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**Commission of Inquiry Respecting the Death of Donald Dunphy**  
**Submissions on behalf of Meghan Dunphy**

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## Table of Contents

	<u>Page</u>
I. Introduction	
(i) Prologue	3
(ii) Summary of Ms. Dunphy's main positions	4
II. Donald Dunphy	
(i) Donald Dunphy, the man	5
(ii) @Sculpen	7
(iii) Donald Dunphy's past dealings with police	8
(iv) Poverty and the danger of dehumanization	9
(v) Donald Dunphy: "a person in crisis"?	10
III. The Protective Services Unit	
(i) The PSU: 2012-2015	13
(ii) The threat assessment protocol employed in the PSU generally	14
(iii) The "tweets of concern" and the Dunphy threat assessment process	16
IV. Mitchell's Brook: April 5, 2015	
(i) Arriving in Mitchell's Brook	20
(ii) The search through the window and Debbie Dunphy	21
(iii) Obtaining Consent to enter the home	21
(iv) Entering through the front door	23
(v) In the living room	24
(vi) Mr. Dunphy's questioning of Constable Smyth	25
(vii) Contradictory evidence of the encounter	26
(viii) The general approach to Mr. Dunphy: empathy?	27

V.	The RCMP investigation	
(i)	The basics	29
(ii)	The scene	30
(iii)	The stick	31
(iv)	The glasses	32
(v)	Mr. Dunphy's physical condition and other questions	33
(vi)	April 5-7, 2015	33
(vii)	Mr. Dunphy's body	35
(viii)	Ms. Dunphy's retention of legal counsel	35
(ix)	Individual civilian/officers	36
VI.	Police Culture:	
(i)	"we don't need the bad publicity" <sup>1</sup>	38
(ii)	The need for a Civilian Investigative Body: <i>"That could have been me"</i> <sup>2</sup>	40
VII.	Conclusion	41

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<sup>1</sup> RCMP Civilian member Wanda Richards, Testimony of February 23, 2017 at p. 31

<sup>2</sup> Exhibit P-0144, p. 6, transcript of Constable Adrian Cox to RCMP Comms Centre, April 5, 2015

## I. Introduction

### (i) Prologue:

On Easter Sunday, April 5, 2015, Donald Dunphy was a citizen residing peacefully within his own private residence in Mitchell's Brook, NL, the community where he lived all of his 58 years. Mr. Dunphy was an injured worker whose commentary on twitter drew him to the attention of both the security personnel of WorkplaceNL and the staff of the Premier's Office. Constable Joseph Smyth of the Royal Newfoundland Constabulary was on duty and working as the acting Sergeant of the Premier's and Elected Officials' Protective Services Unit when he drove the 88 km to Mitchell's Brook to make an unscheduled home visit to Mr. Dunphy. Constable Smyth entered onto Mr. Dunphy's property and subsequently into the residence purportedly with the consent of Mr. Dunphy. After an approximate 15 minute encounter inside the home, Donald Dunphy was shot and killed by Constable Smyth.

Constable Smyth called the RCMP Holyrood Detachment to respond to the scene. The St. John's RCMP Major Crimes Unit commenced an investigation. Public interest was high and concern immediate. Approximately 24 hours after the shooting, then Premier Paul Davis commented publicly.<sup>3</sup> The RCMP issued an unusually detailed press release stating that Mr. Dunphy had pointed a loaded rifle at Constable Smyth prior to being killed.<sup>4</sup> An independent observer in retired Justice David Riche was retained by the RCMP to oversee their investigation for transparency. Five days after the shooting, a lengthy email authored by Constable Smyth relaying his thoughts about the incident was released publicly by the CBC. Ultimately, the Alberta Serious Response Team was brought in to review the investigation.

A constellation of unique factors contributed to the heightened public concern. First, Constable Smyth was a member of the Premier's Protective Services Unit, a position directly related to the government and physically lodged in the Confederation Building. Second, the public were told that Constable Smyth, in plain clothes and an unmarked vehicle, travelled to Mr. Dunphy's home not to investigate a criminal complaint or make an arrest, but rather to discuss Mr. Dunphy's commentary on twitter. Third, Mr. Dunphy was shot and killed inside his own home – his private residence. Finally, there were no living witnesses to the shooting, other than Constable Smyth.

Meghan Dunphy testified that she does not believe that Constable Smyth murdered her father. Ms. Dunphy will never personally believe that her father pointed a rifle at Constable Smyth nor does she accept the version of their interaction as Constable Smyth described it.<sup>5</sup> Ms. Dunphy

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<sup>3</sup> Exhibit P-0547: Premier Davis publicly commented that the Mr. Dunphy's tweets appeared to be directed towards him, another cabinet minister and their family members.

<sup>4</sup> Exhibit P-0570

<sup>5</sup> Testimony of Meghan Dunphy, January 9, 2017 at p. 61

testified that she believes that Constable Smyth made an error and mistook the stick her father used for protection for a gun. While Ms. Dunphy was asked at the outset of the Inquiry to testify about her thoughts as to what took place inside her father's home on April 5, 2015, she recognizes that the Commission's report must be based upon evidence and not speculation. However, Ms. Dunphy will in her submission refer to evidence before the Commission that she believes raises a legitimate concern about Constable Smyth's credibility and the veracity of his version of what took place in the encounter with her father. Ms. Dunphy submits that the RCMP investigation was not thorough or objective and could have missed other evidence that may have existed at the time to point towards any other plausible theory of the event. Ms. Dunphy will address these points later in this submission, but in reference to what she submits are material deficiencies in the RCMP investigation. In making her submissions, Ms. Dunphy is keenly aware that the Commission is to scrupulously avoid making findings which express an opinion as to criminal or civil responsibility in law, although the subject matter of review may overlap.<sup>6</sup>

(ii) Summary of Ms. Dunphy's main positions:

- (a) Ms. Dunphy submits that her father's death was unnecessary and preventable. As a preliminary point, Ms. Dunphy argues that the proper implementation and practice of Recommendation 15 from the 2003 Luther Inquiry into the sudden deaths of Norman Reid and Darryl Power would have prevented the death of Donald Dunphy. Recommendation 15 provided that Regional Health Boards establish mobile health units to respond to mentally ill persons in crisis where no criminal offence is alleged – wherein intervention would be made not by a police officer but by an experienced mental health worker.<sup>7</sup> While Ms. Dunphy submits that her father was not mentally ill, she accepts that he was a person in crisis and that Constable Smyth subjectively believed him to be mentally ill prior to their personal encounter. Ms. Dunphy submits that if Constable Smyth was properly trained<sup>8</sup> and supervised and Luther Recommendation #15 was properly implemented and practiced, he would not have entered the home of Mr. Dunphy as he did on April 5, 2015.<sup>9</sup> Ms. Dunphy submits that Luther Recommendation #15 described the other "level of intervention" that Constable Smyth opined about in his April 10, 2015 e-mail, however it (by design and for common sense reasons) would not involve a first contact from the Premier's security detail in her father's home.<sup>10</sup> Ms. Dunphy submits that recommendations at the Commissioner's discretion must again be

<sup>6</sup> Lamer Report <http://www.justice.gov.nl.ca/just/publications/lamerpart1.pdf> at p. 8

<sup>7</sup> Reid and Power Report [http://www.justice.gov.nl.ca/just/publications/reid\\_and\\_power\\_final\\_report.pdf](http://www.justice.gov.nl.ca/just/publications/reid_and_power_final_report.pdf) at p. 167. Chief Janes briefly addressed the mental health crisis response unit in his testimony and stated that their hours had been increased from 40-84 as a result of RNC research. Testimony of Chief Janes, February 28, 2015 at p. 27.

<sup>8</sup> Chief Janes testified that there is currently no regular mandatory mental health training for all officers. Testimony of Chief Janes, February 28, 2015 at p. 27.

<sup>9</sup> [http://www.ciddd.ca/documents/phasetwo/RNC\\_Mobile\\_Crisis\\_Response\\_Team.pdf](http://www.ciddd.ca/documents/phasetwo/RNC_Mobile_Crisis_Response_Team.pdf)

<sup>10</sup> Exhibit P-0191

put in place to prevent similar tragedies in the future, including mandatory de-escalation training for all officers in the Province as discussed by Dr. Coleman and Sergeant Massine.

- (b) Mr. Dunphy had a high expectation of privacy in his own home. Constable Smyth's entry into his home was a form of state interference in Mr. Dunphy's privacy interests. 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. Ms. Dunphy submits that Constable Smyth's actions comprise a form of egregious state conduct that grossly violated her father's constitutional rights.<sup>11</sup> Ms. Dunphy submits that recommendations at the Commissioner's discretion must be put in place to ensure necessary checks on the discretionary exercise of police power, particularly with respect to the practice of police home visits for non-criminal matters.
- (c) The RCMP investigation was not thorough and was not objective. The evidence before the Commission supports that the RCMP immediately accepted that Constable Smyth's actions were "by the book" before evidence had been evaluated. Ms. Dunphy submits that recommendations at the Commissioner's discretion must be put in place towards the establishment of a Civilian Investigative Body so that police never again investigate police in serious incidents in the Province of Newfoundland and Labrador.

## II. Donald Dunphy

### (i) Donald Dunphy, the man

Donald Dunphy was born on August 23, 1956 and raised in Mitchell's Brook with his three brothers, Dick, Bart and Kevin. In 1984, Mr. Dunphy was involved in a serious workplace accident where he was pinned between two pieces of heavy equipment. He suffered a crushed pelvis and was hospitalized for over a month. This workplace injury would cause him medical problems and chronic pain for the rest of his life.

Mr. Dunphy married Louise Bennett. The couple had a baby boy, but tragically the baby died when he was just one day old.<sup>12</sup> Their daughter Meghan was born in 1988. Meghan's mother, a diabetic, suffered an aortic aneurysm and tragically died at their home in 1991, leaving Mr. Dunphy to raise 3 year old Meghan on his own with the help of extended family who lived nearby.<sup>13</sup>

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<sup>11</sup> R. v. Paterson [2017] S.C.J. No. 15 (S.C.C.); R. v. Law [2002] S.C.J. No. 10 (S.C.C.); R. v. Wills [1992] O.J. No. 294 (Ont. C.A.); R. v. Evans [1996] S.C.J. No. 1 (S.C.C.).

<sup>12</sup> Testimony of Meghan Dunphy, January 9, 2017 at p. 9 and 14

<sup>13</sup> *Ibid.*, p. 11

Mr. Dunphy was a man who loved his daughter deeply, a fact of which she was acutely aware. His desire as a single father to give her a better life was described in detail by Ms. Dunphy in testimony on January 9, 2017.<sup>14</sup> The importance of this relationship to Mr. Dunphy is evident in his selection of his twitter profile picture of him and a young Meghan in a first communion dress.<sup>15</sup> The photographs of a vacant child's bedroom, used for storage by 2015, with the seascape painted wall murals stand out in bright contrast to the rest of the home.<sup>16</sup> Ms. Dunphy also gave testimony about how she and her father moved into her grandfather's residence to care for him in his last days. As an adult, Ms. Dunphy regularly accompanied her father to the doctor and on errands. She cut his hair, made him cold plates and washed his clothes. He regularly stayed at her house and cared for her cat. They shared many similar characteristics. Mr. Dunphy would tease his daughter, tried to 'press her buttons' and made her laugh. The two spoke numerous times a day. After her father's death, Ms. Dunphy was able to shut down his twitter account (despite never having been told his password) by guessing his security codes as she knew that the codes would be about her.<sup>17</sup> Mr. Dunphy taught his daughter some critical life lessons – to always stand up for herself and to never allow anyone to intimidate her. Mr. Dunphy loved animals passionately, particularly cats, and instilled the same in his daughter. Mr. Dunphy loved hockey.<sup>18</sup> He was known to be a good hockey player in his day and still kept old St. John's Maple Leafs hockey calendars and historic Toronto Maple Leafs pictures displayed on the walls in his home.<sup>19</sup>

Ms. Dunphy was forthright in her testimony about other parts of her father's lifestyle that she found frustrating. She testified that she would get upset with him for not cleaning up his house or not keeping a regular routine. She testified that as a teenager she was embarrassed that her father was known in the community to be a marijuana user. Even after Meghan became an adult, her father would still not smoke marijuana in her presence. Ms. Dunphy also testified that her father could be loud and "flighty", meaning confrontational - but never violent - and that they both spoke their minds to each other. Ms. Dunphy testified that she would argue with her father and once her father grew tired of her nagging him, he would tell her to leave his house or escort her out by the arm. Just as quickly, he would be calling her asking her to go to town the next day. Ms. Dunphy testified that since her father's death, she has gained insight into some of the issues that caused her frustration and she now recognizes that her father was doing the best he could in his circumstances of constant physical pain and financial struggle.

Rita Farrell provided other information about Donald Dunphy, the man.<sup>20</sup> She described a friend known to her for over 10 years who was kind-hearted, helpful and trustworthy. Ms. Farrell

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<sup>14</sup> Ibid., p. 13

<sup>15</sup> Exhibit 007, p. 2

<sup>16</sup> Exhibit 0010, Photo 086

<sup>17</sup> Testimony of Meghan Dunphy, January 9, 2017 at p. 79

<sup>18</sup> Testimony of Colin Dinn, January 11, 2017 at p. 107

<sup>19</sup> Exhibit 0010, Photos 063 and 088

<sup>20</sup> Testimony of Rita Farrell, January 27, 2017 at pp. 62-64

valued Mr. Dunphy in her life. She relied on him to act as a caretaker for her summer home during the winter months. Mr. Dunphy would start the fire for her before she got out to her cabin or drop by with jugs of drinking water when needed. Ms. Farrell would visit with meals for Mr. Dunphy and also visited him in hospital in St. John's when he was admitted. He in turn visited with her family in Flatrock. She visited his home several times in 2015 prior to his death and despite the home being messy, she found it to be warm and hospitable.<sup>21</sup> It was obvious during her testimony that Ms. Farrell was deeply impacted by the loss of her dear friend.

