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MEMORANDUM NOTE DE SERVICE

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TO
À

Supt S. Sachsse
A/OIC Criminal Operations
B Division

FROM
DE

Insp P. Cahill
OIC Major Crimes
B Division

SECURITY - CLASSIFICATION - DE SÉCURITÉ
Protected B
OUR FILE - NOTRE RÉFÉRENCE
2015 376186
YOUR FILE - VOTRE RÉFÉRENCE
DATE
2016-01-22

SUBJECT
OBJET

Justice David Riche- Independent Observer Report (Donald Dunphy)

Supt Sachsse:

I've had the opportunity to review the Independent Observer report of (retired) Justice David Riche. I have attached a summation of the review highlighting numerous points within his report that are concerning. It should be noted that the areas of concern have nothing to do with the investigation and do not require any followup by the investigative team. The highlighted areas are questionable from the point that Justice Riche has not adhered to his mandate/role with the written report he has provided.

In the opening paragraphs of his report Justice Riche compliments the RCMP on the thorough investigation. "I wish to compliment the RCMP for their thorough investigation in this manner." This would appear to be one of the few times he commented on an area that was he was mandated to observe.

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

The mandate was clearly stated in a letter he recieved from the Criminal Operations Officer dated April 9th , 2015.

"As outlined in the terms of reference, we are asking that you complete a written report regarding your observations of the independence and thoroughness of the investigation."

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

Moving forward I propose the following recommendations:

1. Follow up with Justice Riche highlighting our concerns in a formalized manner (letter) , and meeting with him to discuss. At that time we can ask him to write a report as to his original mandate, full knowing that we will be disclosing both reports.

OR

2. Forward a letter to Justice Riche documenting our concerns. No personal meeting/ contact after the letter forwarded.

I also suggest that we not allow the Independent Observer report and subsequent followup of the concerns to delay our forwarding the file to the external agency for review.

Insp Cahill
OIC Major Crimes

The following is a written "Summary of Findings" that reviews the compliance with the role of Independent Observer as was outlined in the terms of reference that was provided to Retired Justice David RICHE.

Justice David RICHE was requested by the RCMP 'B' Division to provide independent observation of a criminal investigation being conducted by the RCMP. Justice RICHE had unfettered access to all aspects of the criminal investigation. Justice RICHE was asked to complete a written report regarding his observations of the independence and thoroughness of the investigation.

The following in this report is not meant to summarize comments by Justice RICHE where the RCMP disagree with his findings but the contrast of how police investigators perceive the evidence and base conclusions of the facts presented.

1. Justice RICHE stated that his job as an independent observer requires him to review the evidence and to make his conclusions and his interpretations of what was presented. This is clearly outside his mandate of completing a written report regarding his observations of the independence and thoroughness of the investigation.
2. Justice RICHE when discussing the meeting between Cst. SMYTH and Donald DUNPHY in the DUNPHY residence, said that Cst. SMYTH said in his statement that he got mad at DUNPHY. This statement by Cst. SMYTH must be put into context. Cst. SMYTH refers to being mad at DUNPHY because DUNPHY produced a rifle causing Cst. SMYTH to react with lethal force. It was after the fact.
3. Justice RICHE believes there were two angry men in DUNPHY's house the day of the shooting. Justice RICHE cannot believe that Cst. SMYTH did not become upset at DUNPHY and said he does not believe it was in SMYTH's character to lay back and just take this stuff on the chin without reaction. This belief of Justice RICHE is not supported by evidence.
4. Justice RICHE refers to Cpl. NOEL who said they say DUNPHY lying on the floor after the incident. This is in fact said by Cpl. O'KEEFE. Meghan DUNPHY advised police in her second statement that she was told by Cpl. O'KEEFE that her father was on the floor. In Cpl. O'KEEFE's report he verified that he said that DUNPHY was in sitting in the chair, deceased.
5. Justice RICHE says that Cst. SMYTH, in his statement, said that the rifle was behind the couch. An additional statement was taken from Cst. SMYTH in relation to this and he inadvertently said couch when he meant to say chair.

6. Justice RICHE comments that it was be extremely unlikely that a person who is shot with a fatal shot would have kept holding the rifle after two shots were fired. He added that if the gun was being held by DUNPHY when he was shot, the gun would have likely fell out of his hands and fell to the floor. The only evidence we have with regards to the position of the gun is where the gun was when police entered the scene and we have no evidence of the gun being moved prior to scene examination.

7. Justice RICHE said that we know from Dr. AVIS (OCME) that the shot to the body of DUNPHY was the one that killed him. Dr. AVIS said that either shot that hit DUNPHY (three in total) could have been the fatal shot.

8. Justice RICHE said that he RCMP Use of Force expert does not deal with the rifle being on the floor which Justice RICHE believes fell from DUNPHY's hands after the first two shots. No evidence to support this belief.

9. Justice RICHE said that Cst. SMYTH said he made notes while at the DUNPHY residence but the notes were not produced. These notes were disclosed to Justice RICHE. The notes were made on a file folder and the folder was seized as evidence. The notes consisted of a couple of names of what appears to be worker's compensation employees.

10. Justice RICHE says he was not provided with any information of how Cst. SMYTH was feeling or his demeanour during the incident. Justice RICHE was present for two re-enactments by Cst. SMYTH and reviewed his statement where Cst. SMYTH is quite animated and emotional while retelling the events of that day. It appears that Justice RICHE is just reviewing the transcript of the statement. Justice RICHE was present for both re-enactments but did not since review any video.

