 38, p. 116

Testimony of Cpl. Kelly Lee on February 21, 2017, Vol. 27, pp. 78 and p. 83

(9) Donald Dunphy's eyeglasses

196. As can be seen from the interview with Staff Sgt. Osmond on April 8, 2015 Meghan Dunphy did not have trust in the RCMP to conduct a fair and impartial investigation. On April 8, 2015 Erin Breen, Counsel for Meghan Dunphy, wrote her first letter to the RCMP complaining about certain aspects of the RCMP conduct. A little more than a week later, on April 16, 2016, Ms. Breen wrote the Minister of Justice and Chief Superintendent Andrew Boland of the RCMP and asked to have an out-of-province police force brought in to conduct the investigation.

Letter from Erin Breen to Cst. John Galway dated April 8, 2015, CIDDD Exhibit P-0041

Letter from Erin Breen to Minister Darin King and Chief Supt. Andrew Boland dated April 16, 2015, CIDDD Exhibit P-0043

197. In a letter dated April 25, 2015 to Minister King and Commanding Officer Tracy Hardy, Ms. Breen stated that the failure to collect the eyeglasses from the scene and conduct a proper examination was “a true demonstration of tunnel vision in the very foundation of this investigation”. This theme of tunnel vision was repeated in letters to Commissioner Bob Paulson of the RCMP dated June 18, 2015 and the Federal Minister of Justice, Peter McKay, dated June 19, 2015.

Letter from Erin Breen to the Federal Minister of Justice, Peter McKay, dated June 19, 2015, CIDDD Exhibit P-0056

Letter from Erin Breen to Commissioner Bob Paulson dated June 18, 2015, CIDDD Exhibit P-0054

198. This issue of the eyeglasses is an example of the pressure brought to bear by Ms. Dunphy on the police investigation. Ms. Dunphy's theory, apparently, was that the broken eyeglasses were indicative of a confrontation or struggle which the RCMP refused to investigate because they believed Cst. Smyth's version of events.
199. On April 5, 2015 Cst. John Galway was a member of the General Investigative Section (GIS) of the Holyrood RCMP. Cst. Galway had been a member of the RCMP since 2002. Cst. Galway attended at the Dunphy residence and was appointed the exhibit custodian. He described the house as being probably the worst house he had ever been in, with an overwhelming smell of cat urine and garbage everywhere.

Testimony of Cst. John Galway on February 1, 2017, Vol. 14, pp. 46-62

200. Cst. Galway was also appointed family liaison officer for Meghan Dunphy and he discussed his initial contact with Ms. Dunphy, especially the confusion around Ms. Dunphy not being able to see her father's body.

Testimony of Cst. John Galway on February 1, 2017, Vol. 14, pp. 64-68

201. Much of Cst. Galway's testimony at the Inquiry revolved around the issue of Mr. Dunphy's eyeglasses. Cst. Galway testified that looking back at it he should probably never have seized the glasses. He stated, "We knew it had no evidentiary value and we

have photographs to explain why”. Cst. Galway testified about meeting with Meghan Dunphy and seizing the glasses. Cst. Galway testified that there was a “huge change in the appearance and condition” between the glasses and photos he had seen that same day. He suggested that it looked like someone had sat on the glasses compared to the photographs of the glasses.

Testimony of Cst. John Galway on February 1, 2017, Vol. 14, pp. 88-91

202. Cst. Galway refused to agree with the suggestion from Counsel for Meghan Dunphy of the possibility of a fight or interaction that caused the nose piece to break off and the frames to get bent. Cst. Galway simply reiterated that the glasses had no evidentiary value. However, the RCMP conducted an investigation into the glasses because they were trying to do the right thing by not dismissing the glasses issue brought to their attention by Ms. Dunphy. Counsel for Ms. Dunphy suggested that the glasses could have had “significant evidentiary value” and should have been seized. Cst. Galway countered by saying that the forensic investigators did not seize them because they did not see them as having any evidentiary value.

Testimony of Cst. John Galway on February 1, 2017, Vol. 14, pp. 111-116

203. The following RCMP witnesses gave evidence about the eyeglasses:
- (1) Sgt. Chris Saunders testified that when examining the scene, he did not see the glasses as potentially relevant evidence in a shooting incident because, although bent, they were still in wearable condition. Also, they appeared to

have been laid on the table as one would normally lay down a pair of glasses and were on the table, not on the floor.

Testimony of Sgt. Chris Saunders on February 13, 2017, Vol. 22, pp. 61-62, pp. 106-107, pp. 133-134

- (2) Staff Sgt. Kent Osmond testified that the description offered by Mr. Dunphy of the eyeglasses “didn’t marry up with the scene photographs”. After a meeting with Ms. Dunphy where this was explained to her she asked to view the scene photographs. Arrangements were made on that same date for Ms. Dunphy to attend the RCMP office where she viewed the photos on the computer. However, despite their conclusion on the lack of evidentiary value of the glasses an investigation was conducted to ensure that the RCMP had not missed anything and because Mr. Dunphy, having lost her father, wanted an explanation to address her concerns;

Testimony of Staff Sgt. Kent Osmond on February 20, 2017, Vol. 26, pp. 105-107

- (3) Cpl. Steve Burke testified that they reached the conclusion that the glasses did not have any evidentiary value.

Testimony of Cpl. Steve Burke on February 8, 2017, Vol. 19, pp. 46-48 and pp. 98-99

204. In his report at p. 35 Gareth Jones confirms the lack of evidentiary value of the eyeglasses, “I agree with Cpl. Burke that the glasses have little apparent relevance as to whether or not the shooting was justified.” Mr. Jones testified that, based on what he saw of the scene and all the evidence he had before him, he saw no issue with Corporal Burke

not having those glasses seized at the time as there was no evidence that suggested a struggle.

Report - Commission of Inquiry Respecting the Death of Donald Dunphy dated February 7, 2017 prepared by Gareth Jones, CIDDD Exhibit P-0770 at p. 35

Testimony of Gareth Jones on March 7, 2017, Vol. 37, p. 27

(10) Forensic Experts used by the RCMP

(i) Darryl Barr – Expert in shooting scene reconstruction

205. Mr. Darryl Barr is a civilian employee with the Calgary Police Service employed as a manager of the Forensic Firearms and Tool Mark Laboratory, a position which he has held since 2011. Mr. Barr, who is properly described as a forensic scientist and a firearms and tool mark examiner, was qualified as an expert at the Inquiry to give opinion evidence concerning shooting scene reconstruction, including bullet path analysis.

Testimony of Darryl Barr on March 3, 2017, Vol. 35, p.3, p.7

Curriculum vitae of Darryl Barr, CIDDD Exhibit P-0757, p. 2

206. At the request of Cpl. Steve Burke, Mr. Barr prepared a report for the RCMP. Mr. Barr's report, dated February 8, 2016, reviewed the account of Cst. Smyth and compared it to the shooting-related evidence in order to determine if there was any physical evidence that existed to either support or refute Cst. Smyth's account. Mr. Barr's analysis was first done by collecting data which included the physical evidence collected by the RCMP at the scene, RCMP officers' notes, photographs and video from the forensic identification specialists who processed the scene, the forensic laboratory report and the autopsy report. Mr. Barr then compared findings of the physical evidence to the account of Cst. Smyth.

Testimony of Darryl Barr on March 3, 2017, Vol. 35, pp. 9 – 12

207. Mr. Barr testified that this initial review of the evidence allowed him to formulate a true independent view of the evidence prior to hearing or reading anybody else's version of the events. Only after this initial review was complete did Mr. Barr advise Corporal Burke that he was ready to test the evidence against the RCMP witness statements. Corp. Burke sent Cst. Smyth's account which included notes, a video statement, the video re-enactment, transcripts of the re-enactment and the Chief Medical Examiner Scene Report. The physical evidence was then compared to the account of Cst. Smyth.
208. Although Mr. Barr did not visit the scene of Mr. Dunphy's death, nor did he complete the on-site trajectory analysis, during his testimony he commended the quality of work completed by Sgt. Saunders in completing the bullet trajectory analysis. He stated that Sgt. Saunders was quite thorough and he would not have done anything differently if he had been completing the trajectory analysis himself.

Testimony of Darryl Barr on March 3, 2017, Vol. 35, p. 13

- 209 Mr. Barr's report found that there were no elements of the shooting-related evidence that refuted the account of Cst. Smyth. Mr. Barr testified that the account of Cst. Smyth as it pertains to the shooting death of Mr. Dunphy on April 5, 2015 was supported by 6 pieces of physical evidence. More specifically, the following physical evidence supported Cst. Smyth's statement of events:

1. The number of gunshots determined to have been fired – 4 fired cartridge cases and 4 fired bullets were recovered from the scene and the body of Mr. Dunphy;
2. The location and direction of projectile impact damage in the wall supported the approximate location of Cst. Smyth when the gunshots were fired;
3. The location and nature of projectile impact damage in the chair – the shallow penetration of the chair and visible damage to the bullet were consistent with a bullet having struck Mr. Dunphy first then impacting the chair;
4. The location and direction of gunshot wounds to Mr. Dunphy were consistent with gunshots having been fired in a southwest direction, if Mr. Dunphy was seated in the chair at the time the gunshots were fired, as stated by Cst. Smyth;
5. The distance from which the gunshots were fired at Mr. Dunphy – the location of the muzzle of the pistol and Mr. Dunphy was greater than 76 centimeters at the time of discharge due to the fact that there was no gun residue pattern or powder tattooing detected on Mr. Dunphy's clothing. This is consistent with Cst. Smyth's account of his location when the shots were fired;
6. The location of fired cartridge cases at the scene – although the location of a shooter cannot be determined by location of casings alone, the location of the casings in the north side of the living room was consistent with Cst. Smyth's account of his location and direction of aim while shooting.

Testimony of Darryl Barr on March 3, 2017, Vol. 35, pp. 10-11, pp. 13-27, pp. 39-40

Review of Shooting Evidence - Report no. 1 - amended dated February 8, 2016
prepared by Darryl Barr, CIDDD Exhibit P-0759, p. 3, pp.12-13

210. Both in his testimony and in his report at p. 13, Mr. Barr was clear that “No elements of the shooting related evidence were identified that refute the account of SMYTH”. On cross-examination by Counsel for Cst. Smyth, Mr. Barr confirmed his conclusion:

Mr. Kennedy: Okay. So let's look at the scenario that's put to you. There are six elements of physical evidence which support what Constable Smyth says.

Mr. Barr: Correct.

Mr. Kennedy: There is nothing in the physical evidence that refutes what Constable Smyth says.

Mr. Barr: Correct.

Mr. Kennedy: So when you get then to your statement at 6.3, there's often more than one scenario, is that sort of put there just to show that you can't establish to certainty or absolute certainty what occurred?

Mr. Barr: That's exactly why that's there.

Mr. Kennedy: But in this particular case, everything that you see supports what Smyth said and nothing refutes it.

Mr. Barr: Correct. (emphasis added)

Testimony of Darryl Barr on March 3, 2017, Vol. 35, p. 42, p. 48

211. Mr. Barr testified that in this case he utilized the scientific method by working to try to disprove Cst. Smyth's account. On this point he testified:

...when I'm doing my comparison, my analysis, I'm actually trying to disprove Constable Smyth's statement, that's really my goal, I'm going to see if there is something I can disprove because that's the easiest thing to do.

Review of Shooting Evidence - Report no. 1 - amended dated February 8, 2016
prepared by Darryl Barr, CIDDD Exhibit P-0759, p. 3

Testimony of Darryl Barr on March 3, 2017, Vol. 35, p. 42, p. 48

(ii) Corporal Wayne Knapman – Subject Matter Expert in Use of Force

212. Cpl. Wayne Knapman has been a member of the RCMP for 27 years and since the early 2000's has been designated as a Subject Matter Expert (SME) on the use of force for the RCMP. Cpl. Knapman was qualified at the Inquiry as an expert to give opinion evidence concerning use of force, specifically what is appropriate use of force and what is inappropriate use of force.

Testimony of Corporal Wayne Knapman on March 2, 2017, Vol. 34, p. 68, p. 79

213. By letter dated August 5, 2015, Cpl. Knapman was retained by Cpl. Burke to investigate and provide a report on whether Cst. Smyth's actions were lawful and reasonable. With respect to his scope of review, Cpl. Knapman provided an opinion on whether Cst. Smyth's actions were reasonable and necessary with respect to the circumstances surrounding the shooting of Mr. Dunphy.

Letter dated August 5, 2015 from Steve Burke to Wayne Knapman regarding Dunphy Sudden Death, RCMP Pros File #2015-376186, CIDD Exhibit P-0747

Testimony of Corporal Wayne Knapman on March 2, 2017, Vol. 34, p. 81

214. In his report, and subsequent testimony, Cpl. Knapman reviewed the 7 tactical principles in the RNC's Use of Force training materials related to Cst. Smyth's training. The National Use of Force model and the 7 tactical principals capture the basis of how officers are trained to assess and respond to risk. When an officer undertakes a risk

assessment in a situation they are trained to assess the following 3 elements: situational factors, subject behaviors, and perception and tactical considerations.

Testimony of Corporal Wayne Knapman on March 2, 2017, Vol. 34, p. 91

Use of Force Review dated October 12, 2015 completed by Wayne Knapman, CIDD Exhibit P-0744, p. 13

215. With respect to the situational factors Cst. Smyth encountered, Cpl. Knapman opined that Cst. Smyth conducted the proper background checks, which included checks on CPIC, PROS and CFRO, and there were no indicators that Cst. Smyth would come across the situation that emerged in Mitchell's Brook on April 5, 2015. When Cpl. Knapman reviewed Cst. Smyth's perception and tactical considerations, he concluded that Cst. Smyth's perception played a key role in his use of force against Mr. Dunphy. Further, when Mr. Dunphy pointed the rifle, Cst. Smyth's subsequent actions were consistent with using lethal force in an effort to protect his own life.

Use of Force Review dated October 12, 2015 completed by Wayne Knapman, CIDD Exhibit P-0744, pp. 14-15

216. Cpl. Knapman concluded with his report with the following comments:

After a thorough review of the incident the writer is of the opinion that Cst. Smyth's decision to use lethal force was reasonable and necessary given the totality of the situation. Donald Dunphy threatened Cst. Smyth with a rifle, he possessed the requisite weapon, intent and means to cause death or grievous bodily harm to this officer. These actions were consistent what would be expected from a police officer of similar background and training. Cst. Smyth's decision to use lethal force was necessary to defend his life against the imminent threat posed by Donald Dunphy.

Use of Force Review dated October 12, 2015 completed by Wayne Knapman, CIDD Exhibit P-0744, p. 21

217. Although Cpl. Knapman testified that Cst. Smyth did make some tactical errors with regards to his own safety, such as holding a pen and paper in his hands, and not being in a “fighting stance”, none of the errors identified by Cpl. Knapman resulted in a change of the outcome. Cst. Smyth’s response to the firearm presented by Mr. Dunphy and the reasonableness of his response was not changed by any errors. In his report, Cpl. Knapman explained that as a result of Mr. Dunphy pointing a rifle at Cst. Smyth on April 5, 2015, Cst. Smyth was left with only 1 option, and that was resorting to lethal force.

Testimony of Corporal Wayne Knapman on March 2, 2017, Vol. 34, p. 94, p. 114-115

Use of Force Review dated October 12, 2015 completed by Wayne Knapman, CIDD Exhibit P-0744, p. 19

218. Cpl. Knapman’s opinion during his testimony was conclusive that another police officer with the same training as Cst. Smyth, placed in the same situation, would have acted the same way. These actions were reasonable under s. 25 of the *Criminal Code*. In his report at p. 16, Cpl. Knapman confirmed that Cst. Smyth’s actions were justifiable and he writes:

Cst. Smyth at this point was reasonably in fear for his life. Donald Dunphy possessed the weapon, intent and delivery to kill or grievously harm the officer. Cst. Smyth had no choice at that time but to defend himself. The use of lethal force was defensive in nature, necessary, reasonable and warranted given the situation. Any police officer placed in the same position inside the residence would respond in a similar fashion - anything less might result in their death.

Testimony of Corporal Wayne Knapman on March 2, 2017, Vol. 34, p. 94, p. 119

Use of Force Review dated October 12, 2015 completed by Wayne Knapman, CIDD Exhibit P-0744, p. 16

(11) Sergeant Michael Massine

219. Sgt. Massine has been employed in law enforcement since 1987 and has developed a particular focus on officer safety training. Since 2014 Sgt. Massine has been with the Justice Institute of British Columbia employed as the Police Academy use-of-force coordinator. Sgt. Massine was qualified to give expert opinion evidence in Use of Force, including crisis intervention and de-escalation training and curriculum development design and delivery as it relates to officer safety.