Dr. McGarry testified about his five and a half year doctor-patient relationship with Mr. Dunphy and Mr. Dunphy's health generally.<sup>22</sup> Dr. McGarry described a man who was coping as best he could with living in poverty and chronic pain from two workplace injuries.<sup>23</sup> Dr. McGarry testified that he observed that Mr. Dunphy was slow in his movements due to pain. He had also recommended that Mr. Dunphy refrain from bending or twisting due to his back and pelvis injuries.<sup>24</sup> Though he described Mr. Dunphy as a very physically ill man, Dr. McGarry testified that he saw no evidence of Mr. Dunphy being delusional, paranoid or having a mental illness nor did he ever treat Mr. Dunphy for mental illness.<sup>25</sup> Importantly, Dr. McGarry stressed that he spends a lot of time with his patients and he would be attentive to symptoms like incoherence or delusions that might indicate a major psychotic disorder.<sup>26</sup> Dr. McGarry testified that in his encounters with Mr. Dunphy he was appropriate, well-mannered and easy to deal with. He commented that his wife who scheduled his appointments would get Mr. Dunphy in the very next day, a privilege not extended to many. His last appointment with Mr. Dunphy was on March 6, 2015.<sup>27</sup> Though the results of a kidney MRI were pending for Mr. Dunphy, Dr. McGarry testified that it was not something causing stress for him. Dr. McGarry acknowledged that he felt it was "shocking" to learn that Mr. Dunphy had purportedly pointed a gun at a police officer.<sup>28</sup>

(ii) @Sculpen

Mr. Dunphy used @Sculpen as his twitter handle and Donahue2DonDunphy as his user name. At the time of his death (or soon thereafter), he had 1199 followers and followed 1139.<sup>29</sup> Exhibit P0008 contains 299 pages of his tweets and retweets from the last week of his life (some are repeated due to the format). Mr. Dunphy tweeted about a broad range of issues. He frequently tweeted with people across Canada about national and international politics and injured workers' rights.

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<sup>21</sup> Ibid., p. 69 and p. 80

<sup>22</sup> Testimony of Dr. Thomas McGarry, February 1, 2017 at p. 11

<sup>23</sup> Ibid., p. 15 and 22

<sup>24</sup> Ibid., p. 43

<sup>25</sup> Ibid., p. 22, 37 and 39

<sup>26</sup> Ibid., p. 45

<sup>27</sup> Ibid., p. 30

<sup>28</sup> Ibid., p. 46

<sup>29</sup> Exhibit P008, p. 1



Mr. Dunphy's tweets were also (at times) local in focus. He doled out sharp-tongued criticism of local provincial politicians. Mr. Dunphy tweeted critically about then Deputy Premier Steve Kent<sup>30</sup>; church and government cover ups of sexual abuse; and blamed government for the deaths of seniors and injured workers due to poverty and hunger.<sup>31</sup> On March 29, 2015 he tweeted repeatedly about allegations of criminal activity and corruption in the provincial government and accused Premier Davis of participating in an alleged cover up of sexual harassment at Confederation Building – a story which had also appeared on the front page of the Telegram the day before. Mr. Dunphy mentioned the hashtags #nlpoli and #cdnpoli with these tweets ensuring that anyone who followed the hashtags would see his tweets.<sup>32</sup> In the last week of his life, Mr. Dunphy tweeted back and forth with Paddy Daly, VOCM open line talk show host.<sup>33</sup> Constable Smyth testified that he spent approximately one hour on April 4, 2015 reading approximately 1 year of the @sculpen twitter feed and made his decision to make a home visit to Mr. Dunphy based, in part, on its content.

(iii) Donald Dunphy's past dealings with police

Mr. Dunphy used marijuana frequently to ease his chronic pain. He had a medicinal marijuana licence and grew his own marijuana plants. His previous involvement with police was unremarkable. The Inquiry heard that he had a criminal record for marijuana cultivation and production in 2001. In 2004 he had been charged with uttering threats against Debbie Dunphy, his sister-in-law and neighbor, but that charge was withdrawn and a peace bond ordered in 2005.

Ms. Dunphy described her father as a person who did not disrespect the police.<sup>34</sup> She recalled a time when her father was on house arrest for a marijuana offence and they saw the police officer at the supermarket. She testified that her father greeted the officer and exchanged pleasantries with him.<sup>35</sup> Ms. Dunphy also recalled that RCMP officer Natasha Reid had been in Mr. Dunphy's home back at the time of the peace bond incident.<sup>36</sup> Ms. Dunphy testified that although she could believe her father might be argumentative with a police officer, she did not believe that he would take any action with a police officer that would result in a risk to his life.<sup>37</sup> Ms. Dunphy also testified that based upon her knowledge of her father and her prior observations of him interacting with police, she believed he would be cooperative, answer all questions and, if asked to, produce the firearm in his home.<sup>38</sup>

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<sup>30</sup> Exhibit P-0008, pp. 209 and 280

<sup>31</sup> Exhibit P-0008, p. 292

<sup>32</sup> Exhibit P-0008, pp. 222, pp. 284-295

<sup>33</sup> Exhibit P-008, pp. 70-84

<sup>34</sup> Testimony of Meghan Dunphy, January 9, 2017 at p. 62

<sup>35</sup> Ibid.

<sup>36</sup> Ibid., p. 103 and 134

<sup>37</sup> Ibid., pp. 62-63

<sup>38</sup> Ibid., p. 134

Mr. Dunphy's last known personal encounter with police prior to April 5, 2015 appears to have been on March 30, 2012 when (then) Constable Lee Lush arrested him out of his vehicle on Pitts Memorial Drive.<sup>39</sup> Mr. Dunphy produced his medicinal marijuana licence and was released without charge. Ms. Dunphy found Constable Lush's business card in Mr. Dunphy's wallet after his death.<sup>40</sup> Corporal Lush testified that Mr. Dunphy cooperated with police, was respectful and appropriate in his dealings with him.

(iv) Poverty and the danger of dehumanization

As is now well known, Mr. Dunphy was seriously injured in a heavy machinery accident and ceased working permanently in 2006. A widower, Mr. Dunphy struggled to raise his daughter as a single parent and suffered a series of financial problems, including two bankruptcies. Mr. Dunphy called open line and tweeted frequently in the last year of his life about his struggles. He stated on his twitter feed that he was a "crucified injured worker".<sup>41</sup> Mr. Dunphy and his friend Colin Dinn, both injured workers, spent many hours together discussing their problems. Mr. Dinn testified that Mr. Dunphy viewed his grievance with WorkplaceNL as a problem in common with other injured workers.<sup>42</sup> Mr. Dinn clarified that Mr. Dunphy did not believe himself to be the focus of a government or Workers Comp conspiracy but rather that he was simply getting a hard time.<sup>43</sup> This was confirmed in the March 10, 2017 report of the Office of the Citizen's Representative after its review of Mr. Dunphy's WorkplaceNL file.<sup>44</sup>

During the Inquiry, photographs of Mr. Dunphy's residence were shown repeatedly. The photographs depicted a home in severe disrepair with poor living conditions. Ms. Dunphy submits that by the time these police photographs were taken, the feral cats that Mr. Dunphy cared for had entered from the attachment to the home into the main living area through an open door. Police officers repeatedly testified about their observations, the smell, and their opinions of the state of Mr. Dunphy's home (i.e. "worst they had ever seen;" "wouldn't make a good dog house"). High-ranking management officers from both the RNC and the RCMP were brought into the residence for seemingly unnecessary and vague reasons unrelated to any investigative purpose.<sup>45</sup>

Ms. Dunphy acknowledges that the observations and photographs are relevant and necessary information for the Commission to consider. As well, the photographs demonstrate that Mr. Dunphy was a man experiencing an economic and housing crisis, in need of financial assistance and living in poverty. Ms. Dunphy highlights though that such evidence poses a potential risk to

<sup>39</sup> Testimony of Corporal Lee Lush, January 27, 2017 at p. 39.

<sup>40</sup> Testimony of Meghan Dunphy, January 9, 2017 at p.

<sup>41</sup> Exhibit P-0008, p. 1

<sup>42</sup> Testimony of Colin Dinn, January 11, 2017 at p. 108

<sup>43</sup> Ibid., at p. 145

<sup>44</sup> <http://www.citizensrep.nl.ca/pdfs/DonaldDunphyReport.pdf> at p. 40.

<sup>45</sup> Testimony of Supt. Jason Sheppard, February 17, 2017 at p. 61

dehumanize her father – that is, to deprive him of any positive human qualities.<sup>46</sup> Ms. Dunphy believes that there has been an ongoing effort since April 5, 2015 by some to portray her father as a delusional, out of control man living outside of society. During the Inquiry, Meghan Dunphy and all other witnesses who visited the home before April 5, 2015 explained that Mr. Dunphy had four pet cats and cared for feral cats behind his house and in the attachment to the home that he had converted into a shelter for them.<sup>47</sup> Colin Dinn further explained that at times he observed Mr. Dunphy nurse an ailing feral cat back to health and would bring the cat into the main living room in a box to do so.<sup>48</sup> Sergeant Dion Foote clearly explained that when he entered into the house, there was a cold breeze blowing through the house. He believed it to be caused by a door blowing open or an opening somewhere. He explained that when he entered there were cats “everywhere” inside (he estimated 30-40).<sup>49</sup> Sergeant Foote, a self-described “cat person”, testified that there were four cats – three who appeared to be very well cared for, and one that appeared to be very sick with fur missing - that repeatedly attempted to enter the living room. Sergeant Foote explained that other than these four cats, the cats elsewhere in the house did not try to enter the living room.<sup>50</sup> Ms. Dunphy submits that this evidence confirms what she and Mr. Dunphy’s friends have told the Commission.

Ms. Dunphy acknowledges that the average person may not understand her father’s lifestyle and as noted, she at times would become frustrated with him herself. However, she submits that her father’s devoted care of feral cats should not be twisted to portray him as wild, mentally ill or to further dehumanize him. As far back as she can remember, Ms. Dunphy was raised to respect and care for all animals, including feral cats, and she continues herself to do so. Ms. Dunphy submits that her father was a deeply caring person and this was demonstrated in his love for cats in need of food and shelter that were wild or discarded by others.

(v) Donald Dunphy: “a person in crisis”?

In the *Iacobucci Report*, “a person in crisis” is defined as:

*...a member of the public whose behaviour brings them into contact with police either because of an apparent need for urgent care within the mental health system, or because they are otherwise experiencing a mental or emotional crisis involving behaviour that is sufficiently erratic, threatening or dangerous that the police are called in order to protect the person or those*

<sup>46</sup> <https://en.oxforddictionaries.com/definition/dehumanization>

<sup>47</sup> See Exhibit 0010, photo 0071; testimony of Rita Farrell on January 27, 2017 at p. 66; testimony of Colin Dinn, January 11, 2017 at p. 147

<sup>48</sup> Testimony of Colin Dinn on January 11, 2017 at p. 111 (this was corroborated by Mr. Dunphy’s own twitter direct messages contained in his cell phone records provided in the RCMP disclosure).

<sup>49</sup> Testimony of Sergeant Dion Foote, January 26, 2017 at p. 115 and 117

<sup>50</sup> *Ibid.*, p. 122

*around them. The term “person in crisis” includes those who are mentally ill as well as people who would be described by police as “emotionally disturbed.”*<sup>51</sup>

Ms. Dunphy submits that the evidence at the Inquiry establishes that her father was not emotionally disturbed or mentally ill. Ms. Dunphy submits that her father might be viewed as an eccentric but good man living in poverty who could certainly be loud and animated when expressing his views. Ms. Dunphy submits however that his behavior was not out of control or violent. Even Debbie Dunphy’s untested statement to police does not ground such a conclusion.

Ms. Dunphy submits that her father was a well-informed person coping with economic hardship who required urgent assistance with a housing crisis. Police photos of the home show that at least one ceiling was falling in<sup>52</sup> and the tarps covering the roof had become displaced.<sup>53</sup> Mr. Dunphy expressed a desire to repair his roof in the Spring once the snow melted and had made purchases of some materials for this purpose.<sup>54</sup> However, the house continued to deteriorate and he was not able to start the repairs by the time of his death.

Mr. Dunphy publicly proclaimed his crisis in the content of the sign he erected on his house and over months of tweets from @sculpen where he posted photos of the deteriorating condition of his home.<sup>55</sup> Mr. Dunphy tagged news agencies and politicians in his tweets, one infers for the purpose for making his issue known. As Ms. Dunphy explained in her testimony, her father lived in the hope that someone in authority would listen to his plight and directly assist him or know someone who could help.<sup>56</sup>

There has been no evidence emerge at the Inquiry to suggest that any government or WorkplaceNL official contacted Mr. Dunphy with any kind of outreach, offer of assistance, or referral for help with his housing crisis.<sup>57</sup> Rather, it has emerged that Mr. Dunphy was flagged and monitored as a security concern by WorkplaceNL. Notations imply that WorkplaceNL communications personnel were concerned that Mr. Dunphy’s social media commentary might tarnish its reputation publicly. After concluding that Mr. Dunphy was a “noise maker” and not an “opinion-setter”, it appears that WorkplaceNL made no contact with Mr. Dunphy regarding his file or his housing crisis nor did WorkplaceNL alert any other government agency in an effort to assist him.<sup>58</sup> It appears that the first government official to proactively contact Mr. Dunphy

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<sup>51</sup> Jacobucci Report, Executive Summary, p. 4, para. 2,

[https://www.torontopolice.on.ca/publications/files/reports/police\\_encounters\\_with\\_people\\_in\\_crisis\\_2014.pdf](https://www.torontopolice.on.ca/publications/files/reports/police_encounters_with_people_in_crisis_2014.pdf)

<sup>52</sup> Exhibit P-0010, Photos 64 and 68

<sup>53</sup> Exhibit P-0010, Photos 20-25

<sup>54</sup> Testimony of Meghan Dunphy, January 9, 2017 at p. 29; Colin Dinn, January 11, 2017 at p. 110 and Rita Farrell, January 27, 2017 at p. 67

<sup>55</sup> Exhibits P-0110; P-0111; P-0112; P-0114;

<sup>56</sup> Testimony of Meghan Dunphy, January 9, 2017 at p. 63

<sup>57</sup> There is some evidence that Mr. Dunphy was in contact with then Deputy Premier Steve Kent and his staff about his WorkplaceNL file, however there is no evidence that any offers of assistance were made with respect to his housing crisis.

