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**USE OF FORCE REVIEW ROYAL NEWFOUNDLAND
CONSTABULARY**

PROS 2015-376186



CPL. WAYNE KNAPMAN

ROYAL CANADIAN MOUNTED POLICE

DATE SUBMITTED: 2015-10-12

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SCOPE OF REVIEW

Pursuant to a request from the RCMP 'B' Division (Newfoundland) MCU to the RCMP 'H' Division (Nova Scotia), 'H' Division Criminal Operations has requested that I conduct a Use of Force Operational Review into the police-involved shooting of Donald Dunphy at Mitchell's Brook, NL, on April 5th, 2015. The intent of this review is to determine if the actions of Cst. Smyth of the Royal Newfoundland Constabulary (RNC) were reasonable and necessary with respect to the circumstances surrounding this fatal shooting.

MATERIAL REVIEWED:

The opinions formulated in the preparation of this review were determined by analysis of the following materials:

- Video statements of Cst. Joe Smyth.
- Video re-enactment by Cst. Joe Smyth.
- Statements of Richard Dunphy.
- Statement of Debbie Dunphy.
- Statement of Donna Ivey.
- Statement of Tom Mahoney.
- Statement of Meghan Dunphy.
- Video footage taken by 'B' Division FIS taken shortly after the incident.
- Photographs of the scene taken by 'B' Division FIS shortly after the incident.
- Autopsy photos taken by 'B' Division FIS.
- Autopsy Report of Donald Dunphy.
- Medical Examiners scene report.
- Notes of Cst. Joe Smyth.
- Royal Newfoundland Constabulary (RNC) General Occurrence 2015-17896.
- RCMP Pros General Occurrence 2015-376186.
- Cst. Joe Smyth's training history.
- Royal Newfoundland Constabulary (RNC) Use of Force High Risk Vehicle Stops Training Package.
- Royal Newfoundland Constabulary (RNC) Use of Force Continuum training package.
- Royal Newfoundland Constabulary (RNC) Use of Force Survival Stress training package.
- Royal Newfoundland Constabulary (RNC) Firearms and Use of Force Equipment Order.
- Royal Newfoundland Constabulary (RNC) Jurisdictional Call Response.
- Royal Newfoundland Constabulary (RNC) Assistance to Outside Agency Policy.
- Royal Newfoundland Constabulary (RNC) Criminal Investigation Division Policy.
- Royal Newfoundland Constabulary (RNC) Protective Services Unit Policy.

- Royal Newfoundland Constabulary (RNC) Firearms Policy.
- Cst. Joe Smyth's Use of Force Report Form.
- Notes of Cpl. Steven Burke regarding Cst. Smyth's Professional Standards File.
- Royal Newfoundland Constabulary (RNC) Communication Centre Audio Recordings.
- RCMP 'B' Division Communication Centre Audio Recordings.
- Planned drawing by Sgt. Chris Saunders 'B' Division FIS.
- Ballistic Report.

I have also reviewed the National Use of Force Model (The Royal Newfoundland Constabulary Use of Force Continuum), the RCMP Incident Management Intervention Model (IMIM) and supporting rationale. There are no significant differences between the Royal Newfoundland Constabulary Force Policy, National Use of Force Framework and the IMIM as they relate to this incident.

The opinions expressed are derived from the written, video and audio documentation and material stated above; however, should new information be presented, the opinions may change.

INCIDENT SYNOPSIS (based on summary of reports and statements listed above):

On April 3rd, 2015 (Friday) at 10:21 hours, Cst. John Smyth, a member of the Royal Newfoundland Constabulary Protective Services Unit (PSU) received an email from the Premier of Newfoundland and Labrador's Office staff member, Donna Ivey, regarding a tweet of concern.

As a member of the PSU Cst. Smyth's role is to gather intelligence on persons that could potentially cause direct or indirect harm to the Premier, the Office of the Premier or to any other elected government official.

Donna Ivey advised Cst. Smyth of the following tweet which was in response to a tweet by the Premier of Newfoundland and Labrador on April 2nd, 2015, by the Twitter account holder *Donahue2Don Dunphy*:

“won't mention names this time, 2 prick dead MHAs (Member of the House of Assembly) might have good family members I may hurt”

Cst. Smyth initiated an intelligence threat assessment investigation as this was a common occurrence to be notified by the Premier's Office regarding disparaging social media comments, even if they were ambiguous and/or lacked criminality.