Testimony of Sergeant Massine on March 8, 2017, Vol. 38, p. 27, p. 31

Curriculum vitae of Mike Massine, CIDDD Exhibit P-0771

220. At the request of the Commission, Sgt. Massine co-authored a report with Dr. Terry Coleman. Sgt. Massine was asked to perform three tasks: (1) to review and provide an opinion on the RNC use-of-force and firearms training program (since it is expected that this issue will be addressed by other Counsel Cst. Smyth will not address the same); (2) to review and provide an opinion on Constable Smyth's actions on the day of the shooting; and, (3) to conduct an assessment and provide an opinion on the Use of Force Review conducted by Cpl. Knapman.

Testimony of Sergeant Massine on March 8, 2017, Vol. 38, p.43

Report with Redactions - Commission of Inquiry into the Death of Donald Dunphy dated February 26, 2017 prepared by Mike Massine and Terry Coleman, CIDDD Exhibit P-0773

221. Sgt. Massine's second task was to provide an opinion of Constable Smyth's actions leading up to the use of lethal force. In terms of his opinion, Sgt. Massine broke it down to two events, one being the verbal interaction between Cst. Smyth and Mr. Dunphy, with the second being Cst. Smyth's application of lethal force. With respect to event one, Sgt. Massine testified that he agreed with Cst. Smyth's actions:

Ms. Chaytor: Okay. All right. And so what conclusions did you reach with respect to your analysis with respect to event one, the verbal interaction between the two?

Sgt Massine: Based on the subject behaviour that was reportedly displayed by Mr. Dunphy and the response by Constable Smyth, I fully support Constable's Smyth's actions as far as how that verbal exchange went.

Testimony of Sergeant Massine on March 8, 2017, Vol. 38, p. 58

222. In relation to the second event, Sgt. Massine testified that he supported Cst. Smyth's application of lethal force:

Sgt Massine: Based on the evidence that I've seen in the documentation I was provided and the evidence after watching Constable Smyth on the stand, my opinion is that he responded appropriately with lethal force when the presence of the firearm became known and more importantly was pointed at him, and some of the verbiage Constable Smyth used in describing thought processes that he had when he initially saw the rifle where he was bracing for impact of a round, that to me is a very powerful statement

The Commissioner: I'm sorry, what was the statement?

Sgt Massine: He was bracing for the impact of the round from Mr. Dunphy's rifle, so he was aware in that situation once he did see the riffle levelled towards him that the consequence of a round fired from the riffle if one was discharged would be a painful thing that he would have to work through and that does speak to their training with the win mentality and then the fact that as he was shooting, he described in detail that even with the last shot that the rifle was still pointed at him, so that goes back to what I spoke of earlier with assessing between each round, so it says to me that there was an automatic response to a grievous bodily harm threat

being the presence of the rifle, but he also had that cognitive ability as he was leaving the room and using lethal force against Mr. Dunphy to have the presence of mind to recognize that the rifle was still pointed at him.

Testimony of Sergeant Massine on March 8, 2017, Vol. 38, p. 58

223. In his report, Sgt. Massine was critical of Cst. Smyth's decision to attend the home of Mr. Dunphy alone. At p. 38 of his report, Sgt. Massine opined that Cst. Smyth was not keeping with the best police practices regarding public and police safety when he attended Mr. Dunphy's house alone to investigate a criminal charge of uttering threats. Sgt. Massine confirmed that this criticism was based on his experiences.

Report with Redactions - Commission of Inquiry into the Death of Donald Dunphy dated February 26, 2017 prepared by Mike Massine and Terry Coleman, CIDDD Exhibit P-0773, p. 38

Testimony of Sergeant Massine on March 8, 2017, Vol. 38, p.126

224. It is important to note that although Sgt. Massine's opinion referenced a "Criminal Code investigation of Uttering Threats" there was no evidence given during the Inquiry by any witness that Cst. Smyth was engaging in a criminal investigation of uttering threats. In fact, Cst. Smyth testified that if he was conducting a criminal investigation he would have taken a second officer with him. Cst. Eddie Benoit testified that he accompanied Cst. Smyth on a house visit where he was conducting a criminal investigation based on comments directed towards a Minister.
225. In providing his opinion on Cst. Smyth's response to Mr. Dunphy's behavior in relation to RNC Use of Force Training, Sgt. Massine concluded in his report:

Once faced with behavior capable of causing “Grievous Bodily Harm or Death” to him, Cst. Smyth responded appropriately by responding with “Lethal Force.”

Report with Redactions - Commission of Inquiry into the Death of Donald Dunphy dated February 26, 2017 prepared by Mike Massine and Terry Coleman, CIDDD Exhibit P-0773, p. 42

226. When asked by counsel for Cst. Smyth about Cpl. Knapman’s report on use of force, Sgt. Massine testified that he took no issue “...with the facts of the case and the opinion on Constable Smyth’s on the subject behaviour and then the officer response...”

Testimony of Sergeant Massine on March 8, 2017, Vol. 38, p. 130

(12) Dr. Simon Avis – Chief Medical Examiner

227. Dr. Avis is the Chief Medical Examiner for the Province of NL and was qualified to give expert opinion evidence in the area of forensic pathology. Dr. Avis conducted the autopsy on Donald Dunphy and prepared the Autopsy Report which has been filed at the Inquiry.

Autopsy Report dated June 3, 2015, CIDDD Exhibit P-0738

Testimony of Dr. Avis on February 27, 2017, Vol. 31, pp. 51-121

228. The following are the highlights of Dr. Avis’ testimony:

- (1) the detection of cannabis in Mr. Dunphy’s blood suggested the recent consumption of cannabis and he probably used marijuana within the preceding few hours (pp. 63-64);
- (2) there was no evidence of any abrasions, lacerations, scratches or abrasions to the facial area which indicated that a struggle had occurred (p. 73, p. 111);

(3) all three gunshot wounds were distant wounds, greater than 30 cm, and Mr.

Dunphy sitting in the chair was consistent with the evidence (pp. 77-80, p. 111);

(4) the fact that a person is shot does not mean that the person is immediately incapacitated. After the first head shot and even the second shot to the torso Mr. Dunphy was still capable of movement to be a potential threat (pp. 83-87);

(5) Mr. Dunphy had a tumor in his kidney (p. 89);

(6) Dr. Avis did not see a problem with, or anything of significance in, the trickle of blood in the left temple area (pp. 104-105, p. 114);

(7) while the position of Mr. Dunphy's hands as depicted in the photos were not necessarily the position of his hands prior to being shot it didn't necessarily mean it wasn't either (p. 95);

(8) Dr. Avis found nothing in the evidence which was inconsistent with Cst. Smyth's version of events (p. 116).

229. On the position in which the rifle was found Dr. Avis stated:

(1) *Ms. Chaytor: Okay.*

And in this second batch, I'll call it the second batch of documents that you received, because included in that was the first document which we know you received at 11:29 a.m. April 6 – or 11:53 a.m. April 6 was Constable Cox's first supplementary report or a Supplementary Occurrence Report, I should say. There's also an additional report included here which had some additional detail in terms of the resting position of the gun or the rifle, I should say.

Are you able to give any opinion as to the resting position of the rifle after the event? And if you wish, I can remind you the position being the barrel resting on the floor pointed away from Mr. Dunphy and resting on the side of a blue Rubbermaid-type tub. And is that something that you're able to give an opinion on?

Dr. Avis: *I think people have assumptions about where a firearm should end up after a specific incident. In my experience, I have investigated hundreds of deaths in which an individual died with a firearm in their hand, and we know that because they committed suicide.*

Ms. Chaytor: *If you could just lean in a bit, please Doctor.*

Dr. Avis: *Sorry.*

Because they committed suicide by firearm and the – it stands to reason that they were holding the firearm at the time of discharge. Firearms do not always end up where you expect them to. We know that in most cases they end up usually within three feet of the body, but not always. They can be at some distance.

I had a case two months ago, an individual using a handgun. The handgun is of some considerable distance from the body, yet we know that he shot himself where the photograph of the body is. So how the handgun got there, is it reflex throwing, is it just falling on the floor, I really can't say.

I am not overly concerned about the position of the rifle at the scene. I know there had been some concern that this indicates that there has been – attempt to recreating a scene or that someone's moved it. It's somewhat confusing because the suggestion has been the Constable Smyth did it and then according to the paramedics, the RCMP did it. So I'm not sure who actually is supposed to have of fudged the scene.

Testimony of Dr. Avis on February 27, 2017, Vol. 31, p. 94

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- (2) **The Commissioner:** *But, you – what you're saying is that he could've been holding it in a position indicated by the hands?*

Dr. Avis: *Yes, sir.*

The Commissioner: *That when he was shot, the gun went to the floor, bounced and turned over. That that's one-*

Dr. Avis: *It simply fell out – fell out of his hands, the muzzle impacted the ground, and the gun flipped over. And that would end up in this position that we see it there.*

The Commissioner: *All right.*

Ms. Chaytor: *Okay. Okay, and in terms of the position then, of his hands as you see in the photograph, Doctor, I understand you to say that doesn't necessarily mean the position of his hands at the time he was shot.*

Dr. Avis: *No, it doesn't necessarily mean, but you can take the converse, that it doesn't necessarily mean it isn't.*

Ms. Chaytor: *Right. Okay. Okay, and similar to what you said about the body still being able to move, would that come into play in your answer in that question?*

Dr. Avis: *I don't find as much mystery about the position of the gun as everyone else does.*

Testimony of Dr. Avis on February 27, 2017, Vol. 31, p. 98

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- (3) **Mr. Kennedy:** *Now Sir in terms of where the rifle fell you don't, and you were talking about this, and you said that my note indicates said that you've been dealing with hundreds of deaths with firearms – people with firearms in their hands. And firearms do not always end up where we expect them to lie.*

Dr. Avis: *Yes, sir.*

Mr. Kennedy: *And, you see nothing inconsistent with the firearm, or alarming, or disconcerting with the firearm – where it's located, in this case?*

Dr. Avis: *No, sir.*

Mr. Kennedy: The trickle of blood that was referred to you – you were shown the picture at the – during your interview with Commission counsel; you didn't – you said you didn't find anything of any significance in that either.

Dr. Avis: I can't see anything of any significance.

Mr. Kennedy: Doesn't cause you any concern?

Dr. Avis: No, sir.

Testimony of Dr. Avis on February 27, 2017, Vol. 31, p. 114

(13) Independent Observer – Retired Justice David Riche

230. C/Supt. Andrew Boland testified that even though he did not reconsider his decision for the RCMP to conduct the investigations he was aware of public concerns about the police investigating the police. When thinking about how to assure the public that the investigation would be conducted impartially he came up with the idea to use an independent observer, a role which C/Supt. Boland knew had been utilized out west in the past by the RCMP.

Testimony of C/Supt. Boland on February 15, 2017, Vol. 23, p. 14

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231. After discussions with Chief Judge Mark Pike of the Provincial Court he approached Retired Supreme Court Judge David Riche about taking on the role of the independent observer. Retired Justice Riche attended at the first re-enactment at Mitchell's Brook on April 8, 2015. However, the contract and Terms of Reference were not signed by Justice Riche until April 10, 2015.

Contract and Terms of Reference for Independent Observer dated April 10, 2015, CIDDD Exhibit P-0577

Testimony of Supt. Pat Cahill on February 21, 2017, Vol. 27, p. 35

232. It was clear from the Terms of Reference that the role of the Independent Observer was to “ensure impartiality, fairness and transparency in the investigative process”. The Independent Observer was to “observe” the investigation and could monitor witness interviews with the consent of the lead investigator.

233. Terms (e) and (f) of the Terms of Reference stated:

e. Will respect the confidentiality of the investigation, briefings and the identity of witnesses and suspects.

f. Will not disseminate any information or documentation provided during the investigation.

234. Both Staff Sgt. Osmond and Cpl. Burke testified that it was apparent from the beginning of Justice Riche’s involvement that he saw himself as an investigator and not as an observer. In fact, Justice Riche testified at the Inquiry that he still doesn’t know to this day what an independent observer is meant to do. Staff Sgt. Osmond and Cpl. Burke also testified that they felt that they could not do anything to constrain Justice Riche because of the concern that they would be perceived as interfering with the “independence” of the Independent Observer.

Testimony of Staff Sgt. Kent Osmond on February 20, 2017, Vol. 26, p. 85

Testimony of Cpl. Steve Burke on February 7, 2017, Vol. 18, p. 58

Testimony of Retired Justice Riche on March 1, 2017, Vol. 33, p. 36

235. However, the RCMP tried to work with Justice Riche. For example, in June 2015 Justice Riche wanted to know if there were any fingerprints found on the rifle and Cpl. Burke contacted Cpl. Kelly Lee to obtain an answer to Justice Riche’s question. Also, a meeting

was set up for Justice Riche with Dr. Avis. It was clear from Dr. Avis' testimony that Justice Riche totally misinterpreted what was said to him, such as which shot was the first shot. However, it was during a meeting with Meghan Dunphy on June 12, 2015 that it became clear to the RCMP that Justice Riche was overstepping his mandate by interviewing Meghan Dunphy.

Task 54, CIDDD Exhibit P-0360, pp. 217-219

Testimony of Dr. Simon Avis on February 27, 2017, Vol. 31, p. 103

236. Justice Riche's "investigation" continued in July 2015 with his concern that Cst. Smyth had referred to a couch as opposed to a chair. In Task 54 on July 27, 2015 Cpl. Burke noted that "both Justice Riche and Cpl. Burke agree that a firearm was presented by Dunphy regardless of its origin".

Task 54, CIDDD Exhibit P-0360, at p. 220

237. In a note dated August 6, 2015 Cpl. Burke states the following:

Cpl BURKE spoke with Justice RICHE and advised him of what DUNPHY said in her statement. Justice RICHE responded what this was nothing new to him and was aware of the contents of her statement. Justice RICHE then said that he has a theory of what happened in the residence when DUNPHY was shot. He feels there was a confrontation between Donald DUNPHY and Joe SMYTH (clarified as verbal) and DUNPHY proceeded to go behind the couch and retrieve his gun and tell SMYTH to get out of his house and that was when SMYTH shot him. Cpl BURKE does not feel this theory described by Justice RICHE is logical or in line with the known evidence of this case....

Task 54, CIDDD Exhibit P-0360, at pp. 226-227

238. By this time the RCMP were very concerned that Justice Riche was not acting within his mandate. A meeting was held with Justice Riche at RCMP Headquarters on August 7, 2015 and Justice Riche was advised that he was to act as an independent observer and not as an investigator. Insp. Pat Cahill reviewed Justice Riche's terms of reference with him and ensured that he understood the same.

Testimony of Insp. Pat Cahill on February 21, 2017, Vol. 27, pp. 39-40

Handwritten notes of Insp. Pat Cahill, CIDDD Exhibit P-0629, p. 5

239. Retired Justice Riche filed his report with the RCMP on January 12, 2016. In this Report, which is replete with speculation, Justice Riche advanced his "two angry men" theory. In his covering letter accompanying the Report Justice Riche confirmed that he had been informed by the RCMP that he was not to investigate ("In fact, one of your members told me that I should not be investigating but just observing"). Despite all of his unfounded criticisms of Cst. Smyth he was "satisfied that in all probability Smyth was faced with Dunphy producing the 22 rifle and there would be no way of him knowing whether or not the action was closed or open and whether it could be fired".

Cover letter dated January 12, 2016, CIDDD Exhibit P-0580, at p. 2

Report of Justice David Riche dated January 11, 2016, CIDDD Exhibit P-0005

240. The RCMP felt strongly that Retired Justice Riche had not complied with his mandate as outlined by Inspector Cahill in a memo to Supt. Sachsse:

In the opening paragraphs of his report Justice Riche compliments the RCMP on the thorough investigation. "I wish to compliment the RCMP for their thorough investigation in this manner". This would appear to be

one of the few times he commented on an area that was he was mandated to observe.

Throughout the entire report Justice Riche analyses, interprets and makes conclusions on evidence and information provided to him. In most instances his conclusions are not evidence based and are merely reflections of his feelings and thoughts.