<sup>58</sup> Exhibit P-0116

occurred once Ms. Ivey forwarded Mr. Dunphy's tweet to Constable Smyth – again, soliciting a response to a security concern.

Ms. Dunphy submits that it is clear Constable Smyth believed prior to entering her father's home on April 5, 2015 that Mr. Dunphy was a mentally ill person. Ms. Dunphy submits that is supported by Constable Smyth's BBMs with his friend, Trevor, on April 4, 2015 wherein he referred to Mr. Dunphy as a "lunatic threatening the Premier" and agreed that taking her father in for a psychiatric assessment would be "not a bad idea."<sup>59</sup> Further, if Constable Smyth reviewed her father's twitter account as he said, he would have also seen that Mr. Dunphy was highly critical of the Premier and Deputy Premier of the day. Most significantly, he would know from the twitter feed that Mr. Dunphy was repeatedly seeking help with a housing crisis. Constable Smyth observed that crisis first hand when he saw the condition of the house on April 5, 2015 before he went to Dick and Debbie Dunphy's. At Dick and Debbie Dunphy's, Constable Smyth received information from Debbie Dunphy which caused him to conclude that Mr. Dunphy was "a troubled man" with "some degree of mental illness."<sup>60</sup> Ms. Dunphy submits that the Commissioner must assess Constable Smyth's actions from both a subjective and objective perspective. Subjectively, Ms. Dunphy argues, on April 5, 2015, Constable Smyth, a non-front line police officer with no training in mental health issues in 10 years, while dealing with a non-criminal matter entered into the private home of a citizen he believed to be mentally ill and in crisis.<sup>61</sup> The ultimate purpose: to warn this man of the consequences of the continuation of his inappropriate twitter commentary and determine if he was on the "pathway to violence" against elected officials. Ms. Dunphy submits that common sense – and the average person – would support that the plan was flawed from its inception.

Ms. Dunphy accepts that for the purpose of making future recommendations for policing in Newfoundland and Labrador, the *Iacobucci Report* is relevant and adaptable. Further, Ms. Dunphy accepts the testimony of Dr. Coleman and Sergeant Massinni that the principles/techniques of de-escalation training for police should apply in all situations and to all subject officers, and not just to those situations or officers interacting with members of the public who are deemed to be "in crisis." Most importantly, Ms. Dunphy agrees with Justice Iacobucci's target of "zero deaths when police interact with a member of the public" and his general finding that the death of a fellow human being in such encounters is "likely a failure of the system."<sup>62</sup>

### The Protective Services Unit

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<sup>59</sup> Exhibit P-0774

<sup>60</sup> Exhibit P-0121, p. 76, lines 7-11 and testimony of Constable Smyth, January 17, 2017 at p. 84

<sup>61</sup> Constable Smyth testified that he had completed the 8 hour mental health course arising out of the Reid & Power Inquiries in June 2004 and completed one further course in relation to mental health in 2005, but received no training in mental health after that date. Testimony of Cst. Smyth, January 16, 2017 at pp. 32-33. Further, Cst. Smyth testified that he had completed no specific de-escalation training other than that contained within the mental health courses: Testimony of Cst. Smyth, January 16, 2017 at p. 50.

<sup>62</sup> Iacobucci Report, Executive Summary, p. 8, para. 36

(i) The PSU: 2012-2015

The Protective Services Unit, a 2 officer unit (RNC/RCMP) in April 2015, fell under the Intelligence and Organized Crime section of the RNC.<sup>63</sup> The primary purposes of the unit were (1) to provide close protection to the Premier (bodyguarding); and (2) to conduct intelligence based investigations of persons of interest considered a potential threat to elected officials.<sup>64</sup> In approximately 2012, protective services were formalized from an ad hoc system of assignment of officers from the Criminal Investigative Unit on an as needed basis into an autonomous and full time unit physically located in the Confederation Building.<sup>65</sup> Constable Smyth transitioned to a full time PSU officer at this time, under Premier Kathy Dunderdale.<sup>66</sup> The physical relocation brought the unit closer to those who they protected and their staffers, but separated the officers from their police supervisors. Since its inception as a separate unit in 2012, Constable Smyth was the officer in charge of the Unit.<sup>67</sup> Constable Smyth wrote the policies and procedures for the unit and supervised all other officers who worked in the Unit. Constable Smyth, it is fair to say, ran the unit from the time of its inception until April 5, 2015.<sup>68</sup>

The Unit had daily contact and an open line of communication, personally and electronically, with the staff of the Premier's Office.<sup>69</sup> As noted, in April 2015 the Premier was Paul Davis, a former RNC police officer. Former Premier Davis testified at the Inquiry that he and Constable Smyth shared a close working relationship.<sup>70</sup> The Premier's Chief of Staff was Mr. Joseph Browne, a former RNC Chief of Police under whom Constable Smyth had served.<sup>71</sup> Political staffers were directed to forward any social media commentary they saw that caused them a "concern" to the Protective Services unit. One can only assume that the "concern" meant a concern directed at the security of elected officials, as this was the mandate of the Protective Services Unit. At the time of Mr. Dunphy's death, the staff of Premier Davis had received no formal training regarding the review of social media or the protective services unit beyond the informal direction they received from Constable Smyth.<sup>72</sup>

Constable Smyth testified that the supervisor for the intelligence-gathering work of the unit was Acting Inspector Joe Gullage.<sup>73</sup> Acting Inspector Gullage testified that in April 2015 the PSU reported to him but only for administrative matters, such as payroll, days off, overtime, etc.

<sup>63</sup> Testimony of Supt. Jason Sheppard, February 17, 2015 at p. 14

<sup>64</sup> Testimony of Cst. Smyth, January 16, 2017 at p. 27 and

[http://www.ciddd.ca/documents/phasetwo/RNC\\_Protective\\_Service\\_Unit\\_&\\_Inspector.pdf](http://www.ciddd.ca/documents/phasetwo/RNC_Protective_Service_Unit_&_Inspector.pdf)

<sup>65</sup> Testimony of Cst. Smyth, January 16, 2017 at p. 75

<sup>66</sup> Ibid., at p. 71

<sup>67</sup> Constable Smyth testified that in 2011 he assisted with intelligence investigations while he was in the CIU, but that the close protection services were separate at that time. Testimony of Cst. Smyth, January 16, 2017 at p. 71

<sup>68</sup> Ibid., at pp. 28-29

<sup>69</sup> Testimony of Cst. Smyth, January 16, 2017 at p. 74

<sup>70</sup> Testimony of Former Premier Paul Davis, February 24, 2017 at p.98

<sup>71</sup> Testimony of Cst. Smyth, January 16, 2017 at p. 72

<sup>72</sup> Testimony of Donna Ivey, January 9, 2017 at p. 146

<sup>73</sup> Testimony of Cst. Smyth, January 17, 2017 at p. 3

Acting Inspector Gullage testified that he did not supervise the investigative work of the PSU.<sup>74</sup> Most significantly from Ms. Dunphy's perspective, there was no oversight of the Unit at all on a day-to-day basis.<sup>75</sup> Acting Inspector Gullage explained that due to the location of the Unit in the Confederation Building, he had no awareness of what the Unit's files were until he reviewed them at the request of the Commission.<sup>76</sup> Acting Inspector Gullage acknowledged that the autonomous nature of the PSU was incomparable to other units within the RNC. He could not explain how or why this occurred, as the PSU was established before he became the supervisor of the unit in October 2014.<sup>77</sup> Further, though Acting Inspector Gullage had supervised Constable Smyth during his time in the CIU, no annual performance evaluations were done of him.<sup>78</sup> Constable Smyth testified that he could not remember the last time he received a performance evaluation from his supervisor.<sup>79</sup> Also, Constable Smyth testified that though he had completed use of force forms in the past, no supervisor had ever spoken to him about the form after.<sup>80</sup>

Ms. Dunphy submits that the evidence in totality supports that in April 2015 Constable Smyth was in practice only accountable to one person – that being Premier Davis.

It is important to note that since February 2016 the PSU no longer operates as an autonomous unit. Now, all concerns regarding public officials are forwarded to Acting Inspector Gullage and he assigns an officer if necessary and directly oversees the investigation.<sup>81</sup> Ms. Dunphy is pleased to see that this change has occurred as she submits that the Royal Newfoundland Constabulary failed in its duty to supervise the Protective Services Unit in April 2015.

Acting Inspector Gullage frankly requested that any PSU of the future provide close security detail only and mandated by legislation to avoid the past reality that the Premier of the day determined what services were required. Acting Inspector Gullage requested that all other and future complaints related to the security of elected officials be handled by the IOC office.<sup>82</sup> Ms. Dunphy agrees that this is the safest way for this investigative service to be provided, if necessary.

(ii) The threat assessment protocol employed in the PSU generally

Constable Smyth testified that he did not view the tweets of Mr. Dunphy as comprising a threat and that he was not engaged in the investigation of a threat under the *Criminal Code* on April 5,

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<sup>74</sup> Testimony of Acting Inspector Joe Gullage, February 23, 2017 at p. 51

<sup>75</sup> Ibid. and Testimony of Supt. Jason Sheppard, February 17, 2017 at p. 15

<sup>76</sup> Ibid., at p. 65

<sup>77</sup> Ibid., at p. 94

<sup>78</sup> Ibid., at p. 51

<sup>79</sup> Testimony of Cst. Smyth, January 16, 2017 at p. 40

<sup>80</sup> Testimony of Cst. Smyth, January 16, 2017 at p.53 and Exhibit P-0809, p. 29

<sup>81</sup> Ibid., p. 57

<sup>82</sup> Ibid, p. 66

2015.<sup>83</sup> Constable Smyth testified that from April 3-5, 2015 he was engaged in a threat assessment process in the infancy stage.<sup>84</sup> Constable Smyth testified that there was no policy or formal protocol in place at the Protective Services Unit in April 2015 for the threat assessment process;<sup>85</sup> how to determine if or when a home visit with a member of the public was part of that process;<sup>86</sup> or whether an officer should conduct the home visit alone.<sup>87</sup> Rather, Constable Smyth testified that he utilized a “general philosophical approach”<sup>88</sup> and process as he was taught in the training he received from instructors at the Justice Institute of British Columbia during a 5 day course entitled “Managing Targeted Violence” in 2012.<sup>89</sup> Constable Smyth testified that in this process, he considered whether the subject held a grievance, and whether there was evidence of a violent ideology.<sup>90</sup>

Constable Smyth testified that in his time in the PSU, he investigated approximately 30-40 persons of interests. He estimated that he made approximately 15 home visits.<sup>91</sup> Constable Smyth testified that of those 15 home visits, he conducted half of them alone.<sup>92</sup> In some of the home visits, Constable Smyth testified that he had grounds to arrest the individual, but did not. No charge was ever laid by him in such a situation. Constable Smyth testified that he more than any other officer in the PSU would have conducted the majority of home visits as he was the supervisor in the unit and main point of contact.<sup>93</sup> Without any procedure or protocol in place, a home visit was therefore completely at his discretion. Ms. Dunphy submits that this is an enormous amount of power placed in one officer’s hands, unchecked and unsupervised.

The decision to make a home visit to Mr. Dunphy was therefore purely at the discretion of Constable Smyth who was acting without protocol and without supervision.<sup>94</sup> In the threat assessment literature, this is defined as “unstructured professional judgement.”<sup>95</sup> As noted by Dr. Stephen Hart in his testimony, this format relies heavily on the individual intuition and experience of the officer. A frequent criticism results that such assessments are unreliable and unaccountable. Dr. Hart agreed that such a threat assessment process can make it impossible to trace how decisions regarding risk are made. Dr. Hart also agreed that the standardization of the threat assessment process is highly recommended. This is achieved by putting in place structured professional judgement guidelines for use by law enforcement. Dr. Hart also agreed

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<sup>83</sup> Testimony of Cst. Smyth, January 17, 2017 at p. 32. However, Cst. Smyth testified that he viewed the tweets as “inappropriate” and “problematic”, Testimony of Cst. Smyth, January 17, 2017 at p. 27

<sup>84</sup> Testimony of Cst. Smyth, January 16, 2017 at pp. 37

<sup>85</sup> *Ibid.*, pp. 82 and 85-86

<sup>86</sup> *Ibid.*, p. 89

<sup>87</sup> *Ibid.*, p. 90

<sup>88</sup> *Ibid.*, p. 82

<sup>89</sup> *Ibid.*, pp. 33-34

<sup>90</sup> *Ibid.*, pp. 82-83

<sup>91</sup> *Ibid.*, p. 89

<sup>92</sup> *Ibid.*, p. 90

<sup>93</sup> *Ibid.*, p. 90

<sup>94</sup> *Ibid.*, p. 90

<sup>95</sup> Based on the testimony of Dr. Stephen Hart on March 7, 2017 – transcript not available at the time of drafting.



that the use of a structured professional judgement tool, such as the SAM (which he authored) is best practice. The benefit of such a tool is that it has the potential to increase the consistency and transparency of decisions.

Common sense dictates, and Dr. Hart agreed, that it is vitally important to properly document the information gathered during a threat assessment. Similarly, he agreed that properly planning the process is important. Ms. Dunphy submits that it is basic common sense for an officer engaged in a threat assessment to have as much information about the subject as possible before a decision is made to visit them in their home. Obviously this will help the officer formulate the right questions to ask, as well as assist them to plan properly for their safety and the safety of their subject. It is also basic common sense that having a liason with the agency which is the subject of the person's grievance is a benefit to an officer and would provide significant information. One cannot simply disregard the principle that the best predictor of future behaviour is past behaviour. Ms. Dunphy submits that this principle was disregarded in her father's case.

It was difficult to assess whether there was any consistency in the practice of the PSU with respect to the content of the background work during the conduct of threat assessments. Constable Ed Benoit testified that his practice prior to conducting home visits in 2012-2014 was to obtain a photo of the subject to be visited.<sup>96</sup> Constable Benoit also described a process of compiling background information into a biographical profile of a subject **before** making a decision on what kind of follow up (like a home visit) was required.<sup>97</sup> Without any established protocol or procedure in the Unit, it is not surprising that the practice varied from officer to officer.