On April 4th, 2015 (Saturday), Cst. Smyth was able to identify that the Twitter account holder *Donahue2Don Dunphy*, was Donald Dunphy. Cst Smyth conducted intelligence and background queries on Donald Dunphy and determined Donald Dunphy had in excess of 27,000 tweets over several years expressing his dissatisfaction with the Workplace Health, Safety & Compensation Commission (WHSCC) of Newfoundland and Labrador.

At approximately 16:00 hours, Cst. Smyth spoke to Tom Mahoney of WHSCC of Newfoundland and Labrador. Tom Mahoney advised he was familiar with Donald Dunphy as he had suffered a workplace injury in the 1980s. Donald Dunphy had numerous interactions with the WHSCC staff, some of which caused him concern. Tom Mahoney informed Cst. Smyth that Donald Dunphy lived in Chapels Cove, NL and provided him with his contact numbers.

Cst. Smyth conducted indices checks including CPIC and CFRO. The checks confirmed that Donald Dunphy did not have a firearms licence or any registered firearms and there was no other information that would cause him concern.

On April 5th, 2015 (Sunday) at 11:22 hours, Cst. Smyth contacted RCMP Emergency Communications and subsequently spoke to Cst. Adrian Cox of the Holyrood Detachment and advised him that he would be attending the residence of Donald Dunphy regarding comments he made towards Premier Davis. Cst. Cox conducted PROS database checks on Donald Dunphy and advised Cst. Smyth the members had very little contact with him. However there was a 2005 Uttering Threats charge which had been withdrawn. Cst. Cox offered to attend with Cst. Smyth however Cst. Smyth felt given his low risk assessment that a uniformed member would likely hinder his ability to build rapport with Donald Dunphy and gather intelligence.

At 13:22 hours, Cst. Smyth located Donald Dunphy's residence in Mitchells Brook however there were no vehicles in the driveway. Cst. Smyth noted that the residence was in poor condition and that there was a sign indicating the house was in a state of poverty due to workers compensation and that no political figures were welcome. Cst. Smyth indicated this was a common practice as other people he dealt with would post signs. Cst. Smyth knocked on the front window but there was no sign of anyone being home. Cst. Smyth noted numerous cats in the residence and he felt empathy towards Donald Dunphy due to the deplorable living conditions.

Cst. Smyth then went next door to gather intelligence and spoke to Richard and Debbie Dunphy (Donald Dunphy's brother and sister-in-law). Cst. Smyth learned that there was an ongoing property dispute. Debbie Dunphy described him as being a recluse, antagonistic and having a grudge against the world. Debbie Dunphy advised that she had charged Donald Dunphy with Uttering Threats however it was withdrawn and a Peace Bond was put in place however he did not abide by it. Cst. Smyth asked Debbie Dunphy if she was fearful of him hurting her and she replied "No, he just makes me feel uneasy." Cst. Smyth asked both Richard and Debbie

Dunphy if Donald Dunphy had any firearms. Both responded that Donald Dunphy did not have any firearms and that he wasn't a hunter.

Cst. Smyth left the residence and noted there was now a vehicle parked in Donald Dunphy's driveway. Cst. Smyth entered the driveway and approached the house and knocked on the front window. Cst. Smyth noted there was a lot of garbage and cats in the house but he could not see anyone. Donald Dunphy came to the door, Cst. Smyth was dressed in plain clothes and identified himself by name, that he was a police officer with RNC and showed him his badge and identification. Cst. Smyth asked Donald Dunphy if he could come in and speak to him. Donald Dunphy agreed and was cordial. Donald Dunphy asked Cst. Smyth why the RNC was out there given he lived in RCMP jurisdiction. Cst. Smyth advised him that he was there to talk to him about some comments he made.

Cst. Smyth entered the residence and began rapport building with Donald Dunphy. They talked about how Donald Dunphy was injured when he was struck by a dump truck. Donald Dunphy entered the living room, sat in a recliner chair and asked Cst. Smyth to sit down. Cst. Smyth declined to sit down due to the filthy conditions but not for a tactical reason. Cst. Smyth stood approximately 9-10 feet away from Donald Dunphy next to a coffee table and in front of a fireplace. (See appendix II)

The conversation was cordial. Cst. Smyth began to look at the file folder he had in his hand. Then Donald Dunphy's tone changed and he asked "so what are you here for?" Cst. Smyth advised Donald Dunphy he was there to speak to him regarding the comments that he had made on Twitter and read out the tweet. Donald Dunphy became more agitated and he stated he could say whatever he wanted, accused Cst. Smyth as being an arm of the government and a puppet and asked him who sent him.

