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August 30, 2016

Assistant Commissioner Peter Clark
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Dear Sir:

Re: ASIRT File No. 2016-04(N) – Review – Out of Province
Officer Involved Shooting Fatality: April 5, 2015
Affected Person: Donald Dunphy
Subject Officer: Royal Newfoundland Constabulary (RNC) Acting Sgt. Joseph Smyth
RCMP Investigation: 2015376186

On April 5, 2015, Donald Dunphy, a resident of Mitchell Brooks, NL, was shot and killed in his own home by Acting Sgt. Joseph Smyth, a member of the Royal Newfoundland Constabulary (RNC). At the time of the incident, A/Sgt. Smyth, hereinafter referred to as the subject officer, was on duty as an assigned member of the Protective Services Unit (PSU) responsible for providing protection services to the Premier of Newfoundland and Labrador.

The subject officer was conducting an investigation into some allegedly troubling social media comments purportedly posted on April 3, 2015 by Mr. Dunphy, hereinafter referred to as the affected person, to determine whether he was a potential threat to the Premier, the Office of the Premier, and/or any other member of the Members of the House of Assembly (MHA) of Newfoundland and Labrador. On April 5, 2015, the subject officer was conducting a voluntary interview with the affected person at his Mitchell's Brook residence when a confrontation occurred that resulted in the affected person being shot and killed.

The Alberta Serious Incident Response Team (ASIRT) operates as a civilian led independent integrated investigative unit as part of the Alberta Justice and Solicitor General – Public Security Division. In Alberta, pursuant to the provisions of the *Police Act*¹ and the *Police*

¹ *Police Act RSA 2000 c. P-17, as amended*

Service Regulations,² and an existing MOU with the RCMP, ASIRT has jurisdiction over all police officers within the province. ASIRT's mandate is the investigation of incidents involving Alberta's police that have resulted in serious injury or death to any person, as well as serious or sensitive allegations of police misconduct. That involvement can take many different forms:

- ASIRT might be directed to have primary responsibility for the investigation of any incident or allegation.
- ASIRT might be directed to *oversee* the investigation of an incident or allegation conducted by another police service. This would entail ASIRT essentially directing the course of the investigation being conducted by another service.
- ASIRT might be directed to *review* another police service's completed investigation into a particular incident or allegation.

Most commonly, ASIRT is either directed to have full conduct of the investigation or to review the investigation of another agency.

On occasion, at the request of Alberta's other provincial government partners, ASIRT has been involved in the investigation and/or review of incidents outside of Alberta. As such, ASIRT has previously been tasked with investigations or reviews in British Columbia and Manitoba, and also has a standing agreement with the Yukon to investigate, oversee or review incidents where the conduct of police may have resulted in serious injury or death or where there are serious allegations of police misconduct.

On January 29, 2016, as a result of a request from the Honourable Minister of Justice and Public Safety, and Attorney General Andrew Parsons of the Government of Newfoundland and Labrador for ASIRT to conduct an independent external review of the Royal Canadian Mounted Police (RCMP) investigation into this incident, the Honourable Ms. Kathleen Ganley, Minister of Justice, Attorney General and Solicitor General of Alberta, agreed to authorize ASIRT's involvement in a review capacity.³

It is important to understand the nature and scope of a review. The overarching purpose of a review is to provide an objective, independent *critical* examination and assessment of an investigation to confirm that it was properly conducted using best practices and that all appropriate investigative steps were taken in the circumstances so that the public can have confidence in both the investigation and the consequences flowing from it. A review is also meant to carefully assess an investigation with a view to identifying any evidence of bias, tunnel vision or a lack of objectivity. Having carefully reviewed the investigation in its entirety, ASIRT may make recommendations as to what, if any, additional specific investigative steps might be necessary to perfect an investigation. ASIRT may also make

² *Police Service Regulations* AR 356/90, as amended.

³ Initiating Request and Authorization Letters (Tab A).

recommendations regarding the development of best practices going forward for the purposes of similar future investigations.