With respect to prior home visits made alone by him in relation to social media commentary, Constable Smyth testified that he always had a positive response from the subject. Constable Smyth explained what normally occurred in past interactions: the subject would give him the context of the commentary, he would explain the nature of the inappropriate contact, and he would explain what could happen if the social commentary continued.<sup>98</sup> Ms. Dunphy submits this testimony is important for the Commissioner to keep in mind when examining what occurred in the encounter between Constable Smyth and Mr. Dunphy.

(iii) The "tweets of concern" and the Dunphy threat assessment process:

On Good Friday, April 3, 2015, Donna Ivey, a politically appointed communications specialist in the Premier's Office, noticed a tweet from @sculpen. Ms. Ivey testified that the tweet caused her concern as within it was contained the phrases "dead MHAs" and "family members I may hurt." The twitter handles of Premier Davis, Minister Sandy Collins and musician Sherman Downey appeared in @sculpen's tweet as @sculpen sent a series of replies to a tweet originally

<sup>96</sup> Testimony of Cst. Ed Benoit, February 2, 2017 at p. 38

<sup>97</sup> Ibid., p. 39

<sup>98</sup> Testimony of Cst. Smyth, January 17, 2017 at p. 5

authored by Minister Collins and mentioning the Premier and Mr. Downey. Ms. Ivey contacted Constable Smyth by email despite the fact that both were off work on a statutory holiday and forwarded him a copy of the single tweet in isolation. Constable Smyth testified that he then viewed the tweet in the context of the series of tweets and that he alone interpreted the language.<sup>99</sup> Constable Smyth testified that he interpreted the tweet in context and believed Mr. Dunphy intended to refer to previously deceased MHAs, not living MHAs, and was also referring to hurting the feelings of their family members.<sup>100</sup> However, Constable Smyth was still concerned that the twitter handles of the Premier and Minister Collins were mentioned in the tweets and concluded that he should follow up on the reason why Mr. Dunphy wanted the elected officials to take notice of his comments.<sup>101</sup>

The following day, Saturday April 4, 2015, Constable Smyth testified that he spent about an hour or so reviewing about a year's worth of Mr. Dunphy's twitter feed.<sup>102</sup> From this review, he testified that he believed that Mr. Dunphy had a long-standing unresolved grievance that had elements contained within it that were "possibly not contained in reality".<sup>103</sup> Constable Smyth testified that he believed some of the content of the twitter feed was "aggressive in nature".<sup>104</sup> Constable Smyth noted the following specific observations about the content of the twitter feed that led him to conduct a home visit: (1) that there were past tweets directed at government indicative of a long-standing unresolved grievance; (2) that Mr. Dunphy stated that WorkplaceNL had killed his wife; (3) that certain tweets suggested he was at the end of his rope; and (4) that there were a lack of inhibitors in his life.<sup>105</sup>

Constable Smyth testified that he decided to make the home visit to Mr. Dunphy as "he needed and wanted" to permit Mr. Dunphy the opportunity to give his interpretation of the social media commentary.<sup>106</sup> Constable Smyth testified that as he did not interpret the tweets as a threat, but explained he was erring on the side of caution in case his interpretation was wrong. He testified that if he had determined that the comments comprised a definitive threat, then he would have had to take into consideration that he might also be making an arrest.<sup>107</sup> He noted "if there was any possibility of criminal charges being laid, I would have brought additional resources... I would want a uniformed officer."<sup>108</sup> However, Constable Cox's recorded conversation with his

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<sup>99</sup> Testimony of Cst. Smyth, January 17, 2017 at p. 30

<sup>100</sup> *Ibid.*, p. 31

<sup>101</sup> *Ibid.*, p. 32

<sup>102</sup> Testimony of Cst. Smyth, January 16, 2017 at p. 87

<sup>103</sup> *Ibid.*, p. 88

<sup>104</sup> Testimony of Cst. Smyth, January 17, 2017 at p. 9

<sup>105</sup> *Ibid.*, pp. 9 and 32

<sup>106</sup> *Ibid.*, p. 9

<sup>107</sup> *Ibid.*, p. 37

<sup>108</sup> *Ibid.*, p. 37

comms centre shortly after the incident indicated that Constable Smyth rejected his offer to accompany him as he didn't want a marked unit to "set him (Mr. Dunphy) off".<sup>109</sup>

The Commission later learned that despite having e-mail communications, Ms. Ivey and Constable Smyth also simultaneously conversed on BBM (blackberry messenger) about the matter. In that exchange, Ms. Ivey indicated that she had also contacted the executive assistant of Minister Collins to inform him about the tweet. Ms. Ivey contacted Mr. Ralph Tucker, the Chair of WorkplaceNL, a longtime fundraiser for the Progressive Conservative Party, and her personal contact. Mr. Tucker then contacted Mr. Tom Mahoney, WorkplaceNL's Executive Director of Worker Services, and requested that he contact Constable Smyth. Email correspondence was sent from Mr. Tucker to Mr. Mahoney outlining his request.

Mr. Mahoney testified that he was under the impression that based upon the email correspondence the issue being investigated by Constable Smyth was urgent. Further, Mr. Mahoney testified that he shared the private information of Mr. Dunphy pursuant to section 39 of the ATIPA Act as it existed in April 2015. Mr. Mahoney confirmed to Constable Smyth that there was an injured worker named Don Dunphy living in Mount Carmel, and also confirmed two phone numbers for him. Constable Smyth then asked about what dealings Mr. Mahoney was aware of between WorkplaceNL and Mr. Dunphy. Mr. Mahoney, who also headed corporate security for WorkplaceNL, informed Constable Smyth that Mr. Dunphy's twitter account @sculpen had been monitored by WorkplaceNL. Significantly, in a formalized security process, WorkplaceNL monitored the @sculpen twitter account from December 12, 2014 – March 19, 2015.<sup>110</sup> WorkplaceNL determined that no threat was posed by @sculpen beyond potentially defamatory messages, and that no contact with Don Dunphy or the RNC was required in response. Essentially, WorkplaceNL had determined that a "watch and wait" management strategy was sufficient. Mr. Mahoney told Constable Smyth that WorkplaceNL considered Mr. Dunphy to be very low risk.

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.<sup>111</sup> Constable Smyth told Mr. Mahoney that he thought he was "*going to have to pay this gentleman [Mr. Dunphy] a visit*".<sup>112</sup> 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.*"<sup>113</sup> Ms. Dunphy submits this statement is important for the Commissioner to keep in mind when examining what occurred in the encounter between Constable Smyth and Mr. Dunphy.

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<sup>109</sup> Exhibit P-0144, p. 2

<sup>110</sup> Exhibit P-0108

<sup>111</sup> Exhibit P-0081 at p. 24, lines 612-619 and p. 28, lines 704-706

<sup>112</sup> Exhibit P-0081 at p.7, lines 159-160.

<sup>113</sup> Ibid., at p. 6, line 150-p. 7, line 153

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".

Constable Smyth testified that in his general threat assessment process he would consider the subject's grievance and question whether the subject's expectation of resolution was reasonable. Constable Smyth stated that he would question the subject as well as the source of the grievance – in this case WorkplaceNL – to make this determination.<sup>114</sup> It is noteworthy that Constable Smyth did not question Mr. Mahoney further to get information in relation to Mr. Dunphy's WorkplaceNL file or grievance, despite the fact that this was apparently a part of the threat assessment process and no urgency presented.

Ms. Dunphy submits that during his investigative process, Constable Smyth failed to comply with basic RNC training and existing policy. Prior to visiting Mr. Dunphy, Constable Smyth did not open a file on his investigation.<sup>115</sup> Significantly, Constable Smyth took virtually no notes of his investigation, nor did he even bring his police-issued notebook with him on his visit to Mr. Dunphy.<sup>116</sup> As a result, there is no reliable way to establish when Constable Smyth arrived in Mitchell's Brook, when he interviewed Dick and Debbie Dunphy (or for how long), the details of what they told him, or when he entered into Mr. Dunphy's home. It is therefore virtually impossible to establish a timeline of what occurred in Mitchell's Brook or determine how long Constable Smyth was in Mr. Dunphy's home after the shooting. As RNC policy and the testimony of other police officers demonstrates, the recording of times in a police notebook is a mandatory and fundamental expectation of all police officers while engaged in their duties.<sup>117</sup> Ms. Dunphy finds it troubling that Constable Smyth did not comply with this basic practice or felt that it was unnecessary for him to do so.<sup>118</sup> Even more troubling is that his RNC supervisors were unaware of his day to day practice.

Ms. Dunphy submits that Constable Smyth's background work prior to the visit to her father – even accepting his threat assessment was in the infancy stage - appeared to be rushed and superficial. Ms. Dunphy notes that it takes about one hour to properly read and comprehend only one week of the twitter feed contained in Exhibit P-0008. Ms. Dunphy also submits that Constable Smyth did not appear to have any plan for his process, other than to go see her father – which he had decided before he conducted any review, according to the timing of the BBMs with

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<sup>114</sup> Testimony of Cst. Smyth, January 16, 2017 at p. 84

<sup>115</sup> Ibid., p. 87 and January 18, 2017 at p. 24

<sup>116</sup> Testimony of Cst. Smyth, January 17, 2015 at p. 87 and on January 18, 2017 at p. 16

<sup>117</sup> Exhibit P-0030

<sup>118</sup> Testimony of Cst. Smyth, January 18, 2017 at p. 17

Trevor. Constable Smyth had requested open line transcripts, but did not wait to receive or review them. He was in his police vehicle on his way to Mitchell's Brook when he completed his background checks. It is mere happenstance, she submits, that Constable Smyth interviewed Dick and Debbie Dunphy before the encounter. Ms. Dunphy also submits that she was the logical person to interview before contact was made with her father. Ms. Dunphy does not understand why a more thorough background review was not completed before a home visit in this apparently non-urgent situation. Generally, Ms. Dunphy submits that it is difficult to accept that Constable Smyth was taking this investigation seriously, considering the content of his file and in contrast to Constable Benoit's testimony. Ms. Dunphy questions if there was little import placed upon the investigation – why had Constable Smyth travelled all the way to Mitchell's Brook?

Constable Smyth testified that simultaneous to his threat assessment investigation, he would be conducting his own personal risk assessment. In relation to the home visit to Mr. Dunphy on April 5, 2015 he agreed that this personal risk assessment would be primary in his mind.<sup>119</sup> However, Constable Smyth testified that he based his personal risk assessment on the background checks he conducted on Mr. Dunphy on April 5, 2015.<sup>120</sup>

#### IV. Mitchell's Brook, April 5, 2015

##### (i) Arriving in Mitchell's Brook:

When Constable Smyth first entered onto Mr. Dunphy's property on April 5, 2015, he did so under the authority of the "implied licence to knock".<sup>121</sup> Police officers are entitled to encroach upon private property, but only to facilitate communication with the home dweller. Upon approach to the house, Constable Smyth testified that he quickly saw, read and subsequently dismissed a sign that was erected on the side of the house. The sign stated: "*Warning this is a workers compensation poverty house since 1984. Enter at own risk. Political people not welcome unless your going fix WHSCC.*"<sup>122</sup> Colin Dinn testified that Mr. Dunphy told him that he put the sign there so that "if anyone come, they could read the sign and leave me alone".<sup>123</sup> Despite the sign, Constable Smyth continued to knock on and search into Mr. Dunphy's living room window.

Constable Smyth testified that he ignored the sign because he was not a "political person." Ms. Dunphy does not agree. "Political" defined by Oxford means "related to the government or

<sup>119</sup> Testimony of Cst. Smyth, January 16, 2017 at p. 37

<sup>120</sup> Testimony of Cst. Smyth, January 16, 2017 at p. 39. Constable Smyth testified that he asked Mr. Mark Oram to conduct the CPIC background check from his vehicle on his way to Mitchell's Brook and received no information of concern. However, prior to visiting Mr. Dunphy in Mitchell's Brook, Constable Smyth was aware of both a past uttering threats charge that had been withdrawn, as well as the conviction for marijuana cultivation in 2001. Ms. Dunphy sees no other basis for the "V" for violence caution.

<sup>121</sup> *R. v. Evans* [1996] S.C.J. No. 1 (S.C.C.)

<sup>122</sup> Exhibit P-0065

<sup>123</sup> Testimony of Colin Dinn, January 11, 2017 at p.126

public affairs of a country.” Ms. Dunphy argues that Constable Smyth was the Acting Sergeant in charge of the protective services unit for elected officials. His job was clearly related to the government of Newfoundland and Labrador. Constable Smyth was in fact investigating Mr. Dunphy as a result of social media monitoring by a member of the Premier’s Office. Once Constable Smyth read the sign on the house, Ms. Dunphy submits that arguably the implied licence to knock was revoked. At the very least, the content of the sign should have caused Constable Smyth to be cautious about not putting himself into a place where he was unwelcome.<sup>124</sup> Ms. Dunphy submits that common sense and ethics dictated that Constable Smyth explain to her father the true nature of his position and purpose for his visit before obtaining his consent to enter into his home. Ms. Dunphy submits that Constable Smyth’s decision to dismiss the sign outright is indicative of an ongoing pattern of the marginalization of Mr. Dunphy and the imposition of Constable Smyth’s will.

(ii) The search through the window and Debbie Dunphy:

Constable Smyth told the RCMP on April 6, 2015 that when he looked in through Mr. Dunphy’s front window the first time and saw the inside of the living room, he thought immediately “this guy’s got some issues of some sort to be living in this type of situation”.<sup>125</sup> Constable Smyth told the RCMP that he then went next door to talk to the neighbours to find out if Mr. Dunphy “was out howling at the moon” or “ranting and raving about politicians”.<sup>126</sup> According to Constable Smyth, Debbie Dunphy told him of a lengthy history that she had with Don Dunphy and described him as reclusive and antagonistic with a grudge against the world.<sup>127</sup> When Constable Smyth left Debbie Dunphy’s and made the decision to go again to Mr. Dunphy’s home, he had concluded that Donald Dunphy was mentally ill. Regardless, he carried on.