Cst. Smyth told Donald Dunphy that he was not there to arrest him and that he should calm down as Donald Dunphy was becoming more agitated and was moving around in his chair. Cst. Smyth was looking around at the deplorable conditions of the house and this appeared to agitate Donald Dunphy as he asked "what are you looking for?" Despite the agitation, Cst. Smyth did not feel alarmed as he felt that if Donald Dunphy tried something he would be able to deal with him physically. Cst. Smyth noted a bat or a piece of wood on the floor next to the left side of his chair. Cst. Smyth asked Donald Dunphy about the bat and he replied it was for protection. Cst. Smyth replied "okay as long as it stays where it is." Cst. Smyth observed Donald Dunphy was starting to froth at the mouth and took this as a threat cue, however this did not concern him due to Donald Dunphy's size. Donald Dunphy continued to rant that Cst. Smyth was an arm of the government. Donald Dunphy's behavior caused Cst. Smyth to question whether there was anyone else in the house.

Cst. Smyth kicked some garbage that was on the floor and he observed numerous bugs. He made the comment, 'I've got real concerns here' referencing the state of Donald Dunphy's

residence, however Donald Dunphy may have taken it the wrong way. Cst. Smyth was of the opinion that Donald Dunphy may have thought he was referring to the tweets he posted.

Cst. Smyth was writing some notes in the folder as he leaned against the fireplace mantle approximately ten feet across the room from Donald Dunphy. (See planned drawing Appendix II) Cst. Smyth advised he was writing notes as a de-escalation tactic to try to calm down Donald Dunphy and to stop himself from looking around the room.

As Cst. Smyth was writing, he observed in his peripheral vision the small barrel and bolt of a rifle coming from the right side of Donald Dunphy's chair. When Cst. Smyth observed the barrel, he dropped the folder of papers and simultaneously raised his left hand in a blocking fashion and drew his pistol with his right hand. Cst. Smyth began to move laterally towards the exit door and at the same time yelled, "No, no, no, no, no, no" and fired two shots towards Donald Dunphy's center of mass. Cst. Smyth stated that Donald Dunphy was still moving in the chair, the rifle was still in his hands and the barrel was following him. As Cst. Smyth continued moving toward the door, the rifle continued to be pointed at him so he fired two shots in the direction of Donald Dunphy's head. Cst. Smyth states he observed the last shot impacted the side of Donald Dunphy's head as he was exiting the room.

Cst. Smyth believed the threat was still active, so he edged his way back into the room (pieced the pie) fearing that Donald Dunphy might still have the gun. As Cst. Smyth entered the room, he observed that Donald Dunphy had no signs of life. Cst. Smyth observed the rifle on the floor and he was not sure if Donald Dunphy had discharged the gun.

Cst. Smyth immediately called RCMP Emergency Communications and advised that he was in a residence in Mitchells Brook and there had been shots fired. Cst. Smyth remained in a state of readiness at the entrance of the residence as he was concerned that the sound of shots may have alerted family members that reside next door and that he may be susceptible to additional threats.

Approximately 25 minutes later, members of the RCMP attended the residence.

AUTHORITY FOR OFFICERS TO USE FORCE

Police officers are given authority to use Force under section 25(1) of the C.C.C.:

"Everyone who is required or authorized by Law to do anything in the administration of enforcement of Law as a Peace officer or public officer is, if he acts on reasonable grounds, justified in doing what is required or authorized to do and in using as much force as is necessary for that purpose."

There are subsections of this that relate primarily to Death or Grievous Bodily Harm. 25 (3) C.C.C "Subject to subsection (4) and (5), a person is not justified for the purpose of subsection

(1) in using force that is intended or is likely to cause death or grievous bodily harm unless the person believes on reasonable grounds that it is necessary for the self-preservation of the person or the preservation of any one under that person's protection from death or grievous bodily harm.

Section 25(4) C.C.C. A peace officer, and every person lawfully assisting the peace officer, is justified in using force that is intended or is likely to cause death or grievous bodily harm to a person to be arrested if,

- (a) The peace officer is proceeding lawfully to arrest, with or without warrant, the person to be arrested;
- (b) The offence for which the person is to be arrested is one for which that person may be arrested without warrant;
- (c) The person to be arrested takes flight to avoid arrest;
- (d) The peace officer or other person using force believes on reasonable grounds that the force is necessary for the purpose of protecting the peace officer, the person lawfully assisting the peace officer or any other person from imminent or future death or grievous bodily harm; and
- (e) The flight cannot be prevented by reasonable means in a less violent manner.