The mandate was clearly stated in a letter he received from the Criminal Operations Officer dated April 9, 2015. "As outlined in the terms of reference, we are asking that you complete a written report regarding your observations of the independence and thoroughness of the investigation".

In addition, throughout several meetings with Justice Riche during the course of the investigation the OIC of Major Crimes in the presence of other members repeated the mandate and informed Justice Riche that his mandate was to comment on the transparency, independence and thoroughness of the investigation. At no time throughout the investigation or subsequent meetings with Justice Riche did he mention any confusion or lack of understanding the requested mandate.

Memorandum from Insp. Cahill dated January 22, 2016, CIDDD Exhibit P-0437

241. Attached to Insp. Cahill's memo was a review of Justice Riche's report prepared by Cpl. Steve Burke. In this review Cpl. Burke pointed out numerous statements made by Justice Riche which were not supported by the evidence.

Attachment to Insp. Cahill's memo of January 22, 2016, CIDDD Exhibit P-0437, at pp. 3-6

242. In a note dated September 16, 2016 Cpl. Burke summarized his conversation with Justice Riche on that date:

Cpl. BURKE said that Supt. CAHILL was trying to reach him to update him that the RCMP were releasing their findings in the media. The following is a summary of the comments by Justice RICHE:

- The RCMP did not release his report because they were not happy with it and he said the investigators did not cross-examine the witnesses;

- The RCMP did not want him to investigate or act as "Columbo";

- He said that he would not change one thing in his report.

Task 54, CIDDD Exhibit P-0360, at p. 230

243. One of the most bothersome aspects of Retired Justice Riche's involvement in this matter is the comments he made publicly to numerous media outlets on September 16, 2015, three days after the RCMP announced that no charges would be laid. Retired Justice Riche cast doubt on the RCMP investigation and made comments which were prejudicial to Cst. Smyth. In these interviews Retired Justice Riche made comments like "Dead men tell no tales", described Cst. Smyth as an angry man, outlined his theory that there was a confrontation and that the police did not want him to investigate. By this point none of the reports, including the RCMP Report and the ASIRT Report, had been released to the media.

See CBC interview of September 16, 2015, CIDDD Exhibit P-0754; NTV interview, CIDDD Exhibit P-0755; Global TV interview, CIDDD Exhibit P-0753; VOCM interview, CIDDD Exhibit P-0756 and Telegram interview of September 17, 2016, CIDDD Exhibit P-0749

244. Besides the problem of breaching his confidentiality agreement with the RCMP (which he denied in the interview with VOCM at 0420 on the tape) Retired Justice Riche attached the credibility of his former office as a judge to question the police investigation and to besmirch Cst. Smyth. The comments of Justice Riche had a significant detrimental effect on Cst. Smyth and caused further psychological distress, as testified to by Cst. Smyth at the Inquiry. Also, because Justice Riche was a retired Supreme Court Judge, the public and the media gave credibility to his public statements. As Cst. Smyth described it,

Justice Riche “had a perceived level of credibility in the community” because of his background as a former judge and also because he was “actually privy to the facts of the incident”.

Testimony of Cst. Joe Smyth on January 25, 2017, Vol. 9, pp. 88-89

See article by Brian Jones in Telegram dated September 30, 2016 “Shut up, shut up, shut up”

245. Even after the release of the various reports by the Commission there was significant emphasis place on Justice Riche’s Report. For example, Peter Cowan of CBC tweeted on November 28, 2016 at 11:01 a.m.:

Out of the 4 reports looking at Donald Dunphy’s death and investigation the one by retired justice David Riche is the most critical #cbcnl

246. Cst. Smyth will not comment on Justice Riche’s Report any further other than to say that absolutely no weight should be given to this report. As Cst. Smyth stated in his testimony it “seemed more of a narrative from a Sherlock Holmes movie than it was what you’d expect from somebody of his stature and background”. The same applies to Justice Riche’s testimony at the Inquiry wherein he changed his theory to say that Mr. Dunphy did not point a gun at Cst. Smyth after all. Retired Justice Riche appeared to still be acting as if he was a judge and, in fact, the heading of his Report is entitled “Decision of Riche, Hon David, Independent Observer”. Cst. Smyth suggests that no weight should be given to Retired Justice Riche’s evidence at the Inquiry either.

Testimony of Retired Justice David Riche on March 1, 2017, Vol. 33, pp. 23-76

247. Cst. Smyth, however, urges the Commissioner to correct any perception which still may exist in the public that Justice Riche's report has any validity. It is a report based on speculation and innuendo. Also, the Commissioner should make clear to the public that it was totally inappropriate for Justice Riche to make any public comments, not only because of the confidentiality clause, but due to the damage that his intemperate and unfounded comments had on public perception. Justice Riche's comments inflamed an already sensitive situation and gave further ammunition to the conspiracy theorists. Finally, Cst. Smyth requests that the Commissioner censure Justice Riche for his public comments by specifically stating that it was inappropriate for Justice Riche to make public comment on the RCMP investigation in the manner that he did.

(14) ASIRT Review

248. Ms. Susan Hughson, Executive Director of the Alberta Serious Incident Response Team or ASIRT, was qualified to give expert opinion evidence in the area of the investigation of serious incidents involving police officers. Ms. Hughson testified that ASIRT was created in 2007 as a response to a need for an independent investigative body to investigate specific types of incidents or events in relation to law enforcement in Alberta. Ms. Hughson explained that ASIRT was a civilian led investigative unit that investigates incidents that involve allegations of a serious nature concerns policing conduct such as sexual assault, corruption or serious injury or death to a person caused by police conduct.

Testimony of Susan Hughson on March 6, 2017, Vol. 36, pp. 101-102, p. 109

249. By a letter of request dated January 29, 2016 from Justice Minister Andrew Parsons to the Minister of Justice and Solicitor General of Alberta, Kathleen Ganley, ASIRT was asked to review the RCMP's investigation into the shooting death of Mr. Dunphy for "...thoroughness, competency and overall accuracy".

Letter dated January 29, 2016 from Susan Hughson to Kathleen Ganley regarding ASIRT, CIDDD Exhibit P-0782

Testimony of Susan Hughson on March 6, 2017, Vol. 36, p. 112

250. Ms. Hughson prepared a report for the RCMP dated August 30, 2016, which detailed ASIRT's review of the RCMP's findings. Ms. Hughson's report reviewed the investigation and made recommendations for improvement for future RCMP investigations. With regards to the investigation Ms. Hughson's report concluded:

A careful review of the completed investigation confirms that it was thorough, complete and conducted in a manner consistent with current investigative standard ... ASIRT carefully scrutinized the investigation for evidence of investigational bias, tunnel vision, and/or a lack of objectivity. There was no evidence to support a conclusion or even a suspicion that any of these identified risks manifested themselves in this investigation. Based upon our review, no obvious personal or professional bias was demonstrated

ASIRT Report dated August 30, 2016, CIDDD Exhibit P-0004 at pp. 3-4

251. Ms. Hughson's report provided recommendations on behalf of ASIRT that included not disclosing evidence or information to a subject officer while the investigation is ongoing unless for an investigative purpose, and photographing a subject officer, his or her sidearm and ammunition immediately after the critical incident.

ASIRT Report dated August 30, 2016, CIDDD Exhibit P-0004 at p. 5, p.6-7

252. Ms. Hughson testified that although ASIRT had some comments and recommendations about the investigation but there was nothing in terms of the evidence that impacted her assessment on whether or not Cst. Smyth was in the lawful execution of his duties. Ms. Hughson testified:

Ms. O'Brien: ...ASIRT does make some observations and recommendations in its report which is in the next section. But before we go to that, I think it's important for you to explain – I'm just highlighting here on page 4, the sentence that begins: "While ASIRT has some observations and recommendations regarding aspects of the investigation, it is our opinion that none of the issues identified rise to a level of seriousness that would bring into question the integrity or validity of the investigation or would impact any conclusions ... based on the evidence." Can you just, you know, explain that to the Commissioner before we get into the actual recommendations?

Ms. Hughson: So we may see flaws in an investigation that could change the course of an investigation. That is such a significant piece of the puzzle that it might significantly impact any informed observer's assessment of whether the officer was lawfully – of the evidence in relation to whether the officer placed in the lawful execution of his duties. Some of the identified flaws in this particular investigation, ultimately, in the context of the whole of the evidence, did not impact my assessment that an informed reasonable person would be able to make a reasonable decision on the evidence as to whether the officer was lawfully placed and whether the officer was in lawful execution of his duties. So in my particular – in this particular case, in my opinion, in terms of the evidence, it did not ultimately taint significantly the quality or the content of the evidence in such a way that it might impact that assessment.

253. On cross-examination by counsel for the RCMP at the Inquiry, Ms. Hughson confirmed her findings with respect to bias and impartiality as it related to the RCMP investigation.

Ms. Rasmussen: And again you had no concern in this of tunnel vision or any actual bias.

Ms. Hughson: To me, in my opinion looking at the evidence of the investigation as a whole, there was no evidence of tunnel vision; investigational bias; or a lack of objectivity in this investigation.

Testimony of Susan Hughson on March 6, 2017, Vol. 36, p. 116, p. 137

(15) Report of Gareth Jones

254. Mr. Gareth Jones was hired by the Commission to review the RCMP investigation and was qualified at the Inquiry to give expert opinion evidence in the area of investigation of serious incidents involving police officers. Mr. Jones is a former investigator with the Attorney General's Special Investigations Unit (SIU) in Ontario and has been the Director with the Special Ombudsman Response Team (SORT) at the office of the Ombudsmen of Ontario since 2005. As the Director he is responsible for running major investigation teams that investigate all major systemic issues, with some investigations involving policing issues.

Testimony of Gareth Jones on March 7, 2017, Vol. 37, p. 4, p. 11

255. In his role as an expert Mr. Jones had prepared a report at the request of Commission Counsel to provide an opinion regarding any material deficiencies in the investigation by the RCMP into the death of Mr. Dunphy. The Report assessed the quality of the RCMP investigation with reference to 8 questions.

Testimony of Gareth Jones on March 7, 2017, Vol. 37, p. 4, p. 13

Report - Commission of Inquiry Respecting the Death of Donald Dunphy dated February 7, 2017 prepared by Gareth Jones, CIDDD Exhibit P-0770 at p. 1, pp.6-7

256. The following are the highlights of Mr. Jones testimony:

- (1) Mr. Jones testified that he found no evidence of actual conflict of interest on behalf of any of the investigative team. There may have been some perceived conflict of interest issues that should have been addressed;

Testimony of Gareth Jones on March 7, 2017, Vol. 37, p. 13

- (2) Mr. Jones concluded that Cpl. Burke, Cpl. Henstridge and Staff Sgt. Osmond were suitably trained and experienced to conduct an investigation of this kind as they all had homicide experience;

Testimony of Gareth Jones on March 7, 2017, Vol. 37, p. 19

- (3) In his report he detailed some of the issues he felt were not appropriately pursued, including that the focus of the investigation was not on Cst. Smyth, but rather on Mr. Dunphy, that more efforts should have been made to re-trace Smyth's steps on the day of the shooting, and whether the trickle of blood on Mr. Dunphy's forehead should have been further investigated with a forensic pathologist. (As previously outlined, Dr. Avis testified that the trickle of blood caused him no concern);

Testimony of Gareth Jones on March 7, 2017, Vol. 37, pp. 19-22

- (4) With the exception of posting someone at the back of the property to secure it, Mr. Jones testified that from both an investigative perspective and from a forensic perspective there appeared to have been sufficient resources applied to the investigation;

Testimony of Gareth Jones on March 7, 2017, Vol. 37, p. 21

- (5) Mr. Jones also felt that investigators should have requested Cst. Smyth to provide a blood sample. Mr. Jones further reported that he would have thought the position of the gun, or lack of clarity to its position could have been resolved should more questions have been asked. (Cst. Smyth refers to the testimony of Dr. Avis on the position of the gun). Other pieces of evidence Mr. Jones discussed was the folder drop test that he felt was irrelevant, the delay in seizing Cst. Smyth's cell phone, using a timeline as an investigative aid and failure to search Cst. Smyth's vehicle. (While an extensive search was not conducted Sgt. Saunders testified that he did a search of Cst. Smyth's vehicle using a flashlight);

Testimony of Gareth Jones on March 7, 2017, Vol. 37, pp. 21-26

- (6) Mr. Jones testified that the officers involved did a good job of obtaining and reviewing documentation that might be relevant to the issue they were investigating. He saw no serious deficiencies in the quality of the investigation in this area;

Testimony of Gareth Jones on March 7, 2017, Vol. 37, p. 27

- (7) Although he determined that the investigators properly identified which witnesses to interview, Mr. Jones stated that there were deficiencies with some of the interviews;

Testimony of Gareth Jones on March 7, 2017, Vol. 37, p. 28

- (8) Mr. Jones testified that although there were some criticisms, he had no major criticism of the assessment of the evidence. He testified "I think by and large it was based on the available evidence, I have no major criticisms of the ultimate

conclusion, there are a couple of minor things that I pointed out that maybe potentially weren't dealt with ... the trickle of the blood; the position of the gun; but I didn't have any major criticism of his assessment of the evidence."

Testimony of Gareth Jones on March 7, 2017, Vol. 37, p. 40

257. In his report Mr. Jones noted at p. 62 that many aspects of the investigation were conducted thoroughly and objectively. He did not see any deliberate attempt to destroy or suppress evidence that was central to whether Cst. Smyth's use of force was criminal or not. Mr. Jones testified that there were aspects of the RCMP investigation that were done very well and these included engaging an independent observer, hiring a use of force expert and a firearms expert, and re-enacting the shooting. Despite finding deficiencies in the RCMP investigation Mr. Jones testified that he had no major criticisms of the investigation's ultimate conclusion when it came to the assessment of the physical evidence. Further, Mr. Jones opined that flaws in an investigation do not equate to an outcome or conclusion being incorrect:

Mr. Jones: Well I think I should start with the premise that I start with in the conclusion that no investigation is perfect, I've certainly never done one; I've never seen one; and many aspects of this investigation were done well, many aspects were done well... At least in my views, some (inaudible) deficiencies in some aspects of this instigation. ...

Ms. O'Brien: Okay, and I don't know if you're able to give an opinion on this, or not. But are – if you are, or not; please say so. And that would be an opinion as to whether these aspects that you've highlighted affected the ultimate conclusion of the investigation.

Mr. Jones: I haven't look to it, and I didn't look at it. I didn't reinvestigate this. Just because there are flaws in an investigation, doesn't mean that the ultimate conclusion, the ultimate outcome is wrong. And that's about as far as I can really go.

Testimony of Gareth Jones on March 7, 2017, Vol. 37, pp. 40-41

Report - Commission of Inquiry Respecting the Death of Donald Dunphy dated February 7, 2017 prepared by Gareth Jones, CIDDD Exhibit P-0770 at p. 62

258. On cross-examination, Mr. Jones described Cst. Smyth as one of the most co-operative officers he had ever seen having regard to all his dealings with subject officers in the SIU, possibly the most cooperative. In his report at p. 39 Mr. Jones provided examples of Cst. Smyth's co-operativeness throughout the RCMP investigation. These included his willingness to participate in several interviews over the course of a few months, partake in two re-enactments, and provide his personal clothing worn at the time of the incident to the investigators. Mr. Jones opined that had Cst. Smyth not been as cooperative, the investigation into the shooting death of Mr. Dunphy would have been far more challenging.

Testimony of Gareth Jones on March 7, 2017, Vol. 37, p. 41

Report - Commission of Inquiry Respecting the Death of Donald Dunphy dated February 7, 2017 prepared by Gareth Jones, CIDDD Exhibit P-0770 at p. 39

259. Although the Reports of both Mr. Jones and Ms. Hughson found deficiencies with the RCMP investigation no evidence was provided to the Commission that these deficiencies impacted the RCMP's ultimate finding.

