

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

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**REPLY SUBMISSION OF CST. JOSEPH SMYTH**

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Before the Honourable Justice Leo Barry, Commissioner

Filed by:

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## REPLY TO MEGHAN DUNPHY'S SUBMISSION

### (1) Entry into Donald Dunphy's home

1. In the final submission of Meghan Dunphy emphasis is placed on the argument that Cst. Smyth's entry into Mr. Dunphy's home was "a form of egregious state conduct". Ms.

Dunphy further states at p. 5:

*Constable Smyth could only enter Mr. Dunphy's home lawfully with Mr. Dunphy's valid, informed and voluntary consent. Ms. Dunphy submits that her father's consent was not valid or voluntary as it was not informed, by the deliberate choice of Constable Smyth, who believed he was dealing with a vulnerable man.*

2. The following are two of the main issues raised by Meghan Dunphy in her reply:

- (1) Whether or not the invitation to knock principle is applicable and whether or not Cst. Smyth acted in accordance with such principle;

*R. v. Evans*, [1990] S.C.J. No. 1, per Sopinka J. at paragraphs 13-15

- (2) Whether Mr. Dunphy's consent for Cst. Smyth to enter his home was informed and voluntary.

*R. v. Cole*, [2012] S.C.J. No. 53, per Fish J. at paragraph 78

3. In arguing that Mr. Dunphy's consent was not informed and voluntary Ms. Dunphy states at pp. 21-22 of her final submission:

*It is clear from all statements and testimony given by Constable Smyth that before asking for Mr. Dunphy's consent to enter into the house he gave Mr. Dunphy very limited information. Constable Smyth, in plain clothes and driving an unmarked vehicle, told Mr. Dunphy his name, stated that he was RNC, and showed him his walled id and badge while standing at a distance of approximately 20-30 feet away while Mr. Dunphy remained in the doorway. Constable Smyth then asked Mr. Dunphy if he could come in to talk to him. Mr. Dunphy purportedly said yes, come on in". Constable Smyth's weapon and duty belt were concealed by his jacket. Constable*

*Smyth did not tell Mr. Dunphy that he would be bringing a loaded firearm into his home.*

.....

*The evidence before the Commission is that Mr. Dunphy gave a verbal consent to allow Constable Smyth into his residence. Ms. Dunphy submits that Mr. Dunphy's consent was not informed or voluntary as Constable Smyth deliberately withheld information required by Mr. Dunphy to choose whether or not to allow him into his home. Ms. Dunphy submits that Constable Smyth's entry into the home was not reasonable or lawful and resulted in a serious violation of her father's constitutional rights.*

4. Ms. Dunphy's argument on the invitation to knock and consent principles should be rejected for the following reasons:

- (1) Unlike *R. v. Cote* [2011] S.C.J. No. 46 Cst. Smyth was not engaging in the investigation of a criminal offence (paragraph 12);
- (2) Cst. Smyth's threat assessment was being carried out in accordance with accepted threat or risk assessment principles, according to Dr. Hart and Sgt. Lenehan;
- (3) Contrary to Ms. Dunphy's submission of what Cst. Smyth may have thought Meghan Dunphy testified that her father was not emotionally disturbed or mentally ill and there is no evidence that he was impaired by drugs on the date in question;

Testimony of Meghan Dunphy on January 9, 2017, Vol. 1, pp. 20-21 and p. 48; Final Submission of Meghan Dunphy at pp. 11-12

- (4) According to Meghan Dunphy her father knew his rights and could stand up for himself. The evidence of Meghan Dunphy confirms that if Donald Dunphy did not want to allow Cst. Smyth into his house he would not have done so;

Testimony of Meghan Dunphy on January 9, 2017, Vol. 1, p. 64

- (5) Meghan Dunphy confirmed that, despite the sign outside his house, her father would let a police officer into his house, even if he identified himself as a member of the Premier's Protective Detail. Ms. Dunphy testified on this point as follows:

*MS. O'BRIEN: And so, do you think your father would have asked a police officer into his home had he known it was a police officer?*

*MS.M. DUNPHY: Yeah, Dad would let anyone into the house. You know it wouldn't matter who they were, he'd just say come on in, you know, have a seat. Dad was more for, you know, if a police officer was coming or a politician or anything, you know, he'd let them in more in hopes of, okay, well maybe he's here and he can tell me where to go to get help with Workers' Comp, or maybe he can talk to someone who can do this. You know, there would be no reason for him not to let him in the house. He had a medical marijuana card; he was allowed to grow his weed. He had nothing to hide.*

*MS. O'BRIEN: Okay, Do you think it would be the same if your father knew that the officer was a member of the Premier's security detail or protective services unit?*

*MS. M. DUNPHY: Yeah, I think it would have been the same sort of thing. He probably might have asked a few more questions as to why he was there, but I don't see why he wouldn't let him in the home.*

Testimony of Meghan Dunphy on January 9, 2017, Vol. 1, p. 63

- (6) Ms. Dunphy confirmed that her father would have welcomed speaking to someone in authority in the hope of having his problems addressed;