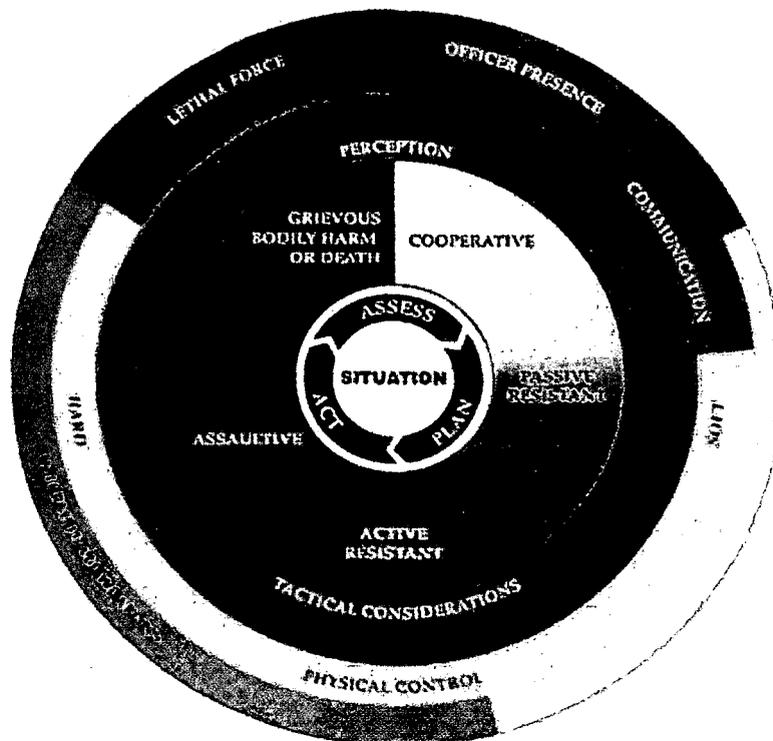
Section 26 of the C.C.C. addresses excessive force. "Everyone who is authorized by law to use force is criminally responsible for any excess thereof according to the nature and quality of the act that constitutes the excess." Generally, force is considered excessive if the following conditions are met:

It is grossly disproportional to the need for action.

It was inspired by malice or over aggression.

It shocks the consciousness of the Court.

NATIONAL USE OF FORCE FRAMEWORK



The officer continuously assesses the situation and acts in a reasonable manner to ensure officer and public safety.

Members of the Royal Newfoundland Constabulary (RNC) receive training on the National Use of Force Model (above). This is a graphic representation of primary factors involved in an officer's risk assessment of a situation and their subsequent actions to address the situation. The author of this report has had no formal training on the National Use of Force model, however it and its underlying philosophies are similar to and consistent with the Incident Management Intervention Model (IMIM) used by the RCMP in which the author has had extensive training.

The model is neither policy of the organization nor law, rather it should be used as an aid for training and to help officers understand and explain their decisions. It is also useful to members of the judiciary and the public in understanding why and what occurred in any encounter involving the police and public. The model is based on the premise that the primary responsibility of a Peace Officer is to preserve and protect life. The primary objective of any use of force is to ensure public safety. Police officer safety is essential to public safety. Officers are taught to make a risk or threat assessment in each situation. This will include assessing the situational factors, the subject's actions, the officer's perceptions and tactical considerations. After analyzing these factors the officer will determine a course of action to address the situation in front of him or her.

As part of their initial and ongoing training, RNC members are taught a variety of tactics based on the curriculum of the Atlantic Police Academy Use of Force Training Manual. They are also guided by their operational policy. Some pertinent aspects of this policy were reviewed, as stated on page 3. This is relevant since the training and policy should form the basis for their actions in any use of force encounter.

The model is circular indicating that the situation does not develop in a linear fashion and can rapidly change, either escalating or de-escalating, and the officer must be able to respond accordingly. In the center of the model is the situation. This is surrounded by words, perception and tactical considerations.

A key component is the officer's perception of the event. For example, how do they feel about the situation at hand? Do they have confidence to handle the situation? Are they physically fit? Do they perceive the subject as being dangerous or fitter than they are? Do they have a past history with the subject? Is the officer fatigued? Etc. This is a personal assessment that he or she makes of their situation. Each officer's perception of an event will be unique within limits. Although this is an individual decision based on an officers unique perception of what is happening, it must still be reasonable and within the law.