RCMP Investigative Report, CIDDD Exhibit P-0003 at p. 34

(16) Conclusion

260. As Gareth Jones stated there is no such thing as the perfect investigation. Having regard to the fluidity of a homicide investigation in its early stages mistakes are going to be made. However, after the first few days of the investigation, when investigators are working around the clock to determine what happened, the investigative team has a chance to sit back, take a breath and examine the evidence that has been gathered. As previously stated, it is easy in hindsight to say what should have been done.
261. Cst. Smyth agrees that it would have been preferable for the RCMP to bring in an out-of-province police force or civilian oversight agency to conduct the investigation if for no other reason than public perception (*Wood v. Schaeffer* [2013] S.C.J. No. 71 at paragraph 48). However, the failure of the RCMP to take these steps should not reflect adversely on Cst. Smyth as he had no say in who was going to conduct the investigation.
262. The same comment applies if the Commissioner finds that the RCMP failed to take certain investigative steps. For example, Cst. Smyth was not asked to provide a blood sample, give his DNA or take a polygraph test. Also, he wanted to, based on his evidence, give a statement to the RCMP on the night of the shooting. However, based on the advice given to him, he chose not to. Whether or not the Commissioner agrees with that approach should not be the guiding principle – Cst. Smyth was provided advice which the police officers providing such advice thought was in accordance with proper police practice at that time. In any event, as the subject of the investigation Cst. Smyth was under no legal obligation to provide a statement to the police or co-operate in any way.

263. The Commissioner may also find that there were other mistakes made by the RCMP during their investigation. Cst. Smyth emphasizes that he co-operated fully with the investigation and had no input into investigative steps taken, or not taken. However, the issue is not whether there were mistakes made - the issue is whether there are material deficiencies. Even then, the question must be asked whether these are deficiencies which could have affected the outcome of the police investigation and the RCMP conclusion that there were no grounds to lay criminal charges.
264. In conclusion on this point, a police investigation must be reviewed by examining the investigation from a global perspective, as opposed to examining the investigation in a piecemeal fashion. Cst. Smyth, as will be reviewed in the next section, outlines what he suggests is overwhelming forensic and scientific corroboration which confirms that he is telling the truth.

PART IV**WHAT HAPPENED IN DONALD DUNPHY'S HOUSE?****(1) Cst. Smyth's arrival in Mitchell's Brook**

265. Cst. Smyth testified that he arrived at Mr. Dunphy's house around 1:30 p.m. He pulled up in the driveway and saw a house that was in generally poor condition. He looked in through the window and saw garbage and poor living conditions. He noticed cameras on the exterior of the house and although that might have caused him some heightened awareness it was not enough to change his approach. He was still prepared to visit Mr. Dunphy on his own. He also saw the sign saying political officials were not welcome.

Testimony of Cst. Joe Smyth on January 17, 2017, Vol. 5, pp. 63-64

266. In Cst. Smyth's mind there was still low potential for an act of violence against him but the thought crossed his mind about mental health issues. Cst Smyth testified however that he does not correlate mental illness to violence. He drove out of the driveway and parked along the side of the road to determine his next course of action. He attempted to phone Mr. Dunphy's cell phone a number of times but there was no service. Excerpts from phone records (Exhibit P-0130) showed that 6 calls were made but none went through.

Testimony of Cst. Joe Smyth on January 17, 2017, Vol. 5, pp. 65-69

267. Cst. Smyth admitted that he had not mentioned these cell phone calls in any of his RCMP statements. In fact, the first time he remembered them was during the interview with Commission counsel after he was asked what he did after he left Mr. Dunphy's residence. Cst. Smyth stated that he was surprised when Commission counsel pointed them out in

the phone records although he remembered seeing the reference to a call to Colin Dinn in the RCMP timeline, he assumed the error in the timeline was referencing a call the Mr Dunphy had perhaps made to Colin Dinn. It was very helpful to see these records as they helped develop a finite timeline and he simply forgot that he made the attempted calls.

Testimony of Cst. Joe Smyth on January 17, 2017, Vol. 5, pp. 69-76

268. Cst. Smyth admitted that he was asked by the RCMP about the possibility of a tipoff but it was not a concern of his because there was no known propensity for, or history of, violence on Mr. Dunphy's part. He testified that he made the calls to Mr. Dunphy's phone parked on the side of the road 200-300' from Mr. Dunphy's driveway. The last call to Mr. Dunphy's phone was made at 1:39:39. He spent some more time on the side of the road thinking about his next course of action. In total, he was parked on the side of the road for 10-20 minutes and the phone calls would have been made in the middle of the stop.

Testimony of Cst. Joe Smyth on January 17, 2017, Vol. 5, pp. 76-81

(2) Rochelle Nolan

269. Ms. Nolan was one of Mr. Dunphy's next door neighbours in Mitchell's Brook. Ms. Nolan, during her examination by Commission counsel, painted a roiser picture of her relationship with Mr. Dunphy than she did in the statement she gave to the police on the date of Mr. Dunphy's death. At the Inquiry she described Mr. Dunphy as an acquaintance and stated that they were friendly with each other and got along for the most part. She told Commission counsel about one incident where they had a "few words and that was it".

Testimony of Rochelle Nolan on January 27, 2017, Vol. 11, pp. 1-6

270. During cross-examination counsel for Cst. Smyth referred Ms. Nolan to her statement to the police on April 5, 2015 in which she stated:

R. Nolan: [REDACTED], my youngest son, came home because Donnie was after going at him like a spider monkey, ah, he came home crying to me and said Mom, Donnie DUNPHY went off his head at me because I was down over the bank trying to save one of the kittens cause I thought they were going to go into the pond.

Cst. Nippard: Yeah.

R. Nolan: So I said, [REDACTED], you stay here, Mom's gonna go over and talk to Donnie, he wouldn't allow me to over by myself cause he's a very protective child, his Dad was away working at the time as per normal, he came with me and before I got to Donnie's house, Donnie came down on the road and met me so I never even had to go up in his driveway and face me, like, face to face and starting going off his head and [REDACTED] came home screeching and bawling because I told him to go home cause Donnie was furious and, ah, after that there were no hard feelings, no nothing, but at the time there was major issues, I had a major issue, like, you don't come after a nine or a ten year old.

Police statement of Rochelle Nolan dated April 5, 2015 and contained in CIDDD Exhibit P-0387 at pp. 5-6

Cross-examination of Ms. Nolan on January 27, 2017, Vol. 11, pp. 23-24

271. Ms. Nolan was also cross-examined on her police statement where she said she thought Mr. Dunphy "was just basically paranoid" because he had so much drugs in his system. Also, she was referred to the following passage in her police statement:

Cst. Nippard: Okay. Did you take him for somebody who could be violent?

R. Nolan: Ah, when he came, when I went over to speak with him

Cst. Nippard: M'hmm
R. Nolan: About coming, scaring the crap out of my oldest son, ah when he came face to face with me

Cst. Nippard: M'hmm

R. Nolan: Literally face to face, I'm thinking, yeah, I warned my children not to go handy because I'm thinking...

Cst. Nippard: Yeah

T. Nolan: He could lose it at any time

R. Nolan: He's burnt

Cst. Nippard: Yeah

R. Nolan: I'm thinking there's that much drugs into his system that he's probably paranoid

Police statement of Rochelle Nolan dated April 5, 2015 and contained in CIDDD Exhibit P-0387 at pp. 21-22

Cross-examination of Ms. Nolan on January 27, 2017, Vol. 11, pp. 24-31

272. While it is perhaps understandable that Ms. Nolan might want to downplay the nature of her interactions with Mr. Dunphy and not say anything bad about him at the Inquiry it is suggested that the most accurate description of Mr. Dunphy's behaviour is in her first statement to the police on the date of Mr. Dunphy's death.

273. The other issue which Ms. Nolan testified about was seeing an unmarked police vehicle parked in front of her house. Under questioning by Commission counsel, Ms. Nolan testified that she saw this vehicle around 1:20 p.m. She testified that the vehicle was parked there for approximately 15 minutes, give or take 5 minutes or so. She assumed that the driver of the vehicle was on the phone. However,

under cross-examination by counsel for Cst. Smyth she was referred to her police statement where she gave an estimate of between 1:00-1:30 p.m. and her interview with Commission counsel where she said she saw the vehicle between 1:30-1:40 p.m.

Examination of Ms. Nolan by Commission counsel on January 27, 2017, Vol. 11, pp. 10-14 and cross-examination at pp. 22-23

274. It is suggested that the time that makes the most sense, in light of the other testimony, is that Ms. Nolan saw the unmarked police vehicle around 1:30-1:40 p.m.

(3) Cst. Smyth's visit to Dick and Debbie Dunphy's

275. Based on the last phone call being made at 1:39:39 p.m. Cst. Smyth estimated that he went to the next door neighbour's at approximately 1:45-1:50 p.m. It turned out that the next door neighbours were the brother and sister-in-law of Donald Dunphy. Cst. Smyth testified that Debbie Dunphy answered the door herself and during the whole conversation, which lasted between 15-25 minutes, they remained in the porch area. Cst. Smyth described Debbie Dunphy as giving a fairly exhaustive account of their relationship with Donald Dunphy and it was obvious that there was a fair bit of acrimony.

Testimony of Cst. Joe Smyth on January 17, 2017, Vol. 5, pp. 80-82

276. Although they saw Donald Dunphy around on a regular basis Debbie Dunphy and her husband had no real contact with him for 10 years. Debbie Dunphy described Donald Dunphy as an antagonistic person with a grudge against the world. She also said he was reclusive and had no friends but that he had a daughter. Cst. Smyth specifically asked

about violence and they said no but they described him as a volatile person. Cst. Smyth asked if they knew whether he had any firearms and they either said no, or I don't believe so. Cst. Smyth would have taken the answer to either one as being the same in that they didn't know. Unless they said they saw Donald Dunphy walking up the driveway with a firearm yesterday he would take whatever answer they gave as they didn't know, having regard to the limited contact in the previous 10 years. Cst. Smyth did not rely upon them to give any reassurances that there were no firearms in the house.

Testimony of Cst. Joe Smyth on January 17, 2017, Vol. 5, pp. 82-84

277. Debbie Dunphy said that Donald Dunphy had a mental health issue. She specifically told him the story of what she said to Donald Dunphy's daughter years before and the problems it caused between the families. Based on what he was told Cst. Smyth felt that he would be visiting a troubled man or a man with some level of mental illness. While this information factored into his risk assessment it did not cause him to reconsider making the visit or the need to bring another officer with him. He testified that he did not automatically correlate mental health issues to violence and he was still looking at this situation as a low risk to himself.

Testimony of Cst. Joe Smyth on January 17, 2017, Vol. 5, pp. 84-85

278. In her police statement on April 5, 2015 Debbie Dunphy outlined a litany of complaints against Donald Dunphy. She confirmed that when Cst. Smyth came to her door he identified himself and asked about Donald Dunphy. She told Cst. Smyth that there was no communication between them and at one point she had threats charges laid against

Donald Dunphy but that ended up with a peace bond. Ms. Dunphy described issues such as Mr. Dunphy putting things on her plants and trees and putting car wrecks in front of their house.

Police Statement of Debbie Dunphy on April 5, 2015, CIDDD Exhibit P-0099, pp. 1-4

279. Ms. Dunphy confirmed that Cst. Smyth asked if Donald Dunphy had a gun and they told him that they did not know. In her police statement she referred to the fact that Donald Dunphy had such a “short fuse” and they knew he was going to “lose it”.

Police Statement of Debbie Dunphy on April 5, 2015, CIDDD Exhibit P-0099, p. 5

280. During her sworn interview with Commission counsel on November 9, 2016 Ms. Dunphy provided the following information:

- (1) she repeated that Mr. Dunphy was putting garbage and old car wrecks on the piece of land in front of their house and poisoning her flower garden (pp. 20-22);
- (2) she discussed the peace bond and telling Meghan Dunphy that her father needed to get psychiatric help (pp. 32-35). She later described Donald Dunphy as being “unstable” (p. 100);
- (3) Cst. Smyth showed her his badge and introduced himself. She told Cst. Smyth that she did not have a good relationship with Donald Dunphy and reviewed some of the things he had done to her. She said that although she told Cst. Smyth that she was afraid of Donald Dunphy she never saw him act violently (pp. 49-60);

(4) she described Cst. Smyth's demeanour as being very cool and calm like there was no emergency but he wanted to talk to Don (p. 64).

Interview of Debbie Dunphy with Commission counsel on November 9, 2016, entered into evidence at the Inquiry

281. In his statement to the police on April 5, 2015 Dick Dunphy said he told Cst. Smyth that they didn't know if Donald Dunphy had any guns because he didn't do any hunting. Dick Dunphy also told the police that Donald Dunphy was a fellow you couldn't deal with because you couldn't trust him. He described Donald Dunphy's attitude as "Everybody owed him something". Mr. Dunphy made similar comments during his testimony before the Inquiry but he confirmed that although his brother was quick-tempered he did not know him to be violent or to threaten to hurt anyone.

Testimony of Richard Dunphy on January 11, 2017, Vol. 3, pp. 15-40 and pp. 48-64

(4) The return to Donald Dunphy's residence

282. Cst. Smyth testified that as he was leaving Dick and Debbie Dunphy's residence he saw a vehicle in Donald Dunphy's driveway so he decided to visit. He arrived at Mr. Dunphy's residence around 2:05-2:10 p.m. When referred to the RCMP timeline prepared by Wanda Richards, Cst. Smyth said it was wrong. Cst. Smyth referred to the fact that he called the RCMP at 2:27 p.m. and he drew his weapon closer to 2:25 p.m, not at 2:13 p.m. as outlined in the RCMP Timeline. Cst. Smyth said that he called the RCMP 2-3 minutes after the shots were fired.

Testimony of Cst. Joe Smyth on January 17, 2017, Vol. 5, pp. 88-91

283. Cst. Smyth testified that he knocked on the window and Mr. Dunphy came to the door a couple of minutes later. He stepped back towards his vehicle, identified himself as Joe Smyth of the RNC, showed him his wallet badge and asked Mr. Dunphy if he could speak to him. Cst. Smyth was wearing business casual clothes and his use of force equipment was concealed by his jacket. Mr. Dunphy invited him in and the first thing that hit Cst. Smyth upon entering the residence was the overpowering smell of cat urine. He observed poor living conditions. He chatted with Mr. Dunphy briefly in the hallway and Mr. Dunphy asked him what was the RNC doing out in RCMP jurisdiction. Mr. Dunphy then sat in his chair and told Cst. Smyth to sit on the couch.

Testimony of Cst. Joe Smyth on January 17, 2017, Vol. 5, pp. 95-104

284. When Cst. Smyth told Mr. Dunphy that he was following up on some comments made on Twitter Mr. Dunphy appeared to be relieved. They had a fairly lengthy discussion about Mr. Dunphy's injuries and within 6-7 minutes they started talking about why Cst. Smyth was there. Cst. Smyth remained standing and did not sit down because of the amount of garbage around. He went over towards the mantel and leaned up against the mantel. Cst. Smyth agreed that his training suggested that he should position himself where there was ease of an exit.

Testimony of Cst. Joe Smyth on January 17, 2017, Vol. 5, pp. 104-106

285. Cst. Smyth noticed a bat by the left side of Mr. Dunphy's chair and when he asked about it Mr. Dunphy said you never know who is going to come in here and he had to protect himself. Cst. Smyth testified that he didn't remember when he saw the bat but he didn't

have to walk over it to get into the room. He described the bat as lying flat on the floor to the left of the chair and the bat did not change position.

Testimony of Cst. Joe Smyth on January 17, 2017, Vol. 5, pp. 106-107

286. While Cst. Smyth said that he was now feeling a heightened alert level he still was not feeling this was going to turn into a violent situation. Also, he did not feel intimidated by Mr. Dunphy as he could either overpower him or pepper spray him if he picked up the stick. While he saw knives on the table used to consume drugs he did not notice the utility knife, the blowtorch or the ashtray. However, Cst. Smyth pointed out that there was a lot of garbage in the area.

Testimony of Cst. Joe Smyth on January 17, 2017, Vol. 5, pp. 107-110

287. Cst. Smyth admitted that he did not see any ammunition on the table and he did not ask Mr. Dunphy if he had any firearms. Nor did Mr. Dunphy volunteer any information about firearms.

Testimony of Cst. Joe Smyth on January 17, 2017, Vol. 5, pp. 115-116

288. Within 5-7 minutes Mr. Dunphy's demeanour started to change. He made comments about Maynard and Gullage (former members of the Workers' Compensation Board) and asked who sent Cst. Smyth there and started calling him a "fucking puppet". Cst. Smyth made reference to Mr. Dunphy's living conditions a couple of times and Mr. Dunphy seemed to take insult to these comments while Cst. Smyth testified that he was simply trying to express empathy.