(iii) Obtaining Consent to enter the home:

Ms. Dunphy submits that it is important for the Commissioner to carefully analyze the information that Constable Smyth has given about his interaction with Mr. Dunphy before the shooting took place.

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 wallet id and badge while standing at a distance of approximately 20-30 feet away while Mr. Dunphy remained in the doorway.<sup>128</sup> Constable Smyth then asked Mr. Dunphy if he could come in to talk to him. Mr. Dunphy purportedly said “yes,

<sup>124</sup> definition of intrude: <https://en.oxforddictionaries.com/definition/intrude>

<sup>125</sup> Exhibit P-0119, p. 7

<sup>126</sup> Exhibit P-0119, p. 7

<sup>127</sup> Exhibit P-0119, p. 7

<sup>128</sup> Testimony of Constable Smyth, January 17, 2017 at p. 99

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 “knock and talk” technique employed by Constable Smyth by paying Mr. Dunphy an unscheduled visit at his home on April 5, 2015 is commonly used by law enforcement in the United States. In that country, it has spawned a plethora of constitutional jurisprudence. In Canada, over 20 years ago, our Supreme Court expressed concern about placing clear limitations on “*this Orwellian vision of police authority*.”<sup>129</sup>

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.<sup>130</sup> 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.

Ms. Dunphy submits that the evidence before the Commission is that the best practice in risk assessment and the common practice of the PSU in 2012-2015 was for an officer to introduce him/herself to a subject of a home visit as both a police officer and as a member of the protective services unit for the premier or elected officials before asking for consent to enter.

Dr. Hart testified that it was important to get “informed consent” from a subject of a threat assessment before an interview so that the evidence obtained would be admissible in court (i.e. constitutionally obtained) and to ensure that the dignity of the subject was respected.<sup>131</sup>

Constable Benoit testified that it was important for the subject of a home visit to give informed consent for an officer to enter their home as the consent was the only legal authority the officer had to be inside the home. Constable Benoit testified that the information given prior to obtaining consent to enter would include the fact that the officer was a member of the Protective Services Unit for Elected Officials and that he personally always provided this information.<sup>132</sup> Sergeant Doug Noel similarly testified that on the one home visit he conducted with the PSU he introduced himself to the subject as a police officer and stated “I work with the Premier’s office. Can I talk to you?” Sergeant Noel explained that he believed it was important to state this as it helped the subject understand at the outset the true purpose of the visit.<sup>133</sup> Sergeant Noel testified it ensured that the subject would not think he was a police officer with a different unit (i.e., investigating a drug offence).

<sup>129</sup> Evans, *supra*. at para. 20.

<sup>130</sup> In addition, Constable Smyth did not tell Mr. Dunphy that he had a right to refuse entry. R. v. Wills [1992] O.J. No. 294 (Ont. C.A.); R. v. Backhouse [2005] O.J. No. 754 (Ont. C.A.), paras. 132-135; R. v. O’Connor [2002] O.J. No. 4410 (Ont. C.A.) at paras. 69-76; and R. v. Wilhelm [2014] O.J. No. 1176 (Ont. S.C.J.) at para. 142.

<sup>131</sup> Testimony of Dr. Stephen Hart, transcript not available at time of drafting

<sup>132</sup> Testimony of Cst. Ed Benoit, February 2, 2017, pp. 44-45

<sup>133</sup> Testimony of Corp. Doug Noel, February 2, 2017 at pp. 138-139

The evidence before the Commission is that despite Constable Smyth believing that Donald Dunphy was a person with unknown mental health issues and with a belief that a government agency had murdered his wife, and despite the presence of a sign stating that political people were not welcome unless they would fix WHSCC, Constable Smyth went forward with his request to enter into Mr. Dunphy's home. Constable Smyth chose not to tell Mr. Dunphy that he was a member of the Premier's Protective Services Unit. Constable Smyth testified that he had considered that Mr. Dunphy, "a man clearly disenfranchised with government and authority," would see him as the symbol of both.<sup>134</sup> Constable Smyth testified that he ignored the sign as he believed himself not to be a political person. However, Ms. Dunphy submits that by Constable Smyth's own testimony, he clearly recognized the risk existed that if he did identify as a member of the Premier's protective services, Mr. Dunphy might view "tie him to politics" and deny him entry into his home. Ms. Dunphy submits that Constable Smyth withheld this information to ensure that he would gain entry into the house and so Mr. Dunphy would not "shut down". By deliberately withholding this information, Constable Smyth misled Mr. Dunphy by omission. Constable Smyth's failure to provide Mr. Dunphy with the full information denied him the ability to make an informed decision as to whether to allow Constable Smyth into his home.

Ms. Dunphy submits that Constable Smyth's will to obtain the information he travelled for overcame the provision of fundamental constitutional rights to Mr. Dunphy, his dignity and basic common sense.

(iv) Entering through the front door:

Constable Smyth carefully noted at the beginning of his video recorded RCMP statement on April 6, 2015 that he had difficulty properly piecing together the details of his 15 minute conversation with Mr. Dunphy prior to shooting. Constable Smyth blamed this on Mr. Dunphy's repetitiveness and said there were points where "I was literally not listening to him."<sup>135</sup>

In each of Constable Smyth's police statements he said that once he entered through the front door and was standing in the porch, Mr. Dunphy asked him a version of the question - why an RNC officer was down there (in Mitchell's Brook)? – a very specific question. In his first statement, Constable Smyth stated that he replied "I'm looking to chat with you about some comments you made" and then immediately went into rapport-building.<sup>136</sup> He volunteered later in the same statement, "I never did tell him what I did."<sup>137</sup> In the re-enactment statement of April 10, 2015, Constable Smyth stated that he gave Mr. Dunphy a "generic" answer that the RNC police operate all over the province.<sup>138</sup> In his third statement, Constable Smyth stated that

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<sup>134</sup> Testimony of Cst. Smyth, January 17, 2017 at p. 26

<sup>135</sup> Exhibit P-0119, p. 3

<sup>136</sup> Exhibit P-0119 at p. 9

<sup>137</sup> Exhibit P-0119 at p. 48, line 12

<sup>138</sup> Exhibit P-0120 at p. 4



he replied to this by saying “I told him who I was and where I worked”.<sup>139</sup> Ms. Dunphy submits that these are three very different responses to a very straightforward question. Ms. Dunphy submits this is significant in that Mr. Dunphy was seeking specific information from Constable Smyth that he required to give a valid consent - but that Constable Smyth deliberately did not give him the information and instead continued his way into the living room.

(v) In the living room:

At the Inquiry, Constable Smyth testified that he was already in the living room when Mr. Dunphy asked him the question “what’s Constab doing out here?” Constable Smyth testified that he told him exactly why he was there – to follow up on comments made on twitter.<sup>140</sup> This is the first time in his many prior statements that he gave this rendition of the reply.

In all statements, Constable Smyth is consistent that it was not until he was in Mr. Dunphy’s living room standing across from him and Mr. Dunphy was seated in his chair that Constable Smyth first told Mr. Dunphy that he was there to talk to him about his tweets. Constable Smyth’s different statements contain versions of the conversation that followed but are inconsistent and confused. In all versions, however Constable Smyth described that once the topic of the tweets was raised, Mr. Dunphy began intermittently laughing, acting agitated, mumbling, squirming, rocking, foaming at the mouth, ranting, being incoherent, and repeating himself. Constable Smyth said that Mr. Dunphy repeatedly said to him “there’s been dead MHAs before and there will be again”; “Who are you?”; “Who sent you here?”; “what are you looking for?”; “What are you looking at?”; “You’re an arm of the government”; “you’re a puppet”. Constable Smyth stated that Mr. Dunphy talked about “Maynard” but that he was making no sense and though Constable Smyth tried to delve into that, he did not know who Maynard was. Ms. Dunphy submits that the description of Mr. Dunphy that Constable Smyth provided in all statements was that Mr. Dunphy responded as an emotionally disturbed person in the midst of some kind of psychotic break once the tweets were mentioned to him. In fact, Constable Smyth described him as in a “manic state” or “in crisis”.<sup>141</sup>

However, in his testimony at the Inquiry, Constable Smyth was shown Exhibit P-0214, the yellow file folder that contained both of the names provided to him by Mr. Dunphy - and their positions at Workers Comp.<sup>142</sup> Constable Smyth testified that he must have recorded that information when the conversation was still cordial between him and Mr. Dunphy.<sup>143</sup> Ms. Dunphy submits that Exhibit P-0214 and this testimony contradict all of Constable Smyth’s prior versions of the interaction with her father. Ms. Dunphy submits that it is clear that the version of the interaction provided by Constable Smyth is not reliable.

<sup>139</sup> Exhibit P-0121 at p.81, lines 11-13.

<sup>140</sup> Testimony of Constable Smyth, January 17, 2017 at p. 104

<sup>141</sup> Testimony of Cst. Smyth, January 18, 2017 at p. 3

<sup>142</sup> Ibid., p. 27

<sup>143</sup> Exhibit P-0214 and testimony of Cst. Smyth, January 18, 2017 at pp. 18-20

In his re-enactment statement of April 10, 2015, Constable Smyth stated other specific phrases said by Mr. Dunphy during their encounter that he did not report on April 6, 2015 or at any time thereafter. Constable Smyth reported that Mr. Dunphy said, “I didn’t threaten anybody” and “No, [I] he wasn’t threatening them.” Ms. Dunphy submits that these phrases, if said, imply that Mr. Dunphy was responding to an accusation being made against him. In his written general occurrence report of April 6, 2015, Constable Smyth stated that he told Mr. Dunphy that he was there to speak to him about the comments that he made but added that he told him he was there “to determine if he poses any risk to government officials.”<sup>144</sup>

(vi) Mr. Dunphy’s questioning of Constable Smyth:

Constable Smyth testified that Mr. Dunphy knew that he was a police officer, that he grouped Constable Smyth in with every other government worker, and that he never felt that Mr. Dunphy “questioned who I was”.<sup>145</sup> Ms. Dunphy does not see any basis for this belief, as Constable Smyth’s own testimony included her father repeatedly asking him “who are you?”

Additionally, Constable Kelly Downey, a first responder on the scene, noted in her general occurrence report that at the scene Constable Smyth told her that Mr. Dunphy’s demeanour suddenly changed and that he began asking him questions about “who he was?” ; “who he worked for?” and “if he worked for the government?”<sup>146</sup> This final question (which Constable Smyth denied was said) is critical. Ms. Dunphy submits that this utterance of Constable Smyth demonstrates that her father was not lumping him in with every other government worker because he was a police officer. From these questions, it is reasonable to infer that Mr. Dunphy felt that Constable Smyth was at the very least in his home in a capacity and for a purpose different than a regular police officer. Ms. Dunphy submits that it is reasonable to infer that her father realized that Constable Smyth was at his home on behalf of a political official (which is essentially accurate) and had not disclosed this to Mr. Dunphy before entering the house. Ms. Dunphy submits that it is likely that this perceived deception would likely have angered her father. Ms. Dunphy submits that this could have caused him to grab his stick in an effort to order Constable Smyth out of his house at that point.

There is further support of this theory in Constable Smyth’s own statements. Constable Smyth told the RCMP on April 6, 2015 that Mr. Dunphy appeared to have a sudden realization about his presence and his demeanour changed as a result. “His agitation, it just seemed to me, in reflection, that it just kind of hit him like there’s a cop in my house and he’s questioning me and I don’t like it.”<sup>147</sup> At the Inquiry, Constable Smyth testified that “it seemed to be that it just struck him at some point in time that government had sent me out there because of... his issues

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<sup>144</sup> Exhibit P-0092 at p. 5/8

<sup>145</sup> Testimony of Constable Smyth, January 17, 2017 at p. 99

<sup>146</sup> Exhibit P-0182, p. 1

<sup>147</sup> Exhibit P-0119, p. 32, lines 18-22

on social media versus what I was actually attempting to do there...”<sup>148</sup> Constable Smyth, however, would not acknowledge that his withholding of relevant information before getting Mr. Dunphy’s consent to enter his home caused any problem.

(vii) Contradictory evidence of the encounter:

Witnesses, including police officers, that encountered Constable Smyth leading up to the April 5, 2015 shooting and also in its aftermath, were told by him that he was at Mr. Dunphy’s home to investigate a “threat” against elected officials or the Premier.<sup>149</sup> At the Inquiry, Constable Smyth testified that he did not recall using such language, but stated that this was language he might use to simplify what he was doing.<sup>150</sup> However, Constable Smyth had told the RCMP on April 6, 2015 that in his call to Cst. Adrian Cox on his way to Mitchell’s Brook he had told Cst. Cox “exactly what I was doing”.<sup>151</sup>

Ms. Dunphy submits that it is nonsensical that Constable Smyth - a person who appears to pride himself on precision and articulation in his work - would use such language with his fellow police officers and Mr. Mahoney, a professional experienced in threat assessment and security, if the description was false. Further, Ms. Dunphy submits that there exists significant and contradictory evidence of Constable Smyth’s true mindset and intention in his own BBM messages which were later deleted by him. BBMs to his friend Trevor (later recovered), another highly educated professional, indicate that at 1:31 pm on April 4, 2015, Constable Smyth stated that he had to go “deal with some lunatic threatening the Premier”. Further, Constable Smyth stated that he might arrive late at Trevor’s cabin that evening if he had to arrest Mr. Dunphy. Constable Smyth stated “too much paperwork”, which one can reasonably infer refers to a result of the act of arrest. Constable Smyth further replied that it was “not a bad idea” to bring Mr. Dunphy for a psych assessment.<sup>152</sup> In this exchange, Constable Smyth’s own words state that on April 4, 2015 arresting Mr. Dunphy for uttering threats and/or under the *Mental Health Act* were clearly potential consequences in the realm of consideration.

Ms. Dunphy submits that the late recovered deleted BBMs comprise evidence that raises a significant concern with respect to the credibility of Constable Smyth and the veracity of his version of the encounter with Mr. Dunphy - a central issue before the Commission. Ms. Dunphy submits that during their encounter if Constable Smyth told her father that he was arresting him for the tweets, or bringing him in for a psychiatric assessment, or that these “consequences” could occur in the future if his twitter commentary continued, Mr. Dunphy would have undoubtedly become enraged. Mr. Dunphy, knowing his tweets were not threatening or

<sup>148</sup> Testimony of Cst. Smyth, January 17, 2017 at p. 117

<sup>149</sup> See testimony of Tom Mahoney; Constable Adrian Cox and Exhibit P-0144, p. 2; Constable X ; also note that the first time Cst. Smyth stated that he did not interpret the tweets as a threat was on April 6, 2015.