Tactical considerations include such things as the number of officers vs. the number of suspects, the environment in which the encounter is taking place, time of day and lighting conditions, the presence of other people, etc. These factors will have a major effect on how an officer perceives his or her risk and how he or she reacts.

The subject's behavior is characterized as either cooperative, passive resistant, active resistant, assaultive or death or grievous bodily harm. The officer's response options are outlined in an outer ring and include officer presence, physical control soft, physical control hard, intermediate weapons and lethal force. Communications and tactical repositioning are two response options that are present and available in virtually any use of force encounter and can be used in conjunction with other force response.

A common error is to look only at the subject behavior characterization and the corresponding response options without examining the officer's perceptions and tactical considerations. For example, if we have an unarmed 90-year old woman threatening to slap an officer and apply only the subject behavior portion of the model then the threat can be characterized as assaultive to the officer. The appropriate response could be physical control hard, such as a punch or kick to the subject, or an intermediate weapon such as defensive baton or Conducted Energy Weapon (CEW). However, if we look at all the tactical considerations and personal perceptions, we may come up with another response. The officer is male, physically fit and confident in the use of all his response options. He knows he has more units attending soon, he is in an area where he can get cover quickly, there is no one else in danger at this time, it is daylight and he sees no other threats in the area. He will consider all these factors in his risk assessment and maybe come up

with a different response than those outlined above. He would probably use physical control soft such as a joint manipulation and handcuffing. Police/suspect interactions can be complex and numerous factors have to be examined.

The officer will consider all these different elements and make a decision on how to respond. It is important to note that officers are individuals and as such their perception of what is occurring and hence their response will be somewhat unique. However, each officer is accountable for his or her actions and they must be reasonable given what is known at the time of the incident. Their actions have to be able to stand the test of reasonableness - would a reasonable person with similar training and experience have reacted in a similar manner?

In addition to the National Use of Force model, officers are trained to consider the seven Tactical Principles. These are:

1. Look for and use cover: not only will cover protect you from harm, you will also feel more secure and think more clearly.
2. Look for threat cues: these are audible or visual stimuli that should raise an officer's threat awareness. For example, officers are trained to pay particular attention to the position and movement of a suspect's hands as these will most often deliver the threat.
3. Time distance ratio: Officers should maintain distance whenever possible from a suspect, especially in the absence of cover or barriers. There is a spatial context to the level of threat an officer feels. For example, if someone has a knife within striking distance of an officer, he or she will rightfully feel a very high stress level. This is a natural reaction to an immediate threat of death and the officer will feel that they have very limited options and move to those options quickly. This is a survival mode mentality. If the officer can create some time and distance, this feeling will diminish somewhat, resulting in more rational thought. As well, more options for dealing with the situation will present themselves.
4. One plus one rule: This simply advises the officer not to be complacent. If one suspect is found there may be another. If one weapon is found, the suspect may have another. Avoid any complacency until you have the suspect secure.
5. Verbal communication: An officer should be communicating with the suspect all the time. You should identify yourself and tell the suspect what you want them to do.
6. De-escalation: Officers are taught to try and de-escalate a confrontation. Are they in control of the situation? Can the danger to themselves be lowered by repositioning? If so, does this put the public or others in danger? Is verbalization working? Are there specialized units available that can better handle the situation? All this is to encourage the officers to think of solutions beyond what is directly in front of them.

7. Win or survival mentality: This is the reinforcement in the officer's mind to control this situation and survive it. They cannot quit. They must be prepared and use all their tools available to handle the situation safely. This reinforcement to the officer's mental preparation allows the officer to think and react and not be overwhelmed by the situation.

The National Use of Force model and the seven tactical principles are just some of the training given to officers but are comprehensive in capturing the basis on how officers are trained to assess risk and respond to it.

Critical Analysis of the Use of Force Encounter

Real life shooting incidents occur much differently than what is commonly portrayed on television and in movies. Shooting incidents are quick, dynamic events, often taking only a few seconds from the first shot to the last. There is a vast body of research on the use of deadly force involving shootings by police and the effect of fear.

Fear is an automatic physical reaction to a perceived threat that will result in predictable physical, emotional, perceptual, and cognitive changes because of high physical arousal states. Fear is the body's way of telling someone that his or her life is in danger and immediate action is required; profound chemical changes occur to make one instinctively and without hesitation, do one of three things to save one's life: fight, flight or freeze.