Testimony of Cst. Joe Smyth on January 17, 2017, Vol. 5, pp. 116-117

289. After the fairly sudden change in demeanour Cst. Smyth told Mr. Dunphy that he was not there to arrest him or give him a hard time. He stated that “I got real concerns for you Mr. Dunphy” and this seemed to agitate him more. While Mr. Dunphy was mostly coherent he was also mumbling under his breath. Cst. Smyth testified that he focussed on trying to calm Mr. Dunphy down. Cst. Smyth also testified that at no point did Mr. Dunphy ask him to leave.

Testimony of Cst. Joe Smyth on January 17, 2017, Vol. 5, pp. 117-118

290. Commission counsel began her third day of examination of Cst. Smyth by asking whether he said anything to Mr. Dunphy about his mental health which he denied. Cst. Smyth testified that Mr. Dunphy remained seated but moved around a lot in his chair, shifting from one side to the other. He also stated that Mr. Dunphy never tried to stand up until he came forward in the chair with the firearm and he was not able to tell whether he was starting to come up out of the chair or was just on the edge.

Testimony of Cst. Joe Smyth on January 18, 2017, Vol. 6, pp. 1-2

291. Cst. Smyth testified that Mr. Dunphy was very bothered that Cst. Smyth was looking around and kept repeating, what are you looking for? Cst. Smyth testified that he was walking just within probably a 2' radius and he would turn around, look behind him and down at the floor. It was around that time that Cst. Smyth made the decision to just look down at his paper. Cst. Smyth testified that he did not become argumentative, raise his

voice, get angry or say anything insulting. He also testified that he did not feel personally slighted by Mr. Dunphy's comments and Cst. Smyth tried to become more conciliatory and reassuring.

Testimony of Cst. Joe Smyth on January 18, 2017, Vol. 6, pp. 2-4

292. By this point Mr. Dunphy was showing agitation and had dried saliva stretching between his upper and bottom lip. After 2-5 seconds of looking down at the folder, in his peripheral vision he saw Mr. Dunphy leaning to his right side. As he came back up he saw something long in his hands which, as his eyes came up, Cst. Smyth focused on it as being a firearm. He found this "shocking" and he went from being relatively calm to full alert.

Testimony of Cst. Joe Smyth on January 18, 2017, Vol. 6, pp. 4-5

293. Cst. Smyth testified that by the time he fully focused on the firearm it was actually pointed at him. At that point he raised his hand and said no, no, no and he was thinking at this stage that he was going to be shot, this was going to hurt and he was getting ready for impact. Cst. Smyth stated that while the gun was pointed at him Mr. Dunphy seemed to be moving his hands but he didn't know if he was trying to get a better grip on the gun or moving the bolt.

Testimony of Cst. Joe Smyth on January 18, 2017, Vol. 6, p. 5

294. Cst. Smyth drew his firearm and by this time was focussed strictly on the gun. He fired his first and second shots towards center mass but he still saw the gun pointed at him as

he was moving. As he was exiting the room he fired towards Mr. Dunphy's head and he was actually looking at Mr. Dunphy as he fired the fourth shot. Another millisecond later and Cst. Smyth was out of the room.

Testimony of Cst. Joe Smyth on January 18, 2017, Vol. 6, pp. 5-6

295. Cst. Smyth testified that prior to the rifle being pointed at him he had not been looking directly at Mr. Dunphy for several seconds as he was looking around at the garbage, looking down at the floor and looking behind him. He avoided eye contact with Mr. Dunphy because of his level of agitation and for that reason tried not to look directly at him. Cst. Smyth estimated that he was looking at the folder for 2-6 seconds when he saw the gun in his peripheral vision, and probably closer to 5-6 seconds. In total, Cst. Smyth was not looking at Mr. Dunphy for a period of probably 10 seconds or more. He saw Mr. Dunphy move to his right but that didn't cause him concern. It was not until Cst. Smyth saw something in Mr. Dunphy's hands in his peripheral vision that he moved his eyes to him.

Testimony of Cst. Joe Smyth on January 18, 2017, Vol. 6, p. 6

296. Cst. Smyth said that although the gun came from Mr. Dunphy's right-hand side he did not see the gun until it was actually in Mr. Dunphy's hands. He reiterated that while the gun was pointed at him Mr. Dunphy seemed to be moving his hands as if to get a better grip. When referred to his statement given to the Saskatoon police Cst. Smyth stated that he did not say Mr. Dunphy was repositioning the gun, but his hands. It seemed to Cst.

Smyth that Mr. Dunphy was moving his hands on the gun for a good shooting position. Cst. Smyth also stated that at no time was the firearm at Mr. Dunphy's shoulder.

Testimony of Cst. Joe Smyth on January 18, 2017, Vol. 6, pp. 7-8

297. Cst. Smyth testified that he did not draw his firearm before the rifle was actually pointed at him. He indicated that it took milliseconds to draw his firearm and milliseconds to get on target. Cst. Smyth testified that he did not have time to just get out of the room. Cst. Smyth, when asked how he could not have seen the rifle, stated that he asked himself that same question every day and every night. He also stated that he was not in a position to get a full view of the right-hand side of the chair. He had no good explanation as to why the rifle escaped his attention. It is interesting to note that during Mr. Simmonds' use of Mr. Dunphy's chair to cross-examine Cst. Smyth it became apparent that the rifle could indeed have been hidden in the pouch on the right-hand side of the chair, a scenario that Cst. Smyth had not previously considered plausible.

Testimony of Cst. Joe Smyth on January 18, 2017, Vol. 6, pp. 9-11

Cross-examination of Cst. Smyth on January 24, 2017, Vol. 8, pp. 4-5

298. When asked if it was possible that he mistook the stick for a gun Cst. Smyth said no and his eyes were focused on a gun, not a stick. There was no question in his mind that when he moved his eyes up, it was a gun.

Testimony of Cst. Joe Smyth on January 18, 2017, Vol. 6, pp. 12-14

299. Commission counsel next questioned Cst. Smyth on what he wrote in the yellow folder. Cst. Smyth reiterated that he was either writing in the yellow folder or pretending to write when the rifle came up. In the yellow folder the names Maynard and Gullage were written. The yellow folder had 4-5 pages in it, including Mr. Dunphy's tweets. Cst. Smyth was shown a photograph of where the file folder landed on the table and he indicated that he was surprised by the way it landed.

300. When asked about the time it took to fire 4 shots Cst. Smyth estimated 2-2 ½ seconds (Cpl. Knapman estimated that 4 shots could be fired in under 2 seconds). He felt that he was on target for the first and second shots but not for the third and that he was approximately 3' away when he fired the fourth shot. Cst. Smyth testified that the gun was in Mr. Dunphy's hands at all times when he was shooting and that Mr. Dunphy kept following him with the rifle, a situation which, as previously outlined, Dr. Avis accepted as very possible. Cst. Smyth testified that he didn't reassess because there was a gun pointing at him.

Testimony of Cst. Joe Smyth on January 18, 2017, Vol. 6, pp. 30-37

Testimony of Cpl. Knapman on March 2, 2017, Vol. 34, pp. 121-122

301. Cst. Smyth testified that after the last shot was fired he immediately went out of the room. He then re-entered the room and it looked like Mr. Dunphy was deceased. He called the RCMP within 1-3 minutes after the last shot and the call to the RCMP was at 2:27 p.m. He was concerned that there could still be a threat and he spent a period of time in the front porch looking outside. At that point he described himself as being in shock,

on extremely high alert and his adrenaline was very high. Although it was really hard for Cst. Smyth to piece those couple of minutes together he estimates that he stayed in the porch area for 10-15 minutes.

Testimony of Cst. Joe Smyth on January 18, 2017, Vol. 6, pp. 44-47

302. When asked what he did during the 15 minutes when he remained in the house after he phoned the RCMP Cst. Smyth stated that it could have been that long or it could have been a lot shorter. He stated that he was just catching his breath, trying to stop shaking, observing the front of the house for any potential threats and keeping a look over his shoulder. Once he calmed down he re-holstered his firearm, activated the lights on his vehicle and retrieved a bottle of water from the SUV.

Testimony of Cst. Joe Smyth on January 18, 2017, pp. 45-51

(5) Dr. Terry Coleman – De-escalation techniques

303. Based on lack of information Dr. Coleman was not conclusive when it came to what took place in terms of de-escalation. He testified “So active listening, being sensitive to the situation, treating the other party with respect – I’m not suggesting this didn’t happen. These are the things that should be happening and it’s not clear whether they did or did not.” Dr. Coleman did take issue with Cst. Smyth telling Mr. Dunphy to “calm down”. However, Cst. Smyth testified that he told Mr. Dunphy to calm down and that he was not there to arrest him. Dr. Coleman testified that any sort of command would not be conducive to de-escalating a situation. He criticized Cst. Smyth for looking around,

explaining that his actions may have triggered Mr. Dunphy. Expressing concern over Mr. Dunphy's living situation was also seen by Dr. Coleman as a trigger.

Testimony of Dr. Coleman on March 8, 2017, Vol. 38, pp. 41-42

304. Dr. Coleman confirmed that when forming his opinion on Cst. Smyth's actions he was viewing Cst. Smyth's actions in hindsight as opposed to putting himself in Cst. Smyth's shoes:

Mr. Kennedy: Have you clearly delineated in your own mind whether you're placing yourself in the situation that Constable Smyth found himself in that day or whether you're looking at it through hindsight?

Dr. Coleman: Well I'm obviously looking at it in hindsight.

Testimony of Dr. Coleman on March 8, 2017, Vol. 38, p. 122

305. Counsel for Cst. Smyth questioned Dr. Coleman regarding the requirement for an expert to be objective and independent, he examined why he Dr. Coleman did not take into account evidence regarding Cst. Smyth that was offered by numerous police officers and also why he chose to watch certain testimony of witnesses but choose not to watch or read the transcripts of others. Dr. Coleman testified that he did not attempt to supplement his opinion with any information or documentation other than what was before him. Three separate times on cross-examination by counsel for Cst. Smyth this was confirmed by Dr. Coleman:

Mr. Kennedy: Did you ever jump to reach any conclusions on Sergeant Smyth's or acting Sergeant Smyth, Constable Smyth's credibility?

Dr. Coleman: I based everything on what I had access to: the various statements and some reports and documents, and his recollection of what happened – Constable Smyth's.

Mr. Kennedy: So if you're going to comment on Sergeant Smyth or Constable Smyth's lack of professionalism, wouldn't you think it's incumbent upon you to review other evidence that could be available in this inquiry which could perhaps alter your view somewhat?

Dr. Coleman: Again, I based it on what I had to analyze

Mr. Kennedy: So why wouldn't you, Sir, have gone and reviewed the kind of evidence that I'm told – I'm telling you is available for you to review?

Dr. Coleman: This was my conclusion based on what I had in front of me.

Testimony of Dr. Coleman on March 8, 2017, Vol. 38, p. 90, p. 117, p. 118

(6) Meghan Dunphy – Donald Dunphy's temperament

306. Commission counsel referred Ms. Dunphy to her police statement where she described her father as "like confrontation, he can be flighty" and asked her what she meant by that. She said that he talked with his hands a lot and if giving his opinion he could be moving around, just on the edge of his seat. She testified he would not hold back at all and his attitude was that it was his opinion and he was entitled to it. Ms. Dunphy stated that nagging him about cleaning up the house would make him flighty and he would get angry.

Testimony of Meghan Dunphy on January 9, 2017, Vol. 1, pp. 16-17

307. Ms. Dunphy also testified that her father had a temper and he could go from talking low-normal to talking loud and waving his arms if someone said something he didn't like or if discussing a topic that made him angry. She stated that if something was annoying him or someone saying something he didn't feel he had to listen to then when he decided you were out of the residence it was time to leave.

Testimony of Meghan Dunphy on January 9, 2017, Vol. 1, pp. 17-18

308. Ms. Dunphy stated that her father smoked marijuana a lot, in the morning when he got up, in the afternoon and before he went to bed. She said that her father did not have any mental health issues but she recognized that the state of his home could make him appear a little bit different to the outside world.

Testimony of Meghan Dunphy on January 9, 2017, Vol. 1, pp. 19-21

309. Ms. Dunphy confirmed that her father would definitely use the term “government puppet”. She testified that her father could be confrontational with a cop and would definitely argue with him but he would not risk pointing a gun. She stated that the pointing of a gun was not realistic to her and he would use the stick for protection.

Testimony of Meghan Dunphy on January 9, 2017, Vol. 1, pp. 60-63

310. Ms. Dunphy testified that her father would have let Cst. Smyth into his house knowing that he was a police officer and it would be the same if the police officer said he was from the Premier’s Security Detail. Ms. Dunphy stated that her father wasn’t intimidated by anyone, he knew his rights, he always stood up for himself, he wasn’t going to back down and he would say whatever he wanted to say.

Testimony of Meghan Dunphy on January 9, 2017, Vol. 1, pp. 63-64

311. Ms. Dunphy confirmed that if Cst. Smyth was making comments about Ms. Dunphy living in squalor then her father would not be happy and that would get his back up. If

Cst. Smyth was looking around the living room that would also upset her father. Ms. Dunphy testified that she never saw white foam around her father's mouth but the corners of his mouth would go white with dried spit.

Testimony of Meghan Dunphy on January 9, 2017, Vol. 1, pp. 64-65

(7) Colin Dinn

312. Mr. Dinn appeared to be Donald Dunphy's closest friend in the Mitchell's Brook area. At the time of his testimony Mr. Dinn indicated his memory was affected by the medications he was taking. Mr. Dinn grew up in the Mount Carmel area but lived in Northern Canada for many years before he returned home to Mount Carmel in 2011-12. Mr. Dinn visited Mr. Dunphy regularly and they smoked marijuana together.

Testimony of Colin Dinn on January 11, 2017, Vol. 3, pp. 99-106

313. In his police statement of April 6, 2015 Mr. Dinn made the following comments:

Cpl. Henstridge: *Was he, was he paranoid at all about people coming in and robbing him*

Dinn: *He said to me, when was this b'y, what, what are we in, March, maybe February, Jan, January, February, he said, I guess he must have been after sending a letter or a bad Twitter to somebody or something and he said, wouldn't be a surprise he said they comes for me some night like that*

Col. Henstridge: *When he said they, what did they mean*

Dinn: *No, never, never said anybody in particular, I guess he meant whoever he was...*

Cpl. Henstridge: *Who did you take it to mean*

Dinn: *Whoever he was sending the messages to*

Cpl. Henstridge: *And who would that likely have been*

Dinn: *It had to be somebody in Compensation, that's all I figured or...*

Cpl. Henstridge: *You said he said*

Dinn: *Canada Pension was another one he used to be talking about*

Cpl. Henstridge: *He said I wouldn't be surprised*

Dinn: *If they come for me some night or someday, like, or time or whatever, day and then he said, let 'em come*

Police Statement of Colin Dinn dated April 6, 2015, CIDDD Exhibit P-0100 at p. 13

Testimony of Colin Dinn on January 11, 2017, Vol. 3, pp. 114-115

314. Mr. Dinn confirmed that Mr. Dunphy had a stick in his house for protection and he typically kept it on the right side of the chair. However, Mr. Dinn had never seen a gun or bullets in Mr. Dunphy's house. At 1:46 p.m. on Easter Sunday Mr. Dinn received a text from Mr. Dunphy and he came out of his shed and saw Mr. Dunphy driving by. Although Mr. Dinn initially told the police that the text related to smoking marijuana he was very unclear as to the meaning of the text during his testimony at the Inquiry and maintained that the text referred to bringing a load of wood.