Testimony of Meghan Dunphy on January 9, 2017, Vol. 1, p. 63

- (7) The evidence of Meghan Dunphy corroborates Cst. Smyth's version of events in that Ms. Dunphy confirms that comments attributed to her father by Cst. Smyth would have been said by him (i.e, calling Cst. Smyth a government puppet, her father getting excited and quickly getting angry, her father could be confrontational and certain comments would agitate her father such as comments on the condition of his house). This is especially important where Cst. Smyth had never previously met Donald Dunphy and would have no way of attributing these comments to Mr. Dunphy unless Mr. Dunphy said made the same;

- (8) Cst. Smyth identified himself as a police officer, was in plain clothes which was the normal attire for a member of the PSU, travelled alone for the reasons previously reviewed and did not engage in any form of deception, as indicated by the fact that he clearly identified himself to Dick and Debbie Dunphy and informed both of them and Cst. Cox of his reasons for visiting Mr. Dunphy. There was also evidence before the Inquiry that the vehicle driven by Cst. Smyth would be readily identified in the Mitchell's Brook area as an unmarked police vehicle;

(9) there is no evidence that Cst. Smyth used improper coercion or oppression or made any statements which likely misled Mr. Dunphy into giving his consent (*R. v. O'Connor* [2002] O.J. No. 4410 (Ont. C.A.), per O'Connor A.C.J.O. at paragraphs 70 and 74);

(10) although Mr. Dunphy unequivocally invited Cst. Smyth into his residence the invitation to enter may also be implied from the circumstances when one compares the testimony of Cst. Smyth to the evidence of Meghan Dunphy (*R. v. Atkinson*, 2012 ONCA, per Watt J.A. at paragraph 48);

(11) there is no evidence that Cst. Smyth forced himself into the residence (i.e., pushing the door open) and, in fact, the evidence is contrary to such proposition (*R. v. Wilhelm*, [2014] O.J. No. 1176 (Ont. S.C.J.), per Hill J. at paragraph 108).

5. It is Cst. Smyth's position that for the Commissioner to accept Meghan Dunphy's version of events he would have to engage in improper speculation contrary to the evidence. The evidence of Cst. Smyth that Mr. Dunphy gave his consent is corroborated by Meghan Dunphy and Ms. Dunphy's argument on this issue should be rejected by the Commissioner.

**(2) Improper reference to the evidence of Tom Mahoney**

6. Ms. Dunphy in her final submission also continues to place emphasis upon a quote from the police statement of Tom Mahoney which was pointed out as being inaccurate during testimony at the Inquiry. At pp. 18-19 Ms. Dunphy states:

*In his April 9, 2015 RCMP statement, Mr. Mahoney stated that Constable Smyth informed him during their phone call of April 4, 2015 at 4:07 pm that he was investigating a tweet that threatened generally some government officials and their families. Constable Smyth told Mr. Mahoney that he thought he was “going to have to pay this gentleman [Mr. Dunphy] a visit”. **Mr. Mahoney also told police that Constable Smyth stated that “the worst thing about these situations is that these guys...tend to be in their house, they tend to feel the freedom to say what they like, and they don’t realize there are consequences for these statements”.** Ms. Dunphy submits that this statement is important for the Commissioner to keep in mind when examining what occurred in the encounter between Constable Smyth and Mr. Dunphy.*

*Ms. Dunphy submits that Constable Smyth’s telephone conversation on April 4, 2015 with Mr. Mahoney is very significant. He clearly told Mr. Mahoney, a professional trained in threat assessment and security, that he was investigating a threat made generally against elected officials and their families. He had decided he was going to make a home visit to Mr. Dunphy. **Most importantly, he noted to Mr. Mahoney that there were “consequences” for “these statements”.** (emphasis added)*

7. During examination by Commission counsel at the Inquiry Mr. Mahoney clearly stated that the comments attributed to Cst. Smyth by counsel for Meghan Dunphy were, in fact, made by him. On this point Mr. Mahoney testified at the Inquiry:

*MR. MAHONEY: Absolutely. That is the discussion that we had because what I had stated is that the interactions that we had regarding social media, as we’ve discussed earlier regarding the naming of individuals, people being concerned bringing them to my attention, has caused – you know some of which caused some concern. And that is what I said.*

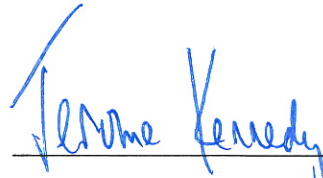
***And I said part of the problem is that from my perspective – is that sometimes people sitting in their own home, expressing themselves, don’t necessarily realize the consequences of their actions. And this was the kind of conversation that was taking place between myself and the***

*officer on the phone that, you know, people sitting in their homes sometimes expressing themselves don't necessarily realize how this is going to be read. Sometimes the written word is viewed differently than the spoken word. (emphasis added)*

Testimony of Tom Mahoney on January 10, 2017, Vol. 2, p. 37

8. Mr. Mahoney clarified what was said in his police statement and stated under oath that he made the comments referred to in Meghan Dunphy's final submission and not Cst. Smyth.

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