<sup>150</sup> Testimony of Cst. Smyth, January 17, 2017 at p. 32

<sup>151</sup> Exhibit P-0119, p. 5, line 33 - p. 6, line 1

<sup>152</sup> Exhibit P-0776

criminal, was a man who knew his rights and was not going to be intimidated by anyone. Ms. Dunphy submits that her father would have viewed such a warning by Constable Smyth as an unjustifiable intimidation tactic. She submits that this would certainly cause her father to grab his stick to order Constable Smyth out of his residence. Ms. Dunphy submits that Constable Smyth's version of the encounter, wherein her father, a non-violent man, purportedly became enraged and pointed a loaded rifle at him for no reason, is not believable, makes no sense, and is not what occurred.

(viii) The general approach to Mr. Dunphy: empathy?

Empathy is simply "the ability to understand and share the feelings of another."<sup>153</sup> Sympathy involves "feelings of pity and sorrow for someone else's misfortune."<sup>154</sup> Ms. Dunphy submits that pity necessarily includes the belief in the inferiority of the object - the looking down upon - while empathy is rooted in a belief in the equality of human beings. People generally do not like to be looked down upon, or pitied. Rather, people desire to be treated equally with dignity.

Constable Smyth testified that he believed that empathy was one of the most important traits of a police officer. He stated that he generally utilized an empathetic approach in his policing work. Ms. Dunphy submits that Constable Smyth displayed no empathy in his conduct or interaction with her father, despite that he may have felt sympathy for him.

(a) Home visit on Easter Sunday afternoon

Throughout the Inquiry, police officer after police officer was asked to reiterate the fact that they regularly work on holidays and that Easter Sunday is no different than any other day to them.<sup>155</sup> Constable Smyth testified that he should not have nor did he give any consideration to postponing his unscheduled visit to Mr. Dunphy's home because it was Easter Sunday.<sup>156</sup> Constable Smyth testified that he decided to visit Mr. Dunphy's home "as soon as practical or practicable" for him – so long as he was working.<sup>157</sup> If that happened to be Easter Sunday, then so be it.

The Commissioner will undoubtedly recognize that for most citizens, Easter Sunday is a special holiday wherein families gather together to celebrate by upholding certain customs and traditions. In Newfoundland, families will traditionally gather for an Easter meal at dinner or supper time. Ms. Dunphy accepts that police work must occur on every day of the year. Police must respond to complaints, emergencies and make arrests on holidays – that is their sworn duty. However, Constable Smyth testified that the visit to Mr. Dunphy was not urgent. The concern that Easter Sunday dinner time could be an inappropriate time from Mr. Dunphy's perspective

<sup>153</sup> <https://en.oxforddictionaries.com/definition/empathy>

<sup>154</sup> <https://en.oxforddictionaries.com/definition/sympathy>

<sup>155</sup> Testimony of Acting Inspector Joe Gullage, February 23, 2017 at p. 96

<sup>156</sup> Testimony of Cst. Smyth, January 17, 2017 at p. 38

<sup>157</sup> Ibid., pp. 21-22

for a surprise police visit either did not occur to Constable Smyth at all or it was dismissed by him as unimportant. Regardless, Constable Smyth's will to obtain the information he wanted overcame this basic common sense concern. This, Ms. Dunphy argues, is demonstrative of both a lack of empathy and a pattern of Constable Smyth's perhaps unintended marginalization of Mr. Dunphy.

(b) General conduct and commentary:

Constable Smyth testified that he attempted to "express some empathy" during his encounter with Mr. Dunphy by stating to him "it was no way for anyone to be living."<sup>158</sup> Constable Smyth stated in his April 6, 2015 RCMP interview that he was in the mode of thinking that Mr. Dunphy was a "sorry case".<sup>159</sup> He testified that although Mr. Dunphy invited him several times to sit down to talk, Constable Smyth continually refused as he did not want to sit on a dirty couch. Instead, he chose to stand across from Mr. Dunphy while he sat.<sup>160</sup> Constable Smyth testified that he moved garbage on the floor with his foot, watched bugs move out from underneath, and said to Mr. Dunphy that he had "real concerns".

Mr. Dunphy, his friends testified, was a poor but proud man.<sup>161</sup> Ms. Dunphy submits that Constable Smyth was not expressing empathy nor was he attempting to relate to her father as an equal during their interaction. According to Constable Smyth's first police interview, he felt pity and expressed same. Constable Smyth testified that his communications appeared to anger Mr. Dunphy though he suggested this reaction resulted from Mr. Dunphy's misinterpretation of his real intentions. It is reasonable to infer however that his conduct and words towards Mr. Dunphy actually insulted a proud man in his own home.

Ms. Dunphy submits that the attitude of looking down with pity from a position up above – rather than empathy between equal human beings - is striking in the e-mail authored by Constable Smyth and leaked to the media on April 10, 2015. In the email, Constable Smyth reiterates the importance of empathy, but concludes that Mr. Dunphy was so drastically far gone that it was too late for him to be saved by Constable Smyth's April 5, 2015 necessary intervention.<sup>162</sup>

Simply, empathy is the ability to place oneself in another's shoes and view the world from their perspective. Any experienced social worker or public health nurse knows that in visiting a person's home, one never refuses to sit or accept a cup of tea – no matter how personally

<sup>158</sup> Testimony of Cst. Smyth, January 17, 2017 at p. 117

<sup>159</sup> Exhibit P-0119, p. 13, lines 13-16

<sup>160</sup> Note that both Colin Dinn and Rita Farrell testified that they sat on the same couch each time they visited Mr. Dunphy [see testimony of Colin Dinn, January 11, 2017 at p. 110]; When shown photo 042 (the living room), Rita Farrell testified that Mr. Dunphy kept a blue sheet on the same couch as a cover which he would move back before she sat on the couch (Testimony of Rita Farrell, January 27, 2017 at p. 71)

<sup>161</sup> Testimony of Colin Dinn, January 11, 2017 at p. 107;

<sup>162</sup> Exhibit P-0191

disgusted one may be by the surroundings. Ms. Dunphy submits that a trained and experienced social worker, health care professional or mental health worker would likely have been in the best position to relate to her father on April 5, 2015 - with empathy. That is their training.

#### V. The RCMP investigation

***“Right from day one, I felt that they had in their head, they knew had happened and it didn’t matter what I was going to say or what they found or what anyone else said. They had their mind made up that night that they came to the house basically.”<sup>163</sup>***

Ms. Dunphy submits that the evidence is clear before the Commission that the RCMP investigation into Mr. Dunphy’s death was fraught with deficiencies. Ms. Dunphy relies upon the report and testimony of Mr. Gareth Jones in support of her submission and will not repeat the same issues *ad nauseam* but rather will provide some brief comment on additional issues with some inescapable overlap. Ms. Dunphy submits that the investigation was not rigorous and from its onset demonstrated signs of bias and tunnel vision and exemplified unfortunate traits of police culture. Ms. Dunphy submits that these problems are well-known to be unconsciously insidious and may not be apparent to involved police officers at the time when they first occur.

Further, Ms. Dunphy submits that the RCMP’s decision to bring in an independent observer in an attempt to quell public concern about “police investigating police” may have been initially well-intentioned. However, Ms. Dunphy submits that it was completely insufficient, not well planned or executed. Ultimately, once a problem was detected, the RCMP chose not to reveal that problem, causing further public distrust.

##### (i) The basics

Ms. Dunphy submits that she initially expected RCMP investigators to seriously question and examine why and how a non-violent man in chronic pain was able to suddenly point a loaded rifle that appeared out of nowhere in a small room, undetected by an experienced security detail officer. However, Ms. Dunphy submits that it became clear to her quickly that even basic questions about the incident were not being pursued.<sup>164</sup> Ms. Dunphy submits that the fundamental question about the incident, as posed to Constable Smyth by Commission Counsel on January 18, 2017 and raised repeatedly by Ms. Dunphy’s counsel - has not been answered and will likely never be answered. Ms. Dunphy submits that according to Constable Smyth’s version, the scene photos, the examination of the chair in the Inquiry room and the scene video, the only possible place that Mr. Dunphy could have obtained the gun from was the floor. If a

<sup>163</sup> Testimony of Meghan Dunphy, January 9, 2017 at p. 120

<sup>164</sup> Police investigators never asked Ms. Dunphy whether her father was right-handed or left-handed; what entrance to the house he used; the functionality of the chair; Mr. Dunphy’s physical limitations, glasses or eyesight; etc.

rifle was on the floor next to the right hand side of Mr. Dunphy's chair as investigators assumed – how did Constable Smyth not see it while standing - as he said – directly across from Mr. Dunphy in such close quarters?<sup>165</sup>

In her first interview with police on the night of April 5, 2015,<sup>166</sup> Ms. Dunphy told investigators how she, Mr. Corcoran and her father all had brunch together at the Woodstock just prior to the shooting. After brunch, Mr. Dunphy stopped by his daughter's house to change vehicles and run errands. At that time, he told his daughter he was going home to have a nap as he was "full of turkey".<sup>167</sup> He was not aware that the police would be visiting him that day. Ms. Dunphy told the RCMP that Mr. Dunphy placed a call to her from her driveway at 1:03 pm and then left.<sup>168</sup> The following day, Colin Dinn told the RCMP that he received a text from Mr. Dunphy at approximately 2:00 pm and then heard the horn blowing as Mr. Dunphy was driving by.<sup>169</sup> Mr. Dunphy's phone records later demonstrated he was expecting Mr. Dinn for a visit. Police photos show that Mr. Dunphy indeed changed into his pyjama pants before the arrival of Constable Smyth. Ms. Dunphy testified that her father was in a normal mood on Easter Sunday and there was nothing unusual about his behavior or demeanour. Despite providing this background to police, Ms. Dunphy submits that in her first interview, investigators were overly focused on her father's mental health.<sup>170</sup>

(ii) The scene

The scene of the shooting was the small living room of the home where Ms. Dunphy grew up. The room was strewn with garbage and contained multiple objects therein. Ms. Dunphy was a willing and available witness at the disposal of the RCMP. Ms. Dunphy submits that a transcript of her initial interview demonstrates that the RCMP did not view her as source of any information of value, beyond the basics she reported on the night of April 5, 2015. She received no request for a follow up interview before the scene was released.

Similarly, police were aware that Mr. Dinn regularly visited the home. Mr. Dinn testified that he would visit Mr. Dunphy 2-3 times per week for an hour or more<sup>171</sup> and that he last visited with Mr. Dunphy on April 3, 2015.<sup>172</sup> Regardless, investigators asked neither witness any questions about the scene or any items found at the scene. The exception to this was that both were asked about the functionality of the video cameras – it is noteworthy that Constable Smyth raised this particular issue with investigators.

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<sup>165</sup> Testimony of Cst. Smyth, January 18, 2017 at p. 11 and Exhibit C-0001, Photo 45; testimony of Cst. Smyth, January 18, 2017 at p. 33

<sup>166</sup> Exhibit P-0038

<sup>167</sup> Testimony of Meghan Dunphy, January 9, 2017 at p. 45

<sup>168</sup> *Ibid.*, p. 49

<sup>169</sup> Testimony of Colin Dinn, January 11, 2017 at p. 120

<sup>170</sup> Testimony of Meghan Dunphy, January 9, 2017, p. 47

<sup>171</sup> Testimony of Colin Dinn, January 11, 2017 at p. 104

<sup>172</sup> *Ibid.*, p. 119

Ms. Dunphy submits that the evidence at the Inquiry demonstrated that there remain numerous unanswered questions about the shooting scene. Ms. Farrell indicated prior to Sergeant Saunders' testimony that she believed the amount of garbage on the floor in front of the garbage bin to the right hand side of Mr. Dunphy's chair to be unusual, and stated that it looked to her as if someone had dumped out the contents of the bin on the floor.<sup>173</sup> Sergeant Saunders later testified that the garbage bin was in fact empty upon examination.<sup>174</sup> This was not photographed at the scene, nor was it recorded in any notes.

Ms. Dunphy located a single 22 unspent bullet in the living room 2 months after the shooting. Corporal Lee testified that the ice cream bucket on the table in front of Mr. Dunphy contained additional ammunition, but that this was not recorded in her notes or photographed.<sup>175</sup>

Corporal Lee and Sergeant Saunders did not seize a pen at the scene. The pen was important as Constable Smyth indicated he was writing on his file when Mr. Dunphy purportedly raised the gun. The file folder was found intact sitting on the coffee table, a very strange position to say the least after supposedly being dropped by Constable Smyth while it was open. No pen is visible in photographs. Corporal Lee testified that she recalled seeing a pen at the scene close to the folder but she did not record and could not recall its precise position.<sup>176</sup> Corporal Burke never asked Corporal Lee or Sergeant Saunders about the pen before the scene was released. Corporal Lee or Sergeant Saunders never reviewed Constable Smyth's statement before the scene was released and relied upon the investigators to inform them if any follow up was required at the scene. No follow up was ever requested.

### (iii) The stick

The stick that was seized by Sergeant Saunders at the scene measured 101 cm – or 39.7 inches – in length.<sup>177</sup> The rifle measured 39.5 inches in length. Both were brown in colour. Ms. Dunphy submits that when one sees the stick and the rifle laid side by side, it is obvious why investigators should have asked questions.