Testimony of Colin Dinn on January 11, 2017, Vol. 3, pp. 116-117, pp. 129-133

(8) THE STAGING THEORY**(i) Meghan Dunphy – Statement to the police on April 8, 2015**

315. A key factor which was explored in cross-examination with Staff Sgt. Osmond by counsel for Cst. Smyth was that the RCMP were aware early in the investigation of Meghan Dunphy's belief that her father had taken a stick to Cst. Smyth and not a gun. In her statement of April 8, 2015 after confirming that she had seen the rifle behind the couch Ms. Dunphy stated about the stick:

Dunphy: *It's never been in another place. My dad didn't clean up before this you know he got up enough time to get in the shower brush his teeth and go not to mention he lived at our house for a week right before this all happened. So you know it's not like he planned everything out. So you know could it have been this stick that he was getting at, reaching for and then you know if this cop had seen that gun, and I'm not saying he's bad or anything like that....*

Osmond: *No, no.*

Dunphy: *...but you know my dad could of pulled a stick on him and then if he sees the gun well how did you know he didn't put the gun there.*

Osmond: *Right.*

Dunphy: *But there was a stick there that he used for self, say he would use for self defense if someone came.*

Osmond: *Hmm, hmm.*

Dunphy: *So you know the gun was never there for self defense. It was there because it was my pop's and dad was too, had too big of a heart to throw it away he didn't you know, every, he kept dressers and you now there's I bet you there's 12 dressers in our house. We had three bedrooms. He kept everything. Every bed, every everything you know what I'm saying so I just have a hard time believing this story about the gun I'll be honest.*

Police Statement of Meghan Dunphy on April 8, 2015, CIDDD Exhibit P-0037, p. 8

316. A little later in this interview Ms. Dunphy stated:

Osmond: *Ah, see this is where I, this is evidence and ah, you know I don't know if I can go that far.*

Dunphy: *Okay.*

Osmond: *But he, he said out of his peripheral vision he saw, he was actually writing some notes and he saw the barrel of a gun...*

Dunphy: *Lies.*

Osmond: *I'm not saying it's true or it's not...*

Dunphy: *Yeah.*

Osmond: *...I'm saying this is what was said.*

Dunphy: *Okay no that's all you have to tell me. Lies. I know. You know he's writing down something on a piece of paper and my father which didn't happen.*

Osmond: *Okay.*

Dunphy: *Did not happen in his peripheral vision. He probably saw a stick. No, no he didn't even see a stick I don't even believe now that there was anything hauled out. Because my father would be on the edge of his seat with his arms going like this if he was in a rage to do that. That's the type of person he was, he was flicking his arms and he'd be telling him off and that's how it would go.*

Osmond: *Okay.*

Dunphy: *So he didn't simply be like oh I'm you know I'm gonna, never happened. He's full of shit. He better get another story out quickly because that one is not the real one. And I can tell you that right now. (emphasis added)*

Police Statement of Meghan Dunphy on April 8, 2015, CIDDD Exhibit P-0037, p. 21

317. In terms of Cst. Smyth having time to stage the scene Ms. Dunphy alleged:

Dunphy: *That should have been, well apparently my dad was shot at 2:30 we didn't get there 'til after 3 o'clock.*

Osmond: *Hmm, hmm.*

Dunphy: *So this man had 40 minutes to roam around?*

Osmond: *Yeah but you know he was there by himself now I mean it takes some time to get there right?*

Dunphy: *.....
How do you know that, that cop didn't put that rifle there? How do you know he didn't panic and just look for something to lay next to him and say he had a gun and moved the stick back where it was?*

Osmond: *There's absolutely no way I can control what happened when nobody was there.*

Dunphy: *There you go. But yet my dad's the bad one and this officers telling the truth?*

Osmond: *No I never said your dad was a bad person or...*

Dunphy: *Well pretty much.*

Osmond: *...all I said was what we've been told. (emphasis added)*

Police Statement of Meghan Dunphy on April 8, 2015, CIDDD Exhibit P-0037, p. 36-38

318. In cross-examination of Staff Sgt. Osmond, counsel for Cst. Smyth explored some of the following issues:

(1) Meghan Dunphy's staging theory was set out 3 days into the RCMP investigation;

(2) Ms. Dunphy said that her father could have pulled a stick on Cst. Smyth;

(3) Ms. Dunphy confirmed in her interview that there were certain things which could set Mr. Dunphy off such as referring to his living conditions, looking around the house or telling him that he could not say certain things;

(4) Mr. Dunphy would have definitely used the term “puppet of government”, or a term like that, and could have been on the edge of his seat with his arms going.

Testimony of Staff Sgt. Osmond on February 20, 2017, Vol. 26, pp. 171-174

319. On the issue of how Cst. Smyth could have found the gun to stage the scene Staff Sgt. Osmond stated:

Mr. Kennedy: But you pointed out one of the problems with that theory is where did the gun come from? Is that correct?

Staff Sgt. Osmond: Correct.

Mr. Kennedy: In other words that, for Constable Smyth either had to find the gun which is behind the couch.

Staff Sgt. Osmond: Well, he would have had to have found a gun in a house that he no inclination there was a gun in.

Mr. Kennedy: Yeah.

Or he had to allow Mr. Dunphy to walk across the room, get the gun out from behind the couch, come back and sit down with the gun.

Staff Sgt. Osmond: Correct.

Mr. Kennedy: So the most likely scenario, from an investigative perspective, is that the gun was by the side of the chair or somewhere around the chair as described by Constable Smyth. Correct?

Staff Sgt. Osmond: I mean that's the way it appeared, given what was given to us but, for me, the theory that he was allowed to go get the gun and bring it back to the chair was - just doesn't, didn't make sense to me.

Testimony of Staff Sgt. Osmond on February 20, 2017, Vol. 26, p. 173

320. On the validity of the staging theory Staff Sgt. Osmond stated:

Mr. Kennedy: *Okay.*

So this whole staging theory, Sir, that's put to you early on, did you investigate or did your team investigate it?

Staff Sgt. Osmond: *Well, it was certainly-I mean, it's raised so you're going to consider it.*

Mr. Kennedy: *Okay.*

So was it considered during the investigation?

S.Sgt. Osmond: *Yes.*

Mr. Kennedy: *Was there any evidence found to substantiate the staging theory?*

Staff Sgt. Osmond: *None. (emphasis added)*

Testimony of Staff Sgt. Osmond on February 20, 2017, Vol. 26, pp. 174-175

321. The following exchange occurred between Commission counsel and Cst. Smyth on the staging theory wherein Cst. Smyth made the following comments:

Ms. Chaytor: *During your time in Mr. Dunphy's house did you ever see the rifle behind the couch?*

Cst. Smyth: *No.*

Ms. Chaytor: *Did you see the rifle anywhere prior to the shooting? And prior to Mr. Dunphy picking it up, did you see it anywhere else in the house?*

Cst. Smyth: *No.*

Ms. Chaytor: *Constable Smyth - and we'll get to this evidence as to what happens after the shooting but I understand you did somewhat of a clearing of the house, albeit perhaps not a full clearing, but you did do a clearing of the house after the shooting. Is that correct?*

Cst. Smyth: *Yes, I did.*

Ms. Chaytor: Okay. Did you find the rifle after the shooting and place it where it ultimately ends up?

Cst. Smyth: No.

Ms. Chaytor: So any suggestion that you staged the scene I would like you to have an opportunity to speak to that.

Cst. Smyth: It's to me, I guess, an outlandish theory. I, I can't imagine how you can have the theory and be able to reasonably fill in all the other components of it, but people are going to have their theories. I know what happened. What I'm saying happened is what happened. When I first saw that gun, it was in his hands. It eventually dropped from his hands and it dropped onto the floor and it was leaned up against something. I never moved it; I never touched it. (emphasis added)

Testimony of Cst. Joe Smyth on January 18, 2017, Vol. 6, pp. 14-15

(ii) Meghan Dunphy – Exchange with Commissioner Barry

322. After counsel finished their examination of Ms. Dunphy an exchange occurred between Commissioner Barry and Meghan Dunphy in which the following points emerged:

(1) Ms. Dunphy did not believe that Cst. Smyth deliberately shot her father (p. 122);

(2) Ms. Dunphy questioned whether the position of the .22 rifle was where Cst. Smyth said it was (p. 125);

(3) Ms. Dunphy agreed that something happened in the house which led to her father being shot and she stated that Cst. Smyth then moved the rifle and possibly the stick to better support his account of what happened (p. 125);

- (4) Ms. Dunphy didn't know why the gun was standing the way it was but she guessed that it could have been staged that way (p. 126).

Testimony of Meghan Dunphy on January 9, 2017, Vol. 1, pp. 122-126

323. As previously outlined, Dr. Avis was not "overly concerned" about the position of the rifle and saw nothing inconsistent or disconcerting about the way the rifle was found.

Testimony of Dr. Simon Avis on February 27, 2017, Vol. 31, p. 94, p. 98 and p. 114

324. The following exchange then occurred between the Commissioner and Ms. Dunphy;

The Commissioner:-things to be moved around. But I'm just letting you tell me any reason why you think-I shouldn't be asking myself. Well, if he was going to stage the scene-

Ms. M. Dunphy: Uh-huh.

The Commissioner:-why didn't he do a better job of it?

Ms. M. Dunphy: Well, he was just after killing someone. You know, he put three shots in my father and one into the wall. So I'm sure that was probably an adrenaline rush right there. I can imagine he was fairly nervous, and probably not thinking exactly what he was doing. I remember from reading his statement that, you know, he said, basically, he wasn't sure, you know-I guess he got excited and stuff like that. So you're probably not thinking right-

The Commissioner:-And he was concerned about somebody-

Ms. M. Dunphy: Yeah.

The Commissioner:-else coming in from next door and so forth.

Ms. M. Dunphy: Yeah. So he could have staged the scene quickly and then left the house. You know, if Dad had picked up the stick and he thought it was a gun, you know, and then he shot him and then afterwards realized, oh my God, like this is a stick, I'm going to go to jail, I'm going to lose my life, you know, everything I have, because a man picked up a

stick and I accidentally thought it was a gun. You know, that would be a reason to stage the scene.

The Commissioner: *But that's, then it's just luck that he found the rifle there, because there's nobody denying that's your father's rifle, is it?*

Ms. M. Dunphy: *No, but you know, he could have picked up a knife and laid it there and said he came at him with a knife. It could have been anything really.*

Testimony of Meghan Dunphy on January 9, 2017, Vol. 1, p. 128

325. And a little later the following discussion occurred:

The Commissioner: *Well, I have to wonder-*

Ms. M. Dunphy: *Uh-huh.*

The Commissioner: *-might your father just have made a terrible mistake in terms of possibly, not because he intended to shoot, but to make a point, to exercise his authority in his own house to-*

Ms. M. Dunphy: *Well, that's what he had his stick for.*

The Commissioner: *-require the police officer to get out.*

Ms. M. Dunphy: *The same goes for officer Smyth, really. Did Smyth make the mistake and think that Dad had a gun in his hand when actually he had a stick-I don't know. I can't determine that. It's the same thing for Dad. I don't think he would take a gun; there was no reason for him to. If he was going to take a gun to someone, it would have been someone he had something against. He didn't know this man. He had nothing against him. There was no reason for him to want to shoot him. You know, you know, I said one thing, you said the other, but it goes both ways to me-*

Testimony of Meghan Dunphy on January 9, 2017, Vol. 1, p. 132

(iii) Rita Farrell

326. Rita Farrell, who lives in Flatrock, had a cabin or seasonal home in Mitchell's Brook that used to be the family home of Donald Dunphy's parents. This was how Ms. Farrell and her husband met and became friends with Donald Dunphy. Ms. Farrell was aware of Mr.

Dunphy's frustrations with Workers' Compensation. The last time Ms. Farrell saw Mr. Dunphy was three weeks before he died. Surprisingly, Ms. Farrell never smelled cat urine in the house.

Testimony of Rita Farrell on January 27, 2017, Vol. 11, pp. 60-72

327. On the issue of the amount of garbage by Mr. Dunphy's chair as depicted in the photos Ms. Farrell testified:

Ms. O'Brien: Okay.

All right. The final photograph I'll just bring you to is P 104.

Madam Clerk, can you make that smaller there so we can see the full photograph? Okay, can it go a little smaller, even just so we can – yeah, there we go.

All right. So here we're seeing again, we're seeing a lot of garbage – this is next to Mr. Dunphy's chair, and I won't keep you on this one long, but I'm seeing a lot of, see – there's a lot of garbage here, okay, so we can see, you know a lot of BOOST bottles and water bottles, ginger ale bottles. Would it be typical to see that much garbage on the floor?

Ms. Farrell: No. That's – I've never seen that. It almost looks like the garbage was in the garbage can and it almost looks like it was dumped out because somebody was looking for something or some reason. Like, there's broken paper cups there, I've never seen anything like that.

Ms. O'Brien: Okay. So of all the other photos you saw you thought were representative but this one you don't. That's more-

Ms. Farrell: In the living room, I haven't seen that in the living room.

Testimony of Rita Farrell on January 27, 2017, Vol. 11, p. 73

328. Ms. Farrell testified that she saw a stick that looked like a baseball stick on the right-hand side of Mr. Dunphy's chair. Although a police officer came to her door in Mitchell's Brook during the investigation a statement was never taken from her. Ms. Farrell verified

that during her interview with Commission counsel she referred to the stick but did not say it was always on the right-hand side of the chair because she was never asked. Ms. Farrell had also sat through parts of the Inquiry.

Testimony of Rita Farrell on January 27, 2017, Vol. 11, pp. 73-75, pp. 82-90

329. Sgt. Saunders confirmed that the photographs depicted the way the police found the white bucket with the Gatorade bottle on top. Sgt. Saunders stated that if someone had dumped the white bucket, as suggested by Rita Farrell, then they would have had to put the Gatorade bottle and the papers back on top of the bucket. Sgt. Saunders testified that the papers on top of the bucket had something to do with Workers' Compensation. Sgt. Saunders also confirmed that there was cat hair on most surfaces in the residence. Sgt. Saunders stated that he would be very surprised that the two paramedics who were in the house around 3:00 p.m. said they could not smell cat urine.

Testimony of Sgt. Chris Saunders on February 13, 2017, Vol. 22, p. 118, p. 122

(iv) The paramedics – The position of the rifle

330. Both Nancy Linehan and Kevin Bishop, the paramedics who examined Mr. Dunphy's body, testified that the rifle was in a different position than what is shown in the photographs, thereby implicitly suggesting that the rifle was moved. Ms. Linehan testified that the rifle was "laid either against the chair or his foot". Ms. Linehan testified that she did not recall the blue tub. Ms. Bishop testified that the tub definitely wasn't there.

Testimony of Nancy Linehan on February 3, 2017, Vol. 16, pp. 13-19

Testimony of Kevin Bishop on February 3, 2017, Vol. 16, pp. 63-71

331. Both Ms. Linehan and Ms. Bishop testified that Mr. Dunphy's left arm was in a different position than depicted in the photos. Ms. Linehan testified that she recalled his left arm hanging over the side of the chair. Both Ms. Linehan and Mr. Bishop testified that they did not smell cat urine in the house. Ms. Linehan confirmed that she had previously worked with Meghan Dunphy and Mr. Bishop stated that he had been friends with Bill Corcoran, Meghan Dunphy's boyfriend, for years.

Testimony of Nancy Linehan on February 3, 2017, Vol. 16, p. 18, p. 38

Testimony of Kevin Bishop on February 3, 2017, Vol. 16, pp. 68-69, pp. 82-83

332. The following are the problems with Ms. Linehan's and Mr. Bishop's statements in attempting to use the same to support a staging theory:

(1) when Cst. Cox entered the home with Cpl. O'Keefe he clearly described the rifle leaning against the tub as depicted in the photos. Cst. Smyth definitely did not enter the house after Cst. Cox and Cpl. O'Keefe went in. Therefore, if the rifle and/or tub were moved after Cst. Cox entered the house then one or more of the RCMP officers would have had to do the same;

(2) Cst. Cox's notes indicate that the paramedics were only in the house for a total of 3 minutes;

(3) both paramedics testified that they did not smell what all police officers who entered the Dunphy residence described as an overwhelming smell of cat urine;

(4) someone, presumably the RCMP, would have had to position Mr. Dunphy's hands as if they were holding a rifle after the paramedics left the scene.

333. The only conclusion which can be reached is that Nancy Linehan and Kevin Bishop are mistaken, having regard to the short period of time they were in the house, the photographs which were taken shortly thereafter, their relationship with the parties involved and/or the effect of gossip and discussion in the community. To suggest that Cst. Smyt staged the scene is outlandish enough, to suggest that the RCMP engaged in such staging is simply ridiculous.

(v) Mr. Dunphy's level of disability

334. On numerous occasions throughout the Inquiry counsel for Meghan Dunphy described Mr. Dunphy as "disabled" or "partially disabled", apparently suggesting that Mr. Dunphy, as a result of his physical limitations, could not reach to the right-hand side of the chair and lift the gun. This appeared to be the basis upon which counsel for Meghan Dunphy wanted to call the biomechanical engineer to give evidence.

Submissions of Mr. Simmonds of February 3, 2017, Vol. 16, p. 103, p. 115

335. Dr. McGarry provided evidence that Mr. Dunphy suffered from numerous health conditions and that he was not able to carry out tasks such as cutting wood. However, Dr.

McGarry had not carried out any specific tests to determine the level of Mr. Dunphy's mobility.