11. Justice RICHE said that he didn't know whether or not there was any physical handling of DUNPHY and mention the fact that DUNPHY's glasses were damaged because he used them that morning. Scene photos show DUNPHY's glasses in poor condition but wearable. When found in the DUNPHY residence days later by Meghan DUNPHY, the glasses were in noticeably worse shape than in the scene photos. The glasses were on a table directly in front of DUNPHY, this table would have had to been moved to remove DUNPHY's body. The scene was released by police when the glasses were found. Justice RICHE then makes the comment that the autopsy does not show any bruising or any other indication of a physical nature other than the bullet wounds inflicted by Cst. SMYTH.

12. Justice RICHE said he would have liked to have had Cst. SMYTH submit to a Polygraph examination. S/Sgt. TOWNSEND NCO i/c Truth Verification Section was consulted if a Polygraph

examination was a reasonable investigative step in this case. S/Sgt TOWNSEND noted that a polygraph would not be appropriate in this case because there is no suitable issue to test. The proposed issue would be whether or not the firearm was pointed at the officer. TOWNSEND noted that this is 'interpretive' and not a suitable question. It is similar to a consent question with a sexual assault which is also not typically suited to a polygraph examination.

13. Justice RICHE concluded that the last shot was fired by Cst. SMYTH indicated that he intended to fatally injure DUNPHY. This is not supported by evidence.

14. Justice RICHE talked about section 25 of the Criminal Code and how police are not justified in using excessive force. Justice RICHE noted that Cst. SMYTH was equipped with OC Spray and that may be used to incapacitate a subject so they can be controlled with minimal physical contact. Cst. SMYTH was faced with a rifle / grievous bodily harm or death and responded to the threat with lethal force. He fired 4 shots, 3 that struck DUNPHY while exiting the room. RCMP SME Use of Force concluded that the response by Cst. SMYTH was appropriate and not excessive.

15. Justice RICHE said that Cst. SMYTH was not questioned in detail about what he was doing the 30 to 40 minutes after the shooting before police arrived. Cst. SMYTH gave a detailed account of what he was doing after shooting that included clearing the house (ensuring safety) and advising RCMP and RNC of incident.

16. Justice RICHE makes a conclusion that the 22 rifle was behind the couch up to the time the shooting took place between Cst. SMYTH and DUNPHY. At the scene police found the rifle in front of DUNPHY, Cst. SMYTH said the rifle came from the right side of the chair and there was a void in the garbage on the floor that is consider consistent with the dimensions of the rifle found. Justice RICHE then says there is no way for anyone to determine where the 22 rifle was located on Easter Sunday. Justice RICHE said that another circumstance took place, where the gun was moved, following what he would refer to as an argument between DUNPHY and SMYTH. There is no evidence to support this statement by Justice RICHE.

17. Justice RICHE said that the RCMP did not provide any details to him with whether or not Cst. SMYTH physically handled DUNPHY. There is no evidence to say that Cst. SMYTH physically handled DUNPHY.

18. Justice RICHE describes another scenario where Cst. SMYTH and DUNPHY got into an argument and added, "which I am sure they did..." Then DUNPHY ordered him out of the house and if Cst. SMYTH refused, DUNPHY could have gone behind the couch and took the 22 rifle to threaten Cst. SMYTH. Justice RICHE said that this could have probably been done while Cst. SMYTH was looking around the house, checking things out down the hallway. The scenario is in contradiction of all evidence available.

19. Justice RICHE does not agree with Cpl. KNAPMAN, RCMP SME Use of Force of where the gun should have landed when DUNPHY was shot. This would be impossible to verify and we have to depend on the evidence presented and if it would be reasonable for the gun to land where it was found. Justice RICHE then goes on the discredit Cpl. KNAPMAN as an expert in use of force. Cpl. KNAPMAN is a Use of Force SME and provides a lengthy CV qualifying his expertise.

20. Justice RICHE notes an example by Cpl. KNAPMAN where an unarmed 90 year old woman threatens to slap a police officer. The police officer response could be a punch or kick or physical control hard. Justice RICHE misinterprets this example. Cpl. KNAPMAN is talking about officer perception and tactical considerations and how police can response differently from what they perceive as a threat. (a 90 year old female opposed to a 30 year old fit 250 pound male, your response to that threat would be different.) Cpl Steve Burke provided Justice Riche with what he thought was clarity on this example used by the SME in his report.

21. Justice RICHE talks about a series of mistakes because he believes that this killing should have never happened:

- DUNPHY should have been arrested by Cst. SMYTH for Uttering Threats. The investigation did not reveal that Cst. SMYTH had reasonable grounds to arrest DUNPHY;
- The RCMP could have asked DUNPHY to drop into RCMP detachment to explain what he meant by raising or sending the items on Twitter. Cst. SMYTH was unable to assess the risk without speaking to DUNPHY. What if he refused to come in. What if something were to happen if DUNPHY decided take action?
- Cst. SMYTH could have stopped to see Meghan DUNPHY en route to DUNPHY's residence. The value of this visit at the time would have been considered low.

22. Justice RICHE makes the comment that DUNPHY was only trying to get SMYTH out of the house, he was not trying to hurt him. No evidence to support this statement.