In her first interview with police on April 5, 2015, Ms. Dunphy unprompted told the RCMP about her father's stick that he always used for protection. Police asked Ms. Dunphy no further questions about the stick. Ms. Dunphy testified at the Inquiry that the stick was normally on the right hand side of the chair, usually stood up against the chair or the wall next to it.<sup>178</sup> On April 6, 2015, Constable Smyth also mentioned the stick in his interview. In the same interview, Constable Smyth later coincidentally stated to the investigators in describing his first peripheral view of the object brought up by Mr. Dunphy from his right hand side that: "*It wasn't until I saw*

<sup>173</sup> Testimony of Rita Farrell, January 27, 2017 at p. 73

<sup>174</sup> Testimony of Sgt. Chris Saunders, February 13, 2017 at p. 111

<sup>175</sup> Testimony of Cpl. Kelly Lee, February 21, 2017 at p. 79

<sup>176</sup> Ibid., p. 78

<sup>177</sup> Exhibit P-0803

<sup>178</sup> Testimony of Meghan Dunphy, January 9, 2017 at p. 44



– and I think I even might have thought like – my first – maybe like a broom stick or something... you know, like that was, you know what your peripheral vision is like. You just get kind of shapes...”<sup>179</sup> On April 6, 2015 Colin Dinn in his first interview also told investigators about the stick that Mr. Dunphy used for protection. He too testified that the stick was always on the right hand side of the chair, on the floor or stood against the wall next to the stereo.<sup>180</sup> Ms. Farrell was never interviewed by police, but she too testified about Mr. Dunphy’s stick which he always kept on the right hand side of his chair.<sup>181</sup> Sergeant Saunders testified that he seized the stick from the scene because it seemed “out of place and in the way” and he figured it might be important to the investigation.<sup>182</sup> Despite all of these factors, there was no forensic testing ever conducted on the stick. There is no evidence that the lead investigator ever examined the stick himself.

Ms. Dunphy submits that the failure of the investigators to ask any questions about the stick whatsoever is evidence that they accepted Constable Smyth’s version of the event immediately and to the exclusion of all other theories – the definition of tunnel vision.

(iv) The glasses

Ms. Dunphy submits that the glasses issue is demonstrative of the extreme lack of attention that investigators paid to items at the scene that Constable Smyth hadn’t mentioned. Ms. Dunphy was never asked about her father’s eyesight, whether he had vision issues, the condition of his glasses when she last saw him, or any similar question. Ms. Dunphy submits that the glasses were potentially relevant evidence for investigators, as they were prescription and used frequently by Mr. Dunphy. Ms. Dunphy submits that investigators should have been interested, at the very least, in whether her father could have seen the badge and id that Constable Smyth showed him from 20-30 feet away. Further, Ms. Dunphy submits that the condition of the glasses cried out for questioning. Ms. Dunphy points out to the Commissioner that the glasses were bent and the nose pad was broken off in the scene photos. Ms. Dunphy submits that she was never asked about the glasses because Constable Smyth never mentioned them in his police statement. Generally, Ms. Dunphy submits that if Constable Smyth did not mention it, it was not followed up on by investigators.

Ms. Dunphy testified about her frustration in watching Constable Galway seize her father’s glasses when it was obvious to her that he believed they had no evidentiary value whatsoever.<sup>183</sup> Ms. Dunphy submits that the further RCMP investigation in relation to the glasses makes no sense in light of Constable Galway’s testimony and appears to have been done simply to appease her.

<sup>179</sup> Exhibit P-0119, p. 34, lines 15-20

<sup>180</sup> Testimony of Colin Dinn, January 11, 2017 at p. 117

<sup>181</sup> Testimony of Rita Farrell, January 27, 2017 at pp. 73-74;

<sup>182</sup> Testimony of Sergeant Saunders, February 13, 2017 at p. 47

<sup>183</sup> Testimony of Meghan Dunphy, January 9, 2017 at p. 70

(v) Mr. Dunphy's physical condition and other questions:

Investigators asked Ms. Dunphy no questions about her father's physical ability to move quickly. When questioned on this Sergeant Henstridge testified that he was satisfied after seeing Mr. Dunphy's front step that he did not have a mobility issue. However Sergeant Henstridge then admitted that investigators never asked what door Mr. Dunphy utilized to access his home.<sup>184</sup> This again is another example of an assumption made by investigators without any evidentiary basis.

Mr. Jones' testimony and report similarly explained in detail with examples how the investigators' focus was inappropriately focused on Mr. Dunphy's mindset, when it should have instead been on Constable Smyth's. As demonstrated in Corporal Burke's testimony, the investigators failed to ask Constable Smyth basic questions regarding his frame of mind on April 5, 2015, including questions about his consumption of alcohol and drugs. Ms. Dunphy submits that it is significant that in the deleted BBMs recovered at the Inquiry, Constable Smyth stated to his friend Trevor that on April 4, 2015 he was retaining fluid as a result of "days of drinking".<sup>185</sup> Constable Smyth then went on to another cabin on the night of April 4, 2015 and once again consumed alcohol then arose early on April 5, 2015 to begin work. Ms. Dunphy submits that common sense and expert testimony provided that fatigue can have a significant impact on an officer's reaction. This relevant consideration does not appear to have even crossed the investigators' mind.

(vi) April 5-7, 2015

Ms. Dunphy submits that the most serious deficiency of the investigation was the lack of communication between the investigators and the forensic identification team while the shooting scene was still in police custody. As described in testimony, there was no debriefing between them before the scene was released despite this being standard protocol in major cases.<sup>186</sup> Ms. Dunphy was bewildered to learn that the lead investigator did not even become aware that the scene had been released until the following day. This breakdown in communication, Ms. Dunphy submits, was a result of an early attitude that the case was "open and shut" and such a debriefing was therefore unnecessary. There appeared to be an immediate acceptance that Constable Smyth told the truth to the investigators and that things were exactly as they appeared at the scene.<sup>187</sup> There was a noticeable lack of a contrarian view amongst investigators in the

<sup>184</sup> Testimony of Sgt. Henstridge, February 24, 2017 at p. 20

<sup>185</sup> Exhibit P-0774 at p. 5

<sup>186</sup> Testimony of Sgt. Saunders, February 13, 2017 at pp. 107-108

<sup>187</sup> Several police officers noted that they were struck by the position of Mr. Dunphy's hands at the scene, which appeared as if they had been holding a rifle. However, Chief Medical Examiner Simon Avis explained that the hand positioning after death did not necessarily mean that this was the position of Mr. Dunphy's hands at the time he was shot. Testimony of Dr. Simon Avis, February 27, 2017 at p. 62. Further, first responder Nancy Linehan testified that she had a clear recollection that Mr. Dunphy's left arm was hanging off the chair and not in the position in the police photograph. Testimony of Nancy Linehan, February 3, 2017 at p. 48.

earliest and most important days.<sup>188</sup> Ms. Dunphy submits that the testimony overall establishes that there was no discussion or contemplation at this necessary time regarding a pursuit of thorough or novel forensic testing of potentially relevant items. Ms. Dunphy submits that an important opportunity was lost to fully exhaust investigative possibilities.

Ms. Dunphy submits that there was puzzlingly no legal authority for the search of Mr. Dunphy's residence. Medical Examiner Simon Avis testified that he would have expected in this case that a general warrant would have been sought by the police and issued to authorize the search of the home.<sup>189</sup> It was not done. Ms. Dunphy submits that despite what the investigators stated, it appears that in the early days they were conducting a *Fatalities Investigations Act* investigation, and not a *Criminal Code* investigation.

Ms. Dunphy submits that from April 5-7, 2015 the investigators failed to critically assess the scene with a view to corroborating or disproving Constable Smyth's version while the scene was still in their custody and continuity of evidence was not at issue. No officer conducted a functional examination of Mr. Dunphy's chair or attempted to determine whether the rifle could have been hidden in, under, or alongside the chair. The chair was never seized by the police. No officer conducted any kind of testing to determine whether the rifle could fall in the position in which it was found. Police did not retain a biomechanical engineer to determine whether it was possible for Mr. Dunphy to raise a rifle in the manner described, undetected, and with his physical problems. Police never photographed the chair from all sides. Police never photographed the chair from the perspective of where Constable Smyth said he was standing at all points along the mantle. Ms. Dunphy submits that there were numerous relevant questions raised at the Inquiry about the scene that simply were not addressed in any way by the investigators.

Ms. Dunphy submits that the attitude of the investigative team from April 5-7, 2015 is exemplified in the first interviews conducted. Ms. Dunphy submits that Sergeant Henstridge's admitted errors in Constable Smyth's first interview proceeded without any meaningful comment, reprimand or consequence as the investigative team as a whole was similarly unconsciously impacted.<sup>190</sup> Ms. Dunphy does not believe that any officer intentionally set out to be unfair to her or her father. Conversely, Ms. Dunphy believes that as Sergeant Henstridge testified, there was a natural human tendency for the officers to put themselves in Constable Smyth's position. Professional judgement was impacted and unconscious errors resulted. It is evident from the transcripts that Sergeant Henstridge and Staff Sergeant Osmond felt that they too were victims of an unfair and unjustified social media attack in relation to a different case. It

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<sup>188</sup> Lamer Report at p. 132.

<sup>189</sup> Testimony of Dr. Simon Avis, February 27, 2017 at p. 62

<sup>190</sup> Corporal Burke was present during the interview and similarly made inappropriate comments and shared information inappropriately with Constable Smyth. Staff Sergeant Osmond watched from afar and merely commented to the officers that they appeared "too friendly" on the video. No further steps were taken. Testimony of Sergeant Henstridge, February 24, 2017 at p. 23

is clear that they empathized with Constable Smyth in this regard and Ms. Dunphy submits they made professional errors in judgement as a result.<sup>191</sup>

Ms. Dunphy submits that it is clear from Staff Sergeant Osmond's comments to her on April 8, 2015, that the RCMP investigation was coming to a close. Ms. Dunphy submits that after she retained legal counsel and spoke publicly about her concerns with the investigation, the RCMP then took additional steps in an attempt to appear unbiased and thorough. She submits that it appears they may have taken such steps not because they had evidentiary value or purpose, but rather to simply to appease her – an approach that was not helpful to anyone.

(vii) Mr. Dunphy's body:

Ms. Dunphy gave detailed testimony about her extreme anguish of not being able to see her father before he was cremated. Ms. Dunphy testified that she told multiple RCMP officers of her desire to see her father and her belief was that she would get to see him at some point.<sup>192</sup> The RCMP did not tell Ms. Dunphy that her father had been shot in the head. Ms. Dunphy learned this for the first time when the funeral director, Kenneth Dunphy, informed her that he could not let her see her father's body. Ms. Dunphy testified that she became enraged and upset. She phoned Constable Galway and "told him off". Constable Galway testified that he could not recollect the event.<sup>193</sup> Ms. Dunphy submits that the importance of seeing a loved one's body to a family member cannot be understated. Ms. Dunphy believes that it would be beneficial in the future, as the Commissioner mused, for a family liaison officer to give to the family member a printed brochure containing the necessary information about the process of autopsy and release of the body to the funeral home. The brochure should include the contact information for the Medical Examiner's office so that family members may directly receive answers to their questions about their loved one's body from the Medical Examiner. Ms. Dunphy believes that if such a brochure had been provided to her on April 5, 2015 it would have spared her much anguish and confusion.<sup>194</sup>

(viii) Ms. Dunphy's retention of legal counsel:

After a letter from Ms. Dunphy's legal counsel was sent to Constable Galway the following day, Staff Sergeant Osmond quickly intervened and arranged a meeting with her. Ms. Dunphy submits that Staff Sergeant Osmond met personally with her so to take control of a potential problem. He apologized to her for the oversight of either the RCMP or the Medical Examiner in failing to inform her about the condition of her father's body and the wounds he had received. Staff Sergeant Osmond spent hours with her and Mr. Corcoran telling them about the investigation in an amount of detail that Mr. Jones opined was inappropriate. Ms. Dunphy

<sup>191</sup> Ms. Dunphy submits that this in part caused officers to release the inappropriate press release on April 7, 2015.

<sup>192</sup> Ibid, p. 54

<sup>193</sup> Ibid., p. 59

<sup>194</sup> Comments of Commissioner Barry, February 17, 2017 at pp. 71-72

submits that Staff Sergeant Osmond was going to all efforts to prevent her from becoming antagonistic, especially due to any RCMP mistake. Staff Sergeant Osmond promised Ms. Dunphy that Constable Smyth would not again enter her father's house without her informed consent. Staff Sergeant Osmond also told Ms. Dunphy that he would have done the exact same thing as Constable Smyth did in terms of his decision to visit and his approach to her father.<sup>195</sup>

The promise made by Staff Sergeant Osmond was not kept by the RCMP. On April 10, 2015 Constable Smyth once again entered her father's home without her knowledge to complete a second re-enactment as the original was accidentally lost by the RCMP. Staff Sergeant Osmond initially directed that no second re-enactment take place, as he was concerned about causing further trauma to Constable Smyth, especially due to an RCMP mistake, a decision subsequently overridden by Inspector Andrew Boland.<sup>196</sup>

(ix) Individual civilian/officers:

Wanda Richards, an RCMP civilian member, was tasked to create a timeline and complete an analyst's report. The report was created on June 9, 2015 and attempted to compile significant amounts of investigative information with the cell phone records of both Constable Smyth and Mr. Dunphy to create a timeline of the event which was cited by Corporal Burke in his final report. However, very basic and significant errors in the report were not detected by Corporal Burke, or by ASIRT for that matter. As a result of the errors, the analyst's timeline is rendered useless.<sup>197</sup> One has to wonder why such an exercise was undertaken to begin with, if as Corporal Burke testified, the timeline means nothing to his conclusion anyway. Ms. Dunphy submits that this is yet another example of window-dressing by the RCMP. In any event, it certainly was not reviewed appropriately by the lead investigator.