Testimony of Dr. McGarry of February 1, 2017, Vol. 14, pp. 15-17

336. While there can be doubt that Mr. Dunphy had restricted mobility it would be totally speculative to conclude that he could not reach over the chair and lift the gun. In the preceding week Mr. Dunphy had travelled back and forth to his daughter's house and looked after her house while she was away on vacation. On Easter Sunday Mr. Dunphy had brunch with Meghan Dunphy and Billy Corcoran and there is no evidence that he had any difficulty getting around on that date.

337. Finally, a number of witnesses gave evidence that it was difficult to get into Mr. Dunphy's residence as there was no real step. Cpl. Lee testified that she had to watch her footing getting over the step, as did paramedic Nancy Linehan. There was no evidence presented to the Inquiry that Mr. Dunphy had difficulty getting over this step or that he used any other way to enter his house.

Testimony of Cpl. Lee on February 21, 2017, Vol. 27, pp. 85-86

Testimony of Nancy Linehan on February 3, 2017, Vol. 16, p. 10

(vi) Timing

338. In her interview of April 8, 2015 Meghan Dunphy raised the question of what Cst. Smyth did while waiting for the RCMP to arrive. After the release of the various reports by the Commission questions were raised about Cst. Smyth's actions between the shooting and

calling the RCMP – identified as a 12-14 minute period on the RCMP timeline completed by Wanda Richards. This RCMP timeline, which has since proven to be inaccurate, led to a lot of public speculation about the staging of the scene.

RCMP Report, CIDDD Exhibit P-0003, p. 5

339. The following is what Cst. Smyth suggests is the most accurate description of times:

- (i) 1:30 p.m. – Cst. Smyth arrives in Mitchell’s Brook
- (ii) 1:39:39 p.m. – Cst. Smyth’s last call to Donald Dunphy’s cell phone
- (iii) 1:45-1:50 p.m. – Cst. Smyth attends at Dick and Debbie Dunphy’s
- (iv) 2:05-2:10 p.m. – Cst. Smyth goes back to Donald Dunphy’s residence
- (v) 2:20-2:25 p.m. – shots are fired
- (vi) 2:27:01 p.m. – Cst. Smyth calls RCMP Comm Center
- (vii) 2:30:47 – Cst. Smyth called RNC Comm Center
- (viii) 2:55 p.m. – Cst. Cox arrives

340. In her testimony Wanda Richards verified that the times entered in the timeline as to when parts of the conversation between Cst. Smyth and Mr. Dunphy occurred and when the shots were fired were estimates taken from Cst. Smyth’s various reports and statements. The two time frames which are known to be accurate are the last call to Mr. Dunphy’s cell phone (1:39:39 p.m.) and Cst. Smyth’s call to the RCMP (2:27:01 p.m.).

Testimony of Wanda Richards on February 23, 2017, Vol. 29, p. 34

341. Therefore, if Cst. Smyth entered the Dunphy residence at 2:10 p.m. and the conversation lasted 15 minutes before the call to the RCMP at 2:27 p.m. this makes perfect sense. In order for the staging theory to be accurate the following would have had to have occurred:

(1) Cst. Smyth, who has been described by all police officers who had dealings with him as cool and professional, would have had to lose his temper over Mr. Dunphy's insult and

(i) shot him because Mr. Dunphy took a stick out and threatened him with it; or

(ii) mistook the stick for a gun and, in a moment of panic, shot Mr. Dunphy 4 times;

(2) after the shooting Cst. Smyth, despite the level of adrenaline running through his body, would have had to been calm enough to search the house for a gun (which he did not know was there nor did he have reason to suspect that there was a gun in the residence) and find the gun which was hidden behind the couch;

(3) Cst. Smyth would have had to find a bullet, load the rifle and stage the rifle against the tub in a way that would not be the best way to stage the scene;

(4) for some reason, if Rita Farrell is correct, he would have had to dump the white garbage bucket and then put the Gatorade bottle and Workers' Compensation papers back on top of the white bucket;

(5) he would have had to position Mr. Dunphy's hands as if he was holding a rifle.

342. Cst. Smyth would have had to have taken all these steps in 2-7 minutes if he did it before he called the RCMP. If he is alleged to have taken these steps after the call to the RCMP then he would have had to have done the same not knowing if someone had heard the shots and was going to arrive and not knowing where the closest RCMP vehicle was (i.e., for all Cst. Smyth knew there could have been a patrol vehicle in Mount Carmel).

343. The speculative nature of the staging theory was further confirmed by counsel for Meghan Dunphy in the following exchange with the Commissioner when counsel for Ms. Dunphy stated that he did not know what happened in Mr. Dunphy's house:

The Commissioner: So Constable Smyth shoots him, the firearm is where Constable Smyth had put it-

Mr. Simmonds: And for whatever reason-

The Commissioner: -after he found it behind the couch, and then he brings it over and places it, and my question there is: Why would you place it in that direction?

Mr. Simmonds: I, I can't answer why it would be placed in that angle.

The Commissioner: But that's, that's the problem, you see, with putting up a scenario. You're trying to - my job, I think, has to be to find logical-

Mr. Simmonds: To fit everything in.

The Commissioner: - complete inferences to go, you know, to follow a particular path, and when I come to-

Mr. Simmonds: And maybe Constable-

The Commissioner: - a bridge that's been blown up because there's no explanation, I can't keep following that path.

Mr. Simmonds: No, maybe Constable believed that is the position the gun would likely have come in if someone was shot with it in their hands.

The Commissioner: And if he had believed that, just to follow on in that same scenario, why would he have left the stick there just inside the-

Mr. Simmonds: I suspect that this was, whichever thing took place, a traumatic moment. I don't think it's something where you would be able to take all kinds of time, particularly when he indicates he phoned within two to three minutes after the event. The shots likely would have been heard, or could have been heard by other people, so there would be an onus to be very expeditious on this.

The Commissioner: Okay. I appreciate your, your comments, Mr. Simmonds, and I should point out that I'm getting you to help me do my job in terms of giving my, giving you my – sorry giving me your views of various scenarios that might arise.

Mr. Simmonds: I don't know what took place.

The Commissioner: We've gone, we've gone a bit more widely, but I think it will help me in terms of when I come to the question of deciding whether or not this evidence is of, of your engineer is going to help me to any-

Mr. Simmonds: I don't know-

The Commissioner: - to any significant degree. Go ahead.

Mr. Simmonds: I don't know what took place now.

The Commissioner: Right.

Mr. Simmonds: I don't accept Officer Smyth's rendition for a whole lot of logical reasons with respect to stick placement, gun never seen before, Mr. Dunphy not being in a bad mood, invites him in, is going to take on an armed police officer that he's just met who's in far better shape than he is, he's going to try and do this from seated in a chair. All of those things cry out for this, this just doesn't fit right. (emphasis added)

Exchange between Commissioner and Counsel for Meghan Dunphy on February 23, 2017, Vol. 16, pp. 126-127

344. When one logically analyses these allegations it becomes clear that they are total speculation and, as Cst. Smyth suggested, "outlandish". The Commissioner should totally dismiss the staging theory as speculation and state unequivocally that there is no factual or evidentiary basis to support the same.

(9) Donald Dunphy's state of mind

345. While Donald Dunphy may have been in a good mood at brunch on Easter Sunday the evidence given by Meghan Dunphy was that he was quick to anger and could become agitated very easily. Also, the evidence given by Dick and Debbie Dunphy and Rochelle Nolan was that he could be difficult to deal with. Dick Dunphy described his brother's attitude as if the world owed him something.

346. There can be no doubt that Donald Dunphy was in a lot of pain and had a long-standing grievance with Workers' Compensation and government officials. However, as noted by the Consumer Representative, it was only when he started using Twitter that he became particularly aggressive and insulting. In fact, Mr. Fleming noted that Mr. Dunphy's response on Twitter appeared to be disproportionate to the way he had been treated by

Workers' Compensation over the years. On this point the Citizen's Representative stated at p. 39:

*In terms of formal written protests or protracted writing or email campaigns, Mr. Dunphy's file contained only a fraction of these as compared to other claims of similar duration reviewed by this office in 15 years of investigating Workplace NL. However, there were clearly perceptions on Mr. Dunphy's behalf that he had suffered many of the anti-therapeutic consequences of injured workers outlined in scholarly journals, and he believed firmly he was driven into poverty by being on claim. **This was exemplified increasingly by his active Twitter account, which gave him a platform to denounce publicly and around the clock Workplace NL and certain employees of Workplace NL, and politicians.***

*Mr. Dunphy clearly felt dehumanized by a bureaucratic and a perceived adversarial process, and had formed the opinion that he, and other injured workers were powerless in a system that worked in favour of the other stakeholders in the triangular worker's compensation process outlined on page 5 of this report: employers and the government. **This is somewhat puzzling again because over 30 years and three claims, the legitimacy of his injuries were never contested, there is no documentary evidence of malice on the part of Workplace NL, and he made only one formal appeal to WHSCRD, in 2005.** (emphasis added)*

347. There can be no question that in late 2014, early 2015 Mr. Dunphy started making bizarre allegations on Twitter which could be described as disconcerting comments. While he might never have made any direct threats, as late as March 3, 2015, a month before his death, Mr. Dunphy was talking about tarring and feathering politicians and using terms such as murder, referring to death and talking about guns.

348. Prior to April 3, 2015 Mr. Dunphy had directed tweets to Premier Paul Davis and Deputy Premier Steve Kent, displaying hostility towards these politicians. Under examination by her own counsel Ms. Dunphy confirmed that for a number of months Steve Kent had been looking into her father's file but then Mr. Kent stopped taking her father's calls. In

fact, Steve Kent blocked her father on Twitter and didn't want any relations with him anymore. Ms. Dunphy thought this occurred a few months before he died but she was not 100% sure.

Testimony of Meghan Dunphy on January 9, 2017, Vol. 1, pp. 111-112

349. According to Dr. McGarry, Mr. Dunphy had not been diagnosed with a mental illness. However, Cst. Smyth suggests that he showed signs of a person in crisis as he was living in squalor similar to the living conditions of Norman Reid as outlined in the Reid Inquiry Report. Also, his tweets showed an escalation in aggression and shortly before his death Mr. Dunphy had made the comment to Colin Dinn that he felt someone was coming to get him and let them come.

Testimony of Dr. McGarry on February 1, 2017, Vol. 14, p. 21

Report of Inquiries into the Sudden Deaths of Norman Edward Reid and Darryl Brandon Power, December 16, 2003, The Honourable Donald S. Luther

350. It is also clear Mr. Dunphy was smoking a lot of marijuana and taking painkillers. While marijuana was being used by Mr. Dunphy for pain management common sense dictates that the extensive use of any drug or a combination of drugs can affect the way a person thinks or perceives what is happening around him. Dr. McGarry testified that Mr. Dunphy had been using narcotics for pain relief for many years.

Testimony of Dr. McGarry on February 1, 2017, Vol. 14, p. 27

351. When you take into account Mr. Dunphy's living conditions, his long-standing grievance and anger it is not a leap to accept that Mr. Dunphy was an individual who could

potentially “lose it” at any time. While there is a speculative element to this suggestion it is also supported by the facts. Also, while there is no evidence that he was told he might have cancer he was told by Dr. McGarry on March 6, 2015 of the results of the ultrasound on his right kidney and Dr. McGarry recommended an MRI for further evaluation. Dr. Avis confirmed that Mr. Dunphy had a growth on his kidney.

Testimony of Dr. McGarry on February 1, 2017, Vol. 14, p. 29-30

Testimony of Dr. Avis on February 27, Vol. 31, p. 90

352. The cumulative effect of the abovenoted is that Mr. Dunphy had a potential to be aggressive yet other than the evidence of the incident in the British Virgin Islands there is no indication, according to police officers who worked with him, that Cst. Smyth was anything other than calm and professional.

(10) Credibility of Cst. Smyth

353. As has been reviewed throughout this Brief, Cst. Smyth made oral statements to the police officers at the scene and the RNC officers whom he met with at the Holyrood Detachment. Although there are several minor discrepancies in the statements reported by the RNC officers (where the bat was and where the gun came from) these oral statements are basically consistent. In fact, any apparent discrepancies most likely result from the failure of the RNC officers to take accurate notes than what Cst. Smyth said. Cst. Smyth’s version of events has always been amazingly consistent.
354. Cst. Smyth was totally co-operative with the police investigators and the internal RNC investigation and provided the following statements:

- (1) RNC Narrative Case Summary, April 6, 2015, CIDDD Exhibit P-0128
- (2) Statement to the RCMP, April 6, 2015, CIDDD Exhibit P-0119
- (3) Transcript of Re-enactment #2, April 10, 2015, CIDDD Exhibit P-0120
- (4) Statement to Saskatoon Police, June 17, 2015, CIDDD Exhibit - 0121
- (5) Statement #2 to RCMP, August 26, 2015, CIDDD Exhibit P-0122
- (6) Statement #3 to RCMP, September 14, 2015, CIDDD Exhibit P-0217
- (7) Statement #4 to RCMP, November 9, 2016, CIDDD Exhibit P-0123

355. In addition to these numerous statements Cst. Smyth was interviewed by Commission counsel over a 3 day period from December 20-22, 2016.

356. Cst. Smyth initially testified over a 6 day period at the Inquiry from January 16-18 and January 23-25, 2017. As a result of the discovery of additional Blackberry messages Cst. Smyth was recalled to give testimony before the Inquiry on March 6, 2017. These Blackberry messages were always on Cst. Smyth's phone and therefore were not "new" in this respect.

357. Besides the numerous police statements and extensive testimony before the Inquiry, Cst. Smyth's personal and professional life was put under a microscope during the Inquiry. Cst. Smyth does not make this comment by way of complaint but simply to state that it is very difficult for any individual to withstand such extensive scrutiny without character flaws, moral lapses and professional mistakes being exposed. In a trial process much of the evidence which was put to Cst. Smyth on examination and cross-examination would

have been potentially inadmissible at trial (i.e., evidence of bad character, breach of privacy in the use of private communications, inadmissible opinion evidence, inadmissible hearsay, etc.).

(i) Inconsistencies and discrepancies

358. Having regard to the number of statements given by Cst. Smyth it is not surprising that there would be some memory lapses and inconsistencies/discrepancies in his testimony. What is surprising is the small number and minor nature of the inconsistencies and discrepancies in his numerous statements, his interview with Commission counsel and his 7 days of testimony before the Inquiry.
359. Furthermore, having regard to the traumatic nature of the shooting incident it is not surprising that Cst. Smyth's estimation of time may be questioned or that certain descriptions of events may appear to lack accuracy. This is entirely expected in a situation like this, especially when Cst. Smyth is testifying about incidents that occurred in minutes and even seconds.
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(ii) Testimony at the Inquiry

360. One issue for which Cst. Smyth has been criticized is his failure to tell the Inquiry that he sent his Narrative Case Summary to Sgt. Tim Buckle for review. During his previous testimony Cst. Smyth had stated that this Narrative Summary was prepared by himself without the assistance of anyone else.

361. The Blackberry messages which were discovered after Cst. Smyth finished his testimony established that Cst. Smyth had sent the Narrative Case Summary to Sgt. Buckle for his review. In relation to whether Cst. Smyth had consulted with, or sought advice from anyone, when drafting his notes from the day of the shooting, Cst. Smyth had previously advised Commission counsel that he had sent them to his legal counsel. However the BBM exchange with Sgt. Buckle showed that they were also sent to Sgt. Buckle. Cst. Smyth testified that he did not recall sending the document to Sgt. Buckle. He testified that speaking with Sgt. Buckle was a matter of routine for him. During his testimony on March 6, 2017 Cst. Smyth stated that during his interview with Commission counsel he might have discussed this with others but wasn't sure.

Testimony of Cst. Smyth on March 6, 2017, Vol. 36, pp. 35-37

362. Furthermore, while Sgt. Buckle offered suggestions with respect to formal language he did not offer any suggestions on the facts. In any event, Sgt. Buckle's suggestions were not accepted by Cst. Smyth, as confirmed by the e-mails sent between Cst. Smyth and Sgt. Buckle. When questioned on cross-examination by counsel for Megan Dunphy about how he could forget the conversation between himself and Sgt. Buckle, Cst. Smyth explained:

...When I was first asked when I went to the RCMP headquarters for my interview my response was around 11 o'clock in the morning. I completely forgot sitting down with a psychologist for two hours that very same day. But we were able to, with Commission counsel, piece together that day and many parts of the rest of that week by going through phone records and various components of other disclosure. And in the exact same way we're doing it here now with this so-called new information that I provided to the RCMP two years ago.