It is equally important to understand that a review should not be construed as a second or separate investigation into the circumstances of the incident itself, nor is it generally within the scope of a review to make a determination on the issue of whether the subject officer acted lawfully during the course of an incident or whether there are reasonable grounds to believe an offence has been committed by the subject officer. In this case, you will not find a detailed examination of the social media posts purportedly authored by the affected person or a determination as to whether the posts could constitute a criminal offence. For the purposes of the review, the posts are only relevant to provide context for the steps the subject officer took to investigate, which ultimately led to the death of Mr. Dunphy. As well, ASIRT has not been asked to provide an opinion on whether the subject officer was lawfully placed at the time of the incident and/or acting in the execution of his duties. This determination is more appropriately made by those with the primary responsibility for the investigation. Lastly, ASIRT has not been asked to provide an opinion on whether the use of lethal force was appropriate in the case. Again, this determination is more appropriately made by those with the primary responsibility for the investigation. On a review, the focus is on the quality of the investigation into an incident, not the incident itself.

It should be noted that where ASIRT makes recommendations, that is all they are, *recommendations*. ASIRT has no jurisdiction to direct or order the RCMP or the Royal Newfoundland Constabulary to take certain additional steps or to consider new policies or best practices.

The Investigation

A careful review of the completed investigation confirms that it was thorough, complete and conducted in a manner consistent with current investigative standards. Principles of Major Case Management were followed including the use of an electronic major case management program. The RCMP Investigative Report is comprehensive and contains a detailed summary of the entire investigation. The report provided was organized, logical, professional and in easily searchable electronic format.

Given the sensitivity of the matter under investigation, the RCMP Command Triangle properly limited internal access to the electronic file to maintain the confidentiality and integrity of the investigation. The final report was organized by identifying or categorizing components of the investigation. The investigative mandate was clearly articulated and the final report systematically and factually examined the evidence collected.

ASIRT carefully scrutinized the investigation for evidence of investigational bias, tunnel vision, and/or a lack of objectivity. There was no evidence to support a conclusion or even a

suspicion that any of these identified risks manifested themselves in this investigation. Based on our review, no obvious personal or professional bias was demonstrated. Steps were taken to identify any RCMP or RNC police officer who had a personal and/or professional relationship with the subject officer. The recognition of the potential conflict and the steps taken to isolate the impact of that conflict were noteworthy and demonstrative of an intent to maintain the integrity of the investigation. Aspects of the investigation that were pursued demonstrated the willingness of the RCMP MCU team to explore all avenues of investigation. They were also very receptive to inquiries from the family and took additional investigative steps to address some of those concerns raised.

While ASIRT has some observations and recommendations regarding aspects of the investigation, it is our opinion that none of the issues identified rise to a level of seriousness that would bring into question the integrity or validity of the investigation or would impact any conclusions reached based on the evidence. The investigation more than provides sufficient evidence to allow a person properly informed with respect to the law in this area to be able to clearly assess whether the conduct of the officer caused the death of Mr. Dunphy (as in most officer involved shootings, this question is easily answered) and, more importantly, whether the conduct could constitute a criminal offence. The investigation allows for informed decision making.

The goal of the review was to identify if the investigating agency has completed the investigation in a manner consistent with the level of investigative excellence that maintains ASIRT's objective to maintain public confidence in policing. These investigative standards were pursued and attained in this case.

ASIRT's Recommendations

A. Dealing with the Subject Officer

There are many different approaches to interviewing subjects during an investigation. An interview does not need to be aggressive, loud or confrontational to be effective. Establishing a rapport and making a subject comfortable in the interview is often a strategy to encourage a subject's willingness to speak to investigators and can be very successful.

In investigations into police conduct, however, it is important not only to be independent and objective but to very clearly model that independence and objectivity. Being too informal and friendly in an interview can be perceived as a lack of independence or objectivity, and can appear as if investigators are "taking it easy" on the subject officer. It is a fine line and a difficult balance but the seriousness of the situation should lend a level of formality to the interview. At a minimum, careful consideration should be given to the approach to the interview of the subject officer in advance and any tactics or strategies should be documented along with principled reasons why those tactics or strategies were

selected. In this case, the interviews observed were very informal in the context of a homicide investigation. This may well have been an intentional approach, however, this would best be documented to demonstrate a recognition that while it might be perceived a certain way, the approach was carefully considered and determined to be the most advantageous to the investigation.

a. The Use of a Caution/Setting the Context

The goal of the interview is to obtain reliable and admissible evidence in any given case. The significance of the investigation and the importance of the interview should be highlighted and the subject officer should understand the formality of the proceedings and any potential jeopardy. It should be made clear that this is a *homicide* investigation and the subject officer should understand that he *could* have some jeopardy, particularly given the fact that the use of force must not only be subjectively reasonable but also objectively reasonable. This would best be accomplished, at a minimum, with the use of a caution. The interview with the subject officer was not cautioned, something that could potentially affect its admissibility down the line should the case result in a prosecution. It is *arguably* not strictly necessary but it would seem wise to err on the side of caution in favour of admissibility rather than run the risk of a statement being later excluded.