The following elements comprise the risk assessment process an officer undertakes when formulating their intervention response to a given situation: situational factors, subject behavior, perception and tactical considerations. A critical examination of these factors must be conducted when assessing the officer's actions in order to ascertain whether or not the police response to the situation at hand was both reasonable and necessary given the totality of the circumstances.

This risk assessment and response process will now be applied to this incident

1. Situational Factors:

In this question one must determine under what circumstances the officer and offender came into contact. For example, what was the nature of the call or what criminal offence had taken place requiring a police response, who are the involved parties/victims, number of suspects involved in the matter, are they known to police, what did the officer know prior to the contact with the suspect, were weapons involved or used in the commission of the offence? Additionally, what situational factors impacted the assessment process such as the location or environment of the incident, was the situation static or dynamic, was there an immediate danger to the public or officers involved, number of officers present or back up available, was there access to specialized resources? Finally, what type of resistance was offered by the subject upon contact with police that prompted or compelled a use of force intervention?

Findings:

In this situation, Cst. Smyth was a member of the Protective Services Unit (PSU) mandated to provide close protection services for the Premier of Newfoundland and Labrador and to gather intelligence on persons and groups of interest that could potentially cause direct or indirect harm to the Premier, the Office of the Premier or to any other elected government official.

Cst. Smyth was notified by the Premier's office regarding a tweet of concern by Donald Dunphy. As a member of the PSU it is common for Cst. Smyth to investigate these matters alone. As a part of Cst. Smyth's risk assessment he did the appropriate database checks on CPIC, PROS and CFRO. Cst. Smyth also contacted Cst. Cox of the RCMP to gather more information where he learned that Smyth had limited contact with the police, had no registered firearms however had a threat charge that was withdrawn ten years ago. Cst. Smyth also spoke to Donald Dunphy's brother and sister in-law and he was told that Donald Dunphy was an antagonist, that they were in a long standing dispute over property, that he did not have any guns, however they were not fearful of him. Cst. Smyth considered Donald Dunphy to be low risk and he declined the offer by Cst. Cox to assist as he felt that the presence of a uniformed member may hamper the rapport building and subsequent threat assessment. When Cst. Smyth attended he was met by Donald Dunphy who was alone in the house and was initially cordial. After both parties entered the residence Donald Dunphy's behavior went from being cooperative to passive resistance, then to grievous bodily harm or death when he pointed the rifle at Cst. Smyth. It is the writer's opinion that Cst. Smyth conducted the proper background checks and that there was no indicators that he would be faced with the situation that transpired.

2. Perception / Tactical Considerations:

One of the key factors to consider when assessing a police officer's decision to use force is the officer's perception of the situation at hand. Their perception is influenced by a variety of personal characteristics that they bring to the situation. Some of these factors include their size/strength or overall fitness, their personal experience, their skill/ability training, and their level of confidence to handle the situation. The officer's perception of the incident and the danger to public or police safety (made apparent by the subject's resistive behaviour) will heavily influence the officer's tactical considerations and intervention response. It is important to note that how any given officer perceives and responds to a situation will be based on the previously mentioned factors and that these factors may be unique to that officer and may legitimately differ from another officer facing the same circumstances.

Findings:

In this situation Cst. Smyth's perception of the event as it unfolded played a significant role in his response and ultimately his use of lethal force.

Cst. Smyth approached Donald Dunphy's residence with what he called the standard caution. Dunphy was becoming agitated however Cst. Smyth stated "I didn't feel threatened by any stretch." At one point in time, Cst. Smyth noted a large stick on the floor near Donald Dunphy. He asked Donald Dunphy what it was for and he replied it was for protection. Cst. Smyth still did not feel concerned as he felt that given his physical stature he could easily control Donald Dunphy.

3. The Subject's Behaviour:

In this question one must examine the resistance offered by the subject or perceived by the officers involved. The type or level of resistance threatened or initiated by the subject will directly influence the officer's assessment of the dangerousness of the situation and will ultimately form the basis for their use of force intervention/response.

Findings:

It was during this period of time - measured in seconds – that four shots were fired by Cst. Smyth. The officer utilized lethal force that was in accordance with Section 25 of the *Criminal Code of Canada*, the National Use of Force Framework and his training - the force was used to defend against a threat capable of causing grievous bodily harm or death.

In reviewing this incident it is apparent that the conditions necessary to justify an officer's decision to exercise their authority and to intervene with force if necessary have been met. In this incident Cst. Smyth had the legal authority to attend Donald Dunphy's residence and interview him. Specifically, Donald Dunphy posted tweets that questioned the safety of the Premier of Newfoundland and Labrador. The moment Donald Dunphy pointed a rifle at Cst. Smyth his responding actions were consistent with the criteria required to intervene and use force if necessary in that he was attempting to stop dangerous and/or unlawful behavior and his use of lethal force was necessary to protect his life.