Ms. Dunphy submits that Corporal Burke's testimony from February 7-9, 2017 as a whole supports that he did not act as a thorough lead investigator. Ms. Dunphy submits that at the Inquiry Corporal Burke presented as blasé about his role and the various shortcomings in the investigation. He frequently answered, "it didn't come to me at the time", or "it didn't seem important at the time". Ms. Dunphy submits that it appears that Corporal Burke was relying heavily upon the direction of Staff Sergeant Osmond, particularly in the early stage of the investigation.<sup>198</sup>

Ms. Dunphy submits that Corporal O'Keefe, a first responding officer at the Holyrood detachment was forthright in his testimony and acknowledged he made mistakes. Ms. Dunphy maintains that Corporal O'Keefe did make the statement to her at the scene as she testified, however she understands that the scene was traumatic for all involved and that information could

<sup>195</sup> Exhibit P-0037 at p. 71, lines 16-29

<sup>196</sup> Exhibit P-0584, p. 6; Hw notes of Staff Sergeant Osmond on April 9, 16:45, 2<sup>nd</sup> para and p. 7 and p. 9

<sup>197</sup> Testimony of Wanda Richards, February 23, 2017

<sup>198</sup> See Exhibits P-0592; P-0593; P-0297; P-0583, p. 10;

have been unintentionally misconstrued. Corporal O’Keefe acknowledged that his note-taking was insufficient and that he should not have placed a personal call to Constable Smyth to check on his well-being. Ms. Dunphy appreciates that police officers are human beings who make mistakes from time to time and who are attempting to do the best they can professionally in very difficult circumstances. Ms. Dunphy submits that Corporal O’Keefe did not have the training to respond to the very unique situation with which he was presented on April 5, 2015 and that he attempted to do the best he could in difficult circumstances. Ms. Dunphy submits that twice RCMP requested for Corporal O’Keefe to be admonished by his supervisor for actions similar to that of other members, who continued on without consequence.<sup>199</sup>

Ms. Dunphy submits that the identification officers – Sergeant Saunders and Corporal Kelly Lee – performed their duties in good faith and to the best of their abilities and gave forthright testimony to the Commission. Ms. Dunphy highlights that these officers depended upon the main investigators to request them to provide additional follow up at the scene, a request that was never forthcoming. Ms. Dunphy also recognizes that Constable Kelly Downey, a first responding officer at the scene, kept copious and professional notes and treated her and her spouse, Mr. Corcoran, with respect.

Ms. Dunphy submits that Sergeant Henstridge was forthright in his testimony and acknowledged he made mistakes. Sergeant Henstridge acknowledged that he experienced a significant emotional reaction at the scene on April 5, 2016, that he fixated on that reaction, and despite his training and experience it caused him to make a series of errors in his approach and interview techniques. This included the inappropriate sharing of information with interview subjects.

With the exception of Sergeant Henstridge and Corporal O’Keefe, the RCMP officers testified that they had no real concerns about their conduct of the investigation. Ms. Dunphy submits that the RCMP Major Crimes Unit acted unbeknownst to them (it appears) paternalistically and dismissively towards Ms. Dunphy. Constable John Galway and Staff Sergeant Osmond testified that the RCMP had a good relationship with Meghan Dunphy. Constable Galway testified that he felt sorry for Meghan Dunphy as her head was being filled with conspiracies. Constable Galway was forthright about how the investigative team perceived Ms. Dunphy’s concerns about the glasses – as foolishness. He testified that he believed that the glasses issue “caused all this” – meaning the Inquiry. Staff Sergeant Osmond testified that he would be surprised to learn if Meghan Dunphy did not feel that she had a good relationship with the RCMP, despite her testifying in detail about her feelings on this very issue at the beginning of the Inquiry. It appears

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<sup>199</sup> See Exhibits P-0594 and P-0231: Staff Sergeant Osmond wrote to Sergeant Tiller to request that Corporal O’Keefe be spoken to on two occasions – once when he felt that Corporal O’Keefe had shared too much information with Meghan Dunphy at the scene; and once when he learned that Corporal O’Keefe had phone contact with Constable Smyth. Yet, Staff Sergeant Osmond took no action with respect to Sergeant Henstridge as the senior officer in charge of the unit to protect the investigation. Rather, Sergeant Henstridge was tasked to conduct further interviews the following day.

that neither officer considered that Ms. Dunphy was quite capable of instructing legal counsel to act in accordance with her own thoughts and opinions.

After denying the existence of any shortcomings in the major crimes unit investigation under his supervision, Staff Sergeant Osmond clarified at the very end of his testimony that after contemplating the question overnight, his only comment on the issue of material deficiencies in the investigation was to state his opinion regarding the “scandalous” conduct of legal counsel for Ms. Dunphy in writing a letter to the Attorney General regarding the RCMP investigation and major crimes unit. Staff-Sergeant Osmond opined that this “scandalous” act posed a potential threat to his career (note that Staff Sergeant Osmond appears to have been promoted in rank since the Dunphy investigation).<sup>200</sup> Ms. Dunphy submits that Staff Sergeant Osmond’s testimony is - in and of itself - a concrete example of the pervasiveness of police sub-culture as outlined in David McAlister’s Overcoming Barriers: Changing Our Approach to Police-Involved Deaths [*Police Sub-Culture & Police Personality as Barriers to Reform*] at pp. 224-226.

## VI. Police Culture:

### (i) “We don’t need the bad publicity.”<sup>201</sup>

Ms. Dunphy submits that the Inquiry has heard ample evidence from members of both the RNC and the RCMP of the negative traits of police culture. In many respects, the investigation appeared to be “an investigation of the boys by the boys.” The Commissioner noted during the Inquiry that there were policies and procedures already in existence to counter some negative aspects of police culture, but those policies were violated in this case. Existing RNC policy dictated that Mr. Dunphy’s death was to be treated as criminal until there was sufficient evidence to the contrary.<sup>202</sup> It is clear that no RNC or RCMP member viewed the shooting in this manner.

First, at the shooting scene, Constable Smyth was permitted by the RCMP to remain at the scene freely, until an upset Ms. Dunphy implied to the officers that she knew who the man was. Constable X, the officer who transported Constable Smyth from the scene to the detachment, proactively changed the subject when Constable Smyth began discussing the shooting incident with him and took no notes of what he said.

Immediately upon the incident occurring, four RNC officers were on their way to Mitchell’s Brook to support Constable Smyth. The RCMP provided the RNC members with private access to Constable Smyth. Two claimed to be there for the purpose of conducting a critical incident stress debriefing, though it did not occur and despite existing RNC policy that set out a separate and distinct debriefing process to be conducted by a mental health professional. All four discussed the shooting incident with Constable Smyth and none took notes of what he said at the

<sup>200</sup> Testimony of Staff Sergeant Osmond, February 21, 2017 at p. 20

<sup>201</sup> Testimony of Wanda Richards, February 23, 2017 at p. 31

<sup>202</sup> Exhibit P-018. Ms. Dunphy is aware that RCMP policy differs in this regard.

time. The RNCA president advised Constable Smyth to wait until the following day to give a statement to the police. The RCMP accommodated and agreed with this request easily. In the intervening overnight period, one officer had contact with a significant witness in the case, his friend, and together with a second officer passed on a message from that witness to Constable Smyth.<sup>203</sup> Ms. Dunphy submits that the Commissioner can easily find numerous examples of the “solid blue line” in action in the transcripts of the RCMP interviews with the RNC members, including the April 6, 2015 interview of Constable Smyth.

From the earliest stage, there was evidence of a consistent desire among all officers – RNC and RCMP – to control the media message and sway public opinion. The RCMP expressed a particular distaste for unfair social media commentary and repeatedly noted its solidarity with Constable Smyth in its victimhood in this regard.<sup>204</sup> In Constable Smyth’s first RCMP interview, Sergeant Henstridge referred to one overall conspiracy theory – “Paul Davis is the Premier, you’re with the RNC, and we’re RCMP – there’s a big cover up or whatever.”<sup>205</sup> Sergeant Henstridge noted “it’s a bunch of people on the internet and we deal with it in one of our files in particular everyday.”<sup>206</sup> He later added, “hopefully our media release will be specific enough to dispel some of that.”<sup>207</sup> An “us versus them” mentality was evident. As Sergeant Henstridge stated to Constable Smyth in his first interview: “The general public doesn’t understand the kind of pressure that we’re under, I don’t think – and they never will.”<sup>208</sup>

Ms. Dunphy submits that a significant and oft-overriding motivating factor for both the RNC and RCMP officers was to attempt to quell “bad publicity” resulting from Mr. Dunphy’s death. Notably, there were examples in the evidence of persons who publicly questioned the actions of either Constable Smyth or the RCMP as being labelled by police at the time as “MHA” (Mental Health Act)<sup>209</sup> or during the Commission as engaging in “scandalous” conduct.

Constable Smyth and his best friend Sergeant Tim Buckle both gave evidence at the Inquiry that they both forgot that Constable Smyth had consulted Sergeant Buckle and sought his advice in preparing his notes prior to giving his RCMP statement, contrary to Constable Smyth’s specific testimony. Constable Smyth’s phone records indicate that he was freely discussing the shooting incident with a large number of people. The RCMP never told Constable Smyth to not discuss the incident. Constable Smyth in fact violated RNC policy at least twice in contacting members of the media (James McLeod and Fred Hutton via Sergeant Buckle) either directly or indirectly

<sup>203</sup> Staff Sergeant Mike Adams was a friend of Richard Dunphy. Constable Sullivan and Staff Sergeant Adams passed on a message from Richard Dunphy to Constable Smyth before Constable Smyth gave his RCMP statement on April 6, 2015. See their testimony generally.

<sup>204</sup> Comments of Staff Sergeant Osmond re: “I have no rights”, Exhibit P-0037 at p. 61, lines 20-30

<sup>205</sup> Exhibit P-0119, p. 71 – Sergeant Monty Henstridge to Cst. Smyth on April 6, 2015

<sup>206</sup> Exhibit P-0119, p. 71 – Sergeant Monty Henstridge to Cst. Smyth on April 6, 2015

<sup>207</sup> Exhibit P-0119, pp. 71-72 – Sergeant Monty Henstridge to Cst. Smyth on April 6, 2015

<sup>208</sup> Exhibit P-0119, p. 70 – Sergeant Monty Henstridge to Cst. Smyth on April 6, 2015

<sup>209</sup> Constable Benoit testified that he referred to Ms. Parrot as “MHA” (Mental Health Act) after she spoke publicly and raised questions about the incident. Testimony of Cst. Benoit, February 2, 2017 at pp. 30 and 51



to tell them to interview Mr. Dunphy's brother and next door neighbor about the incident. Sergeant Buckle did not hesitate to agree to make the contact.

Constable Smyth's April 10, 2015 e-mail was mysteriously leaked to CBC reporter David Cochrane. The Inquiry uncovered deleted BBMs between a frustrated Constable Smyth and the Premier's Communications Director written just 2 days prior wherein Constable Smyth stated outright his desire to explain particular concepts involved in the case directly and specifically to Mr. Cochrane. Coincidentally, a mass email he purportedly authored and sent to his colleagues to explain these very concepts was then published by the CBC locally and nationally. Ms. Dunphy submits that this chain of events should cause the Commissioner a genuine concern about Constable Smyth's credibility and the veracity of his denial of knowledge of how this occurred.

The RCMP deliberately withheld information from Meghan Dunphy that her father had received two gunshot wounds to his head. Constable Smyth referenced in his April 6, 2015 interview that this fact would certainly cause a misunderstanding public further unjustified outrage. Sergeant Henstridge, while in the presence of Corporal Burke and while being observed by Staff Sergeant Osmond from a separate room, responded to Constable Smyth's concern by stating "hopefully our investigation will kind of help in that regard a little bit but... there's only so much we can release too, right."<sup>210</sup> Corporal Burke added "there's a lot of rumours going around and there's a lot of people putting their own spin on what happened and we're going to try to put out as much detail as we can."<sup>211</sup> ... to dispel a lot of the rumours that are going around on social media and things like that... which will probably help you as well right?" The result – on April 7, 2015 an unusually detailed RCMP press release which presented Constable Smyth's untested version of the event as fact was released to the public.<sup>212</sup>

Ms. Dunphy submits that members of the RCMP and RNC jointly desired a selective release of information. Ms. Dunphy submits that the RCMP did not tell her about her father's wounds to his head because they wanted to delay for as long as possible the public outrage they knew would surge once it was learned that Mr. Dunphy was shot twice in the head while sitting in his arm chair. Ms. Dunphy submits that it became clear at the Inquiry that a motivating factor for the police was to act so that any mistakes are not publicly exposed or reputations publicly tarnished.

(x) The need for a Civilian Investigative Body: "That could have been me"<sup>213</sup>

Ms. Dunphy submits that it is clear that the public of Newfoundland and Labrador will not in the future accept police investigating police in relation to serious incidents. Public confidence in the

<sup>210</sup> Exhibit P-0119, p. 70 – Sergeant Monty Henstridge to Cst. Smyth on April 6, 2015

<sup>211</sup> Exhibit P-0119, p. 70 – Corporal Burke to Cst. Smyth on April 6, 2015

<sup>212</sup> Exhibit P-0583, p. 10, Handwritten notes of Staff Sergeant Osmond, April 7, 2015 12:00

<sup>213</sup> Exhibit P-0144, p. 6, transcript of Constable Adrian Cox to RCMP Comms Centre, April 5, 2015

administration of justice demands that there be a change in procedure. Ms. Dunphy relies upon the report and testimony of Gareth Jones in support of her submission.

The Inquiry unveiled the fact that the lead investigator and the subject officer had a professional working relationship prior to the investigation. In a small province with frequent joint force training and collaboration, this is of particular concern. Based upon the materials filed for Phase 2 of the Inquiry, it appears that all parties support the creation of a civilian led investigative body for serious incidents involving the police.


Ms. Dunphy submits that the ASIRT paper review of the RCMP investigation did not detect the numerous problems with the investigation that have emerged during the course of the Commission. Ms. Dunphy submits that it is crucial that in the future, a civilian body investigate the incident itself, and not just review a police investigation of police. It is insufficient, as the Inquiry process has proven.

#### VII. Conclusion:

Ms. Dunphy submits that troubling information emerged in all aspects of the evidence at the Inquiry. It is clear that drastic change is required in several key areas, as she outlined at the outset of her submission. Ms. Dunphy trusts that the Commissioner is in the best position to craft specific recommendations to address the multitude of concerns outlined. Ms. Dunphy hopes that the recommendations will be implemented and practiced so that no other person will die unnecessarily in this Province in circumstances similar to her father. Ms. Dunphy also hopes that public confidence in the administration of justice will be restored by the Commissioner's report and recommendations.

Ms. Dunphy is truly appreciative of the time and efforts of the many people that worked so hard to present the evidence and witnesses at the Commission of Inquiry.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 7<sup>TH</sup> DAY OF APRIL, 2017.



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