Although the use of the caution is suggested, there is no magic in the words. What is important is that the subject officer understand what is being investigated, the seriousness of the situation, the potential for jeopardy, his rights and his responsibilities. This allows for an informed decision to be made as to whether he wishes to provide a voluntary statement and provides context for any *Charter* argument regarding admissibility should the statement be necessary in any prosecution.

b. Revealing Information to the Subject Officer

During the interview with the subject officer on April 6, 2015, the subject officer asked investigators whether the affected person's rifle was loaded. Daily Log notes indicate that after consultation within the command triangle, it was decided that releasing this information might give the subject officer some form of "relief" to know that the rifle had been loaded. The subject officer was advised that the firearm did, in fact, contain a live round in the chamber and not to second guess what he did. This was done while the investigation was on-going.

While not often publicly discussed, officer involved shootings can have a significant impact on the mental health of subject officers. It is almost a certainty that the subject officer will repeatedly go over the incident in his or her head wondering what could or should have been done differently. The desire to ease that stress, where possible, is natural and human. While an investigation is underway, however, the integrity of the investigation must come first. It is the opinion of ASIRT that unless there was an investigative purpose for the

sharing of the information before the investigation was concluded, such as attempting to stimulate discussion or conversations on a wiretap, evidence should not be discussed with the subject officer while the investigation is being conducted. The test for whether information should be shared during an investigation should not be “no harm, no foul” but rather whether there is a principled reason, *in the furtherance of the investigation*, to divert from the ordinary practice of not advising witnesses of evidence that they would normally not have known until the investigation is complete. This is even more problematic when at least one other witness who asked questions was told that in the interests of maintaining the integrity of the investigation, information could not be disclosed.

As well, this brings us back to the need to maintain and model independence. Leaving aside the sharing of information obtained during the investigation, even suggesting to the officer not to second guess himself could be problematic. By comforting the subject officer, there is the potential for the *perception* of undue sympathy for the subject officer or investigative bias. One can be kind and compassionate without overtly or expressly sympathizing with the subject officer. Investigators should always be mindful of how a subject officer may be doing but the best way to address the situation would be to engage the relevant police service’s support services and/or the subject officer’s family or friends to secure available supports for the subject officer while/if he is struggling. This allows investigators to remain firmly in the independent investigative role.

Having said all that, the investigators modeled exactly the process for how these types of situations should be handled. Judgment calls are made throughout investigations and investigators are called upon to make the decision that they believe is best in the circumstances. In this situation, the command triangle recognized the potential issue, had a principled discussion about what to do and documented both the discussion and decision. Whether it was the correct decision is a matter of opinion or debate but the process they followed was unassailable.

B. The Subject Officer and Sidearm at the time of the Incident

There are some very minor issues that ASIRT would raise with respect to the handling of a subject officer and his service weapon at the time of the critical incident. They would be as follows:

a. Photographs of the Subject Officer at the time of the Incident

The subject officer was not photographed immediately following the critical incident to capture how he was dressed and his appearance following the incident. Photographing the subject officer as he appeared immediately after can be of some evidentiary value depending upon issues that might be raised in any given case. As such, it would have been beneficial to have photographs to memorialize his appearance should it become an issue down the road, including the manner of dress and the possession and placement of his

weapons systems. That having been said, investigators documented their observations of appearance in writing and further captured similar information through witness interviews of first responders. Investigators also properly seized the subject officer's clothes and police equipment.

b. The Sidearm, Magazine and Ammunition

No photographs were taken of the subject officer's sidearm and the ammunition contained in the magazines at the time of seizure. It would be a best practice to do so, once again, to memorialize the items at the time of the seizure.