Justification for the Use of Force

1. The purpose of the following examination is to determine if the actions of Cst. Smyth meet the test for a use of force that is justified in law. This includes determining the following factors:
 - Was the officer lawfully placed at the time of the incident?
 - Was the officer's use of force intervention necessary?
 - Were the officer's actions objectively reasonable given the totality of the circumstances?

Findings:

In this situation Cst. Smyth believed that he could safely attend the residence of Donald Dunphy and interview him regarding the comments he made on Twitter. The situation rapidly deteriorated when Donald Dunphy accessed the firearm and failing to heed commands to stop pointed the firearm at the police officer. Cst. Smyth at this point was reasonably in fear for his life. Donald Dunphy possessed the weapon, intent and delivery to kill or grievously harm the officer. Cst. Smyth had no choice at that time but to defend himself. The use of lethal force was defensive in nature, necessary, reasonable and warranted given the situation. Any police officer placed in the same position inside the residence would respond in a similar fashion - anything less might result in their death.

2. An officer's justifiable use of force or intervention against a person must be in response to one or more of the following criteria:

- To stop potentially dangerous and unlawful behaviour
- To protect the officer or another from injury or death
- To protect subjects from injuring themselves
- In response to effecting a lawful arrest when the subject offers resistance

In assessing the officer's choice of intervention - the following needs to be addressed:

- Was there a preclusion opportunity - no lower level of force applicable
- Target Identification - did the officer identify the proper threat
- Target Isolation - what do you hit if you miss - public safety considerations.

Findings:

No other application of force, intermediate weapon system or other intervention technique would have been advisable given these circumstances. In the face of this situation Cst. Smyth's decision to use his firearm to stop Donald Dunphy was both reasonable and necessary to potentially save his own life. Regarding target identification issues - there were no concerns in this respect.

In addition to the above mentioned criteria, the use of force option chosen by an officer in order to be viewed as both objectively reasonable and necessary must be in response to the following set of conditions or put simply - did the subject possess the following in mind and body (WID principle):

WID

- **Weapon** - did the subject have or reasonably appear to have a weapon capable of doing harm to the officer or others?
- **Intent** - did the words or actions of the subject place the life or personal well-being of the officer or someone under his/her protection in jeopardy or imminent danger?
- **Delivery** - did the subject have the ability to carry out harm to the officer or person under their protection?

In reviewing this incident it is apparent that the conditions necessary to justify an officer's decision to exercise their authority and to intervene with force if necessary have been met.

Cst. Smyth's actions were consistent with the criteria required to intervene and use force if necessary in that he was attempting to stop dangerous and/or unlawful behavior and his use of lethal force was necessary to protect his life.

The rifle was found with a bullet in the chamber, however the bolt was in the rear position. (Scene photographs). In this condition the rifle would not fire. It is unclear if the bolt became locked back after the rifle fell on the floor or if the rifle was in this condition when it was pointed. If the bolt was locked back when Donald Dunphy pointed the rifle at Cst. Smyth, he would not have seen or been able to recognize the weapon was not capable of firing due to a phenomena called Perceptual Distortion. A number of perceptual changes that can occur as a result of fear: tunnel vision may occur resulting in a loss of peripheral vision and depth perception, as well as inhibiting one's ability to see beyond a threat.¹

Cst. Smyth states he saw the bolt of the rifle however he was not able to recall if the bolt was forward as his focus of attention would have been on the barrel that was pointing at him.

With respect to the principle of WID used to assess the necessity and reasonableness of a police intervention - the conditions have been clearly met. Donald Dunphy was in possession of a rifle or **weapon** to cause death or grievous bodily harm. Donald Dunphy showed the requisite **intent** to use the weapon when he pointed the firearm towards the officer. Due to the proximity of the threat Donald Dunphy had the **delivery** to effectively use the firearm against Cst. Smyth.

Regarding target isolation - in any environment the use of a firearm is fraught with risk given the potential harm that could come to an innocent bystander in the event of a ricochet or missed shot by a police officer. In this regard an officer must balance their immediate need to protect themselves or another person against the public safety issues inherent in the use of a firearm. Cst. Smyth's immediate need to use his firearm outweighed the minor risk to public safety. In this

¹ Klinger, 2002

case - a rural environment, the incident occurring within a residence and no one in close proximity.