Testimony of Cst. Smyth, January 18, 2017, Vol. 6, p. 82 and testimony of Cst. Smyth, March 6, 2017, Vol. 36, pp. 40-41, p. 48 and p. 80

See e-mails dated April 6, 2015, CIDDD Exhibit P-0788

363. When asked further about this by his own counsel, Cst. Smyth stated:

I forgot almost the entire course of the day. Other than providing a statement to the RCMP at some point in time that day it was the recall that Commission Counsel provided in December that I was able to piece it together. I don't think it was until the third day –

...

It wasn't until the third day of our Commission Counsel interviews in December I was able to definitively say, based on text messages they showed me between my wife and I that I did that psychological debriefing with a physiologist. Now that is a significant event in my life, speaking to Tim Buckle is not.

Testimony of Cst. Smyth, March 6, 2017, Vol. 36, pp. 92-93

364. While at first glance the Commissioner might be concerned about Cst. Smyth's "forgetfulness" Cst. Smyth refers to the following:

- (1) the consultation with Sgt. Buckle did not result in any substantive changes to the Case Summary and, as Cst. Smyth had previously testified, he consulted Sgt. Buckle on many issues. For example, Cst. Smyth admitted that he sent his April 10, 2015 e-mail to Sgt. Buckle for his review. Since there were no substantive changes made Cst. Smyth had no reason to lie about sending this document to Sgt. Buckle. In this respect his explanation that he forgot about it makes sense;

- (2) Cst. Smyth forgot making the phone calls to Mr. Dunphy's cell phone which were ultimately very helpful to him in establishing a definite time frame. Also, Cst. Smyth forgot meeting with a psychologist the day after the shooting;
- (3) Cst. Smyth knew, prior to April 5, 2015, from his work in the CIU and PSU that deleted messages from the BBM were never truly deleted but that such messages could be recovered by police forces and technical specialists.

(iii) BBM messaging with Trevor

365. As a result of Blackberry messages being discovered after Cst. Smyth finished his testimony he was recalled on March 6, 2017 to address these messages. Two sets of messages which were at issue were the BBMs exchanged with his friend Trevor on April 4, 2015 and Sgt. Tim Buckle on April 6, 2015.
366. The messages with Trevor included the comment "Gotta go deal with some lunatic threatening the premier etc." and "If I have to arrest him then I'll be late". A little later on that day Trevor asked Cst. Smyth if he arrested buddy and Cst. Smyth replied "Nope, tomorrow". These messages could be concerning, if taken out of context, because they paint a picture of a police officer who, as opposed to being empathetic to those with mental illness, was cavalier in his approach.
367. Cst. Smyth admitted that this message was in reference to Mr. Dunphy. Cst. Smyth testified that the language he used about threatening and arresting was to simplify police activity to a friend who wasn't interested in what he was doing but only whether he

would be there for dinner. He used the word lunatic to describe someone who ranted and raved and, from what he had seen of Mr. Dunphy's social media presence at that early stage, he had a tendency to rant. Cst. Smyth testified that he did not use that term to describe someone with mental health issues and he would never use that term in the presence of Mr. Dunphy, nor would he have used it after the fact, after seeing the poor state Mr. Dunphy was in. Cst. Smyth also used the word lunatic in a conversation with Sgt. Buckle to describe some guy he did not know but who was posting online comments about the incident, thereby establishing that this was a term used by Cst. Smyth which did not refer to someone with mental illness.

Testimony of Cst. Smyth, March 6, 2017, Vol. 36, pp. 57-58

368. In relation to the comment "If I have to arrest him then I'll be late", Cst. Smyth testified that he did not go to Mitchell's Brook with the intention of arresting Mr. Dunphy. Rather, this message was reflective of the unpredictability of policing. Oftentimes police officers do not know the situation they may have to deal with, as confirmed by Sgt. Massine. On cross-examination by counsel for Megan Dunphy Cst. Smyth explained that the conversation with his friend needed to be viewed in context including the relationship and familiarity of the two people messaging. Cst. Smyth explained further on cross-examination by his own counsel:

In a relationship between, this case two people, it's a very private conversation. You know each other's personalities. You know where sarcasm is going to be picked up. You may share different backgrounds whereby you can use darker types of humour that mightn't widely be accepted outside of that relationship. And as your audience gets broader you have generally to adjust your, how you speak accordingly. The same be applied to how I conduct myself at work.

Testimony of Cst. Smyth, March 6, 2017, Vol. 36, p. 59, p. 75, p. 87

369. Cst. Smyth was also asked about another conversation with his friend regarding his requalification at the shooting range where he stated “Worked for me the first time... So...” Cst. Smyth testified that this message exchange was immature and inappropriate and was basically bravado.

Testimony of Cst. Smyth, March 6, 2017, Vol. 36, p. 64

370. The point being made by Cst. Smyth was that he was having a private conversation with a friend, akin to sitting around having a beer and making off-color and stupid comments. These messages do not reflect tone of voice and can easily be taken out of context. In fact, during his conversation with Tom Mahoney, which occurred a couple of hours after the lunatic comment, Mr. Mahoney described Cst. Smyth as being totally professional in his approach to the situation and added that he did not say anything derogatory about Mr. Dunphy.

(iv) The Andrew Abbass comment

371. Cst. Smyth was questioned about another exchange he had with Sgt. Buckle surrounding the arrest of Andrew Abbass under the *Mental Health Care and Treatment Act* where Cst. Smyth responded “loser” in reference to Mr. Abbass. When asked why he would refer to Mr. Abbass using that term, Cst. Smyth provided the following explanation:

My thought process at the time, personally, it's an extremely emotional response. It's an emotional period. I was aware of the communications that he was having with the Premier's office, communications via social media that was causing security concern. And he had a lot of personal things to say directed at me - while my identity wasn't released at that time - there was reference to me, there was reference to being, you know, tied to the Premier's office directly in being sent to see an individual. So, I was sent to see Mr. Dunphy by then to carry out a specific act. There were a lot of really unkind things said in general, and a lot of time spent on

social media doing just that. This was an emotional response to that. And inappropriate, in a private conversation, sure; intently inappropriate when it's released in this form, absolutely.

Testimony of Cst. Smyth, March 6, 2017, Vol. 36, pp. 51-53

372. Cst. Smyth testified that his “private communications with a friend don’t correlate to how I would treat somebody in a professional capacity and that stands to this day”. Cst. Smyth testified that if Andrew Abbass or anyone needed policing services they would get professional services from him. On cross-examination by counsel for Megan Dunphy Cst. Smyth further explained that the comments he made are not reflective of him as a professional, “I don’t think that reflects on my professional work. It’s a conversation in private”.

Testimony of Cst. Smyth, March 6, 2017, Vol. 36, p. 53 and p. 84

(v) The nature of text/BBM messaging

373. Privacy had always been a significant concern to Canadian citizens. The ability to communicate freely, even in a way that is inconsistent with our professional lives, is important for maintaining personal autonomy. For example, black humour may become a way for professionals such as lawyers, doctors, and police officers to cope with the stress of their jobs.
374. The advancements in technology over the last two decades have also meant that privacy concerns have to be extended to new technology and new technological devices such as cell phones and smart phones. In *R. v. Vu* 2013 SCC 60 the Supreme Court of Canada

recognized the importance of requiring prior authorization before searching personal or home computers.

375. In *R. v. Telus Communications Co.* [2013] S.C.J. No. 16 Abella J. described text messaging as follows in paragraphs 1 and 5:

1 For many Canadians, text messaging has become an increasingly popular form of communication. Despite technological differences, text messaging bears several hallmarks of traditional voice communication: it is intended to be conversational, transmission is generally instantaneous, and there is an expectation of privacy [page 15] in the communication.

.....

5 Text messaging is, in essence, an electronic conversation. The only practical difference between text messaging and the traditional voice communications is the transmission process.

376. However, one practical difference between an electronic conversation and a traditional voice communication is the lack of tone and context. A comment that is meant to be sarcastic or joking may not appear that way on paper.

377. On the importance of privacy in the new age communications Cromwell J. stated at paragraphs 112-116 of *R. v. Fearon* [2014] S.C.J. No. 77:

*112 Our Charter jurisprudence recognizes the concept of a “sphere of privacy” to define the proper limits of state authority in a free and democratic society. It recognizes that privacy – a sphere of protection for private life – is essential to personal freedom and dignity (see *R. v. Tessling*, 2004 SCC 67, [2004] 3 S.C.R. 432, at para. 16). Privacy gives us a safe zone in which to explore and develop our identities and our potential both as individuals and as participants in our society.*

113 On our digital devices, we may choose to investigate an idea on the Internet without wishing to attach ourselves to it. We may take pictures in the context of an intimate relationship, but not wish that these pictures be

seen by others and redefine our public image. We may debate controversial ideas through text message or email, but not intend to commit to the opinions expressed.

114 Individuals should be free to choose the audiences with whom they share their ideas, habits, experiments and movements. We should be free to act, think, feel, and ponder outside the public gaze. We should feel free to take actions that may [page 672] elicit negative reactions, or which may be inherently “incompatible with ... putting on a public face”: L. Austin, “Privacy and the Question of Technology” (2003), 22 Law & Phil. 119, at p. 146, citing T. Nagel, “Concealment and Exposure” (1998), 27 Phil. & Publ. Aff. 3, at pp. 18-20. But individuals would fear to do these things if there were no private arena; no place for connections shared only between intimately connected people; no controversial discussion and debate. As Professor Austin argues, at pp. 146-47, we need this private space in order to grow as distinct individuals, and in order to have an “authentic inner life and intimate relationships”.

378. The point being made is that when Cst. Joe Smyth sent these Blackberry messages he was speaking as a private individual and not as a police officer in his professional capacity. The comments made, while distasteful and even bothersome, cannot be used to impute a sinister motive to comments made in private, especially where Cst. Smyth had consented to providing his phone to the police and had not put any restrictions on such consent. Cst. Smyth obviously felt that he had nothing to hide.
379. Cst. Smyth also testified that he did not delete messages or do anything to intentionally mislead the investigators. Cst. Smyth urges the Commissioner to examine his comments to Trevor with these basic principles in mind. In such circumstances the Commissioner should be wary of drawing an adverse inference of Cst. Smyth’s credibility where different interpretations to these very private messages can be applied.

(vi) Conclusion on credibility

380. Applying the principles relating to the assessment of credibility outlined in Part I of this Brief the Commissioner should find that any inconsistencies and discrepancies are of little consequence, considering the number of statements and testimony given. Cst. Smyth was honest in his testimony and admitted that he made mistakes such as sending out the e-mail of April 10, 2015 and making contact with the RCMP investigators while the investigation was ongoing.
381. Giving testimony in a court room is hard at the best of times – baring your soul and having your innermost and private thoughts made public before a viewing audience has to be a harrowing experience. Cst. Smyth withstood extensive and aggressive cross-examination and, although he might have been mistaken on some details, he has always been consistent on what occurred in Donald Dunphy's house on April 5, 2015.

(11) Corroboration of Cst. Smyth's credibility

382. On a number of occasions throughout this Inquiry counsel for Meghan Dunphy has said that he does not accept Cst. Smyth's version of events. Meghan Dunphy herself made this very clear to Staff Sgt. Osmond in her interview of April 8, 2015 and in the subsequent letters written on her behalf by her counsel. Ms. Dunphy's response is, understandably, an emotional response. However, logic and common sense must guide the Commissioner in making findings of fact, as earlier outlined herein.

383. However, this is not a case where the Commissioner has to simply rely upon the evidence of Cst. Smyth. While it is true that Cst. Smyth is the only living eyewitness this Inquiry, this Inquiry has heard from different forensic experts who have provided their reports and testified. While Retired Justice Riche says dead men tell no tales, it is Cst. Smyth's position that forensic evidence certainly does help tell the tale, recreate the scene and allow the Commissioner to make inferences based on fact, not speculation.

384. It is Cst. Smyth's position that the following forensic and other evidence corroborates the truth of his version of events:

- (1) the comments and actions attributed to Mr. Dunphy by Cst. Smyth are confirmed by Meghan Dunphy;
- (2) the rifle, which was last seen by Meghan Dunphy behind the couch, was found leaning against the bluish tub. There was no evidence provided that would suggest Cst. Smyth otherwise had previous knowledge of the existence of the rifle;
- (3) the report and testimony of Darryl Barr confirmed that the physical description of the shooting given by Cst. Smyth was confirmed by the physical evidence;
- (4) the evidence of Dr. Simon Avis established that there were no signs of a struggle and that Mr. Dunphy could have followed Cst. Smyth with the rifle, even after being shot;
- (5) the forensic identification officers did not find anything in the crime scene which refuted Cst. Smyth's version of events;

- (6) Sgt. Massine stated that the actions taken by Cst. Smyth to defend his own life were appropriate and consistent with National Use of Force guidelines;
- (7) the use of force experts agreed that Cst. Smyth was justified in using deadly force when a firearm was pointed at him.

385. Corroboration becomes important if the Commissioner has any concerns about Cst. Smyth's credibility. Corroboration is evidence independent of Cst. Smyth which confirms that he is telling the truth. In this case the independent, confirmatory evidence consists of forensic and scientific evidence which has been reviewed throughout this Brief. This evidence should assist the Commissioner in determining that Cst. Smyth's version of events is credible and accurate.

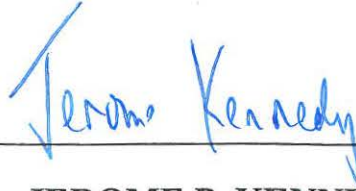
PART V**CONCLUSION**

386. Donald Dunphy had obviously led a tough life but his continued fight to correct what he perceived as an injustice led to him becoming angry and hostile towards government officials. When Mr. Dunphy started using Twitter his language became adversarial, aggressive and open to interpretation. While the death of Mr. Dunphy is tragic and unfortunate it must be emphasized that on April 5, 2015 Cst. Joe Smyth was simply doing his job as a police officer and a member of the PSU. What seems to have been forgotten by many members of the public is that Donald Dunphy pointed a rifle at Cst. Smyth and Cst. Smyth was forced to defend himself, thereby causing Mr. Dunphy's death.
387. Oftentimes in police investigations, as in life, events occur for which there are no logical or reasonable explanations. Human beings are unpredictable and at times can act in a way that is not consistent with their previous character and history, as Donald Dunphy did on Easter Sunday 2015. Sometimes, unfortunately, there is no explanation for human behaviour. While we will never know what was going through Donald Dunphy's mind when he pointed a firearm at Cst. Joe Smyth we know one thing for sure - he pointed a firearm at Cst. Smyth and it was the act of pointing the firearm which led to Mr. Dunphy's death.
388. Cst. Smyth again highlights the importance of avoiding hindsight and refers the Commissioner to the following comments of Justice Archie Campbell in his article on the Bernardo review:

The only fair way to review past conduct is to avoid hindsight. The only fair way is to put yourself in the shoes of the person who had to make the decision. What did they know when they decided to quit a particular line of investigation? What did they know and what did they think when they failed to report a particular incident? Even when one tries to guard against it, hindsight remains an insidious temptation not only to the public and to the critics of an organization, but also to those charged with reviewing past conduct. While hindsight is essential in the recommendation phase, it must constantly be remembered in the fact-finding phase of every inquiry that it is unfair to judge past conduct in light of hindsight.

389. Cst. Smyth suggests that, in order for the Commissioner to accept the facts put forward by Meghan Dunphy, he would have to engage in unacceptable speculation. Cst. Smyth's testimony about what happened in Donald Dunphy's house is, as previously stated, supported by independent, confirmatory evidence. Cst. Smyth's reason for visiting Donald Dunphy is supported by expert evidence and the evidence of numerous police officers.
390. In conclusion, Cst. Smyth again emphasizes that he co-operated fully with the police investigators, never refused any police requests and his actions are entirely consistent with those of an innocent man. The Commissioner can make recommendations to avoid a situation like this from reoccurring in the future but Cst. Smyth deserves a finding from the Commissioner that he acted in accordance with police practice and policy in visiting Mr. Dunphy and that Cst. Smyth is telling the truth about what happened in Mr. Dunphy's house. Also, Cst. Smyth deserves a finding that the conclusion of the RCMP investigation that there was no evidence to support the laying of criminal charges is correct.

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