Additionally, there is nothing in the documentation or notes to indicate that when the sidearm was seized a bullet count for each magazine was conducted. There is also no reference as to whether a bullet was extracted from the chamber when the firearm was unloaded. A Forensic Science and Identification Services report references 20 bullets as accompanying the magazines as part of the magazine exhibits. Four shell casings were recovered on scene. The two magazines have a twelve bullet capacity each would be consistent with the count of 24 bullets based on the 20 bullets recovered and the four shell casings. As such, it appears that the subject officer had the standard number of bullets and that they were all accounted for at the scene and through the autopsy.

The issue of a whether the subject officer would have had a "top up" round should normally be determined. A "top up" round is sometimes used when loading an automatic pistol such as the Sig Sauer. This is done by inserting a magazine with a full capacity of bullets or rounds, 12 in the case of the subject officer's pistol. Once the magazine is inserted and seated in the pistol the "slide" is "racked" or pulled back to mechanically extract a bullet from the magazine and insert it into the chamber, thereby loading the pistol. The magazine can then be removed and another bullet loaded into the magazine to "top up" the magazine to its full 12-round capacity. Once the magazine is reloaded into the pistol the loaded pistol now has 13 bullets that can be fired in succession with each trigger pull. Some police services have policy against using the "top up" method.

Another method of "topping up" is to conduct a tactical re-load when a number of bullets have been fired from a pistol depleting the fully loaded magazine that was in the gun. The user removes the partially empty magazine and inserts a fully loaded one. Because the pistol had cycled a live round into the chamber after the last shot the pistol would now have 13 bullets. This is sometimes done to quickly reload and have the maximum number of bullets at their disposal. The tactical re-load is part of the RNC Pistol Qualification Course. RCMP did, however, cover off the possibility of a tactical re-load. The subject officer stated that he considered, but did not conduct a tactical re-load after the incident. As a best practice, however, an immediate bullet count and the consideration of the initial form of top-up should also have been covered off. That having been said, there is no reason to

believe that the subject officer used a top-up method in this case, nor is there any reason to believe that there are any unaccounted for rounds based on the whole of the evidence.

C. Officer Notes

Officers' notes can be very important in any given case for a variety of reasons. In this case, although overall, the investigation could be described as extremely well-documented, there were some missing notes.

a. Monitor Notes

It is standard practice to have an officer monitor an interview between a subject officer and another officer. It is also a standard practice for the monitor to make "monitor notes". These notes can be a form of back-up documentation of the context, gist and /or key portions of an interview. RCMP followed best practices in the digital video recording of the April 8, 2015 interview with the subject officer. That is the gold standard. Unfortunately, investigators encountered something all investigative agencies have at one time or another. The digital video equipment failed. Technology is fantastic when it works but can be extremely problematic when it doesn't. In this case, the equipment failed. Monitor notes, if they existed, would have provided at least some documentation as to what was said during the interview but no monitor notes were located on the file. Monitor notes should be considered especially during pivotal interviews.

b. Witness Officer Notes

Cpl. O'Keefe was one of the first RCMP officers on scene that the subject officer presented himself to upon arrival. The notes and subsequent PROS report provided by Cpl. O'Keefe's documenting his encounters and discussions with the subject officer are extremely limited and, respectfully, inadequate.

As the sole witness to the critical incident, any spontaneous statements made by the subject officer could be of paramount importance. Although not always the case, spontaneous statements at the time of a traumatic event can have greater reliability than statements made at a later time. They could be assessed against the physical and forensic evidence for consistency and accuracy. They could be useful in establishing correlations to facts and evidence obtained during the investigation. Observations of his physical appearance, movements, and demeanor of the subject officer at the scene could have value in piecing evidence together. Careful and detailed documentation of these statements and observations in notes could be critical. It should have been paramount that Cpl. O'Keefe recorded in his notebook, at that time or contemporaneously to the event as time presented itself, as accurately as possible, the actual words that the subject officer used to convey what had happened and his observations regarding the subject officer's appearance and/or condition. Cpl. O'Keefe also made minimal notes of his seizure of the subject officer's

sidearm and provided little additional detail in his PROS report. Detailed notes should have been made regarding the unloading of the subject officer's service weapon, including whether a live round was ejected from the chamber, the removal of the magazines, and any bullet count, etc. Investigators should consider whether, notwithstanding the considerable passage of time, Cpl. O'Keefe should be interviewed to capture his observations of the subject officer and what, if anything, the subject officer might have said regarding the incident.

No notes from [REDACTED] who transported the subject officer from the scene to the detachment, were contained in the investigation. The officer may have made notes or it may be that the PROS report submitted by [REDACTED] constituted his notes. Either way, it is recommended that investigators confirm whether there are notes, whether the PROS report is what the officer utilized for the purposes of his notes or whether he elected to make no notes.

D. Physical Re-enactment/Experiment

The subject officer described holding a file folder and dropping it when the affected person pointed the rifle at him. The file folder was found on the table intact, with the papers still secured within the file folder. A question arose as to whether the file folder and contents would fall so neatly if dropped as described by the subject officer, a totally legitimate question. RCMP investigators attempted to conduct an experiment to re-create the file folder drop and videotaped a re-enactment of sorts dropping a similar file folder (with contents) to see if it would land in the condition that the folder was found on scene. Various drops resulted in the file folder landing on the table in a condition consistent with the scene, however, others led to the scattering of the papers and/or folder.

While the intention was good, this type of experiment is of dubious assistance, in my opinion, in assessing the veracity of the subject officer's statement unless the conditions can be recreated. This occurred in a dynamic environment in circumstances that would likely be impossible to recreate to provide any significant evidentiary value that would allow an inference to be drawn one way or another as to the veracity of the subject officer's information.

E. The Investigation of Officer-involved Incidents involving Death or Serious Injury

Investigations into incidents involving police conduct that may have resulted in a person's death or serious injury are different from standard investigations. Police officers are authorized, pursuant to the *Criminal Code*, to use force in certain circumstances, including lethal force. These investigations are always sensitive, high-profile, potentially complex and important not just to the individual case but also to the maintenance of public confidence in policing.

In this particular case, some of the issues raised would have been addressed by a comprehensive investigative guide or best practice for these types of matters. For example, all the provincial independent investigative bodies have an established practice regarding the rights and responsibilities of subject officers and witness officers, best practices in evidence gathering, investigative steps when dealing with the subject officer etc. While there was reference to national policy, it is aimed at broader policy issues as opposed to a best practice guide on how these matters should be investigated. These types of guides have been developed in other jurisdictions and by other police services. Indeed, prior to the formation of ASIRT, in 2006, RCMP "K" Division had developed a detailed "Investigation Guide" for the investigation of officer involved deaths or injuries. While it would be our hope that there would never be another need, it would be prudent to consider development of such an investigative guide for future critical incidents to ensure consistently high quality, principled investigations into these matters. Should you wish to see the RCMP "K" Division Investigation Guide, I have been authorized to share it with you. That having been said, it would seem to me that the better practice would be for consultation directly with those at "K" Division who have had the benefit of both the development of their own guide prior to the formation of ASIRT and the experience of dealing with the involvement of an independent investigative agency.

Conclusions

As one considers the above, it should always be kept in mind that with the benefit of hindsight it can be easy to point out in any review how something might have been handled differently. A review has the benefit of time, distance and independence to examine an investigation and identify what might have been done better. As such, the mere fact that issues are identified should not be construed as compromising the entire investigation. The question remains whether the issues, alone or in combination, are such that the quality of the investigation is contaminated.

Notwithstanding the earlier comments, this investigation was done well, following best practices and major case management principles. While some shortcomings were identified, when viewed in the context of the investigation as a whole, they do not taint the overall quality of the investigation and the reliability of the evidence obtained. ASIRT has very carefully reviewed the RCMP investigation into the circumstances surrounding the officer involved shooting that resulted in the death of Donald Dunphy. Subject to the observations shared earlier, the investigation was thorough and provides sufficient context to make a determination, based on evidence, as to whether the subject officer was lawfully placed, and to assess whether the use of force was authorized in law. The investigation reflects an intention to be objective and fair and was reported in an organized, logical, professional, and understandable manner.

These cases are very serious and always very difficult for the family of the person who has died. If ASIRT can be of any assistance in explaining our process or our findings to the family, please do not hesitate to contact us.

If you have any questions or concerns, please do not hesitate to contact me at your convenience.

Yours truly,

A handwritten signature in blue ink, appearing to read "S. Hughson". The signature is fluid and cursive, with a large initial "S" and a long, sweeping tail.

Susan D. Hughson, Q.C.
Executive Director
ASIRT

SDH/lw

c.c. Bill Sweeney, Director Of Law Enforcement