4. Reasonable Force:

Force would be considered excessive if it met the following conditions:

- The force used was grossly disproportionate to the need for action.
- Was inspired by malice or over aggression.
- Would otherwise shock the consciousness of the court.

In assessing reasonableness of the intervention used by the officers the following should be considered:

- Did the officer give the subject a chance to comply without force?
- Did they consider or try to de-escalate?
- Did the suspect limit the officer's ability to de-escalate?
- With compliance by the subject, did the use of force stop?

Findings:

Regarding reasonable force - A peace officer or a citizen is entitled to use force to effect an arrest with or without warrant. Section 25 of the *Criminal Code* authorizes anyone to use force who is required or authorized by law to administer or enforce the law. A person authorized to use force to effect an arrest is justified in using as much force as necessary for that purpose. In determining whether the force used was necessary, the court will consider all the circumstances including the nature and degree of the force used, the gravity of the offence for which the arrest was made, the conduct of the person being arrested and the possibility of effecting the arrest by other alternative means than the use of force. A person is not entitled to use excessive force in effecting an arrest.²

When considering whether or not an intervention technique was reasonable- one of the key factors is to determine if an objectively reasonable person would believe that the level of force used was both necessary and reasonable. In coming to a decision one must consider the totality of the circumstances involved and then place themselves in the subject officer's position. In other words, if faced with the same set of conditions would another person (officer) respond in a similar fashion to the subject officer.

²

Joel E. Pink & David C. Perrier - *From Crime to Punishment* 5th Edition, 2003 Thompson Canada Ltd

Regarding the concept of “grossly” disproportionate to the need for action - if a police officer’s life is placed in jeopardy due to the illicit actions of a subject then the use of lethal force to stop that threat is warranted where no lower level of force is prudent or reasonable given the situation. One must evaluate whether or not the use of force option chosen by the officer was reasonable and necessary giving due regard to the constellation of factors that will influence their assessment process. This choice of intervention technique will be largely based on the resistance offered by the subject.

In this case it is my opinion that Donald Dunphy’s actions left Cst. Smyth with only one option to stop him once he observed the rifle being pointed in his direction - the use of lethal force. A police officer resorting to lethal force to prevent a subject who possessed the weapon/means, intent and delivery system/ability to end his life would not in the writer’s opinion be considered grossly disproportionate to the need for action. Cst. Smyth resorted to lethal force.

According to the National Use of Force Framework, police may use lethal force to prevent grievous bodily harm or death to themselves or someone else. Canadian case law; i.e., *Levesque v Zinibbi*, Ontario 1992, states that it would be unrealistic to expect the police to use a minimal amount of force in these situations as it would place the police officer or public in danger; however the police must still use no more force than necessary given their individual assessment of the situation and the danger they face.

Regarding malice or over aggression - there is no indication that Cst. Smyth’s actions were inspired by malice or over aggression. Cst. Smyth was confronted with a life threatening situation, he met lethal force with lethal force in the immediate defense of his life. In this situation Cst. Smyth fired four shots, this is not unreasonable given the totality of the situation. Cst. Smyth observes a barrel of a rifle being pointed in his direction. As per his training and the expected response by another officer put in the same situation, Cst. Smyth continues to shoot until the threat has stopped.

The average time for an officer to pull the trigger and fire a shot is approximately .25 seconds. It is most likely that the shooting encounter lasted 1-2 seconds. Examining the four shots, one shot missed Donald Dunphy and penetrated the wall to the right of him, one shot hit Donald Dunphy in the left chest and severed his aorta, one shot hit Donald Dunphy’s forehead, and the other shot and most likely the final shot hit Donald Dunphy’s left temple. As per the medical examiner report, all three shots were fatal however not all would be instantaneous in stopping Donald Dunphy’s actions. The bullet that severed Donald Dunphy’s aorta would not prevent him from continuing to move and point the rifle towards Cst. Smyth. According to the study by the Department of Justice report - FBI Firearms Training Unit regarding a one shot stop: “Barring a hit to the brain, the only way to force incapacitation is to cause sufficient blood loss that the subject can no longer function, and that takes time. Even if the heart is instantly destroyed, there

is sufficient oxygen in the brain to support full and complete voluntary action for 10-15 seconds.”³

With respect to Cst. Smyth shooting Donald Dunphy in the head during this incident, when the rifle is pointed at him Cst. Smyth describes that his actions became instinctive. Shooting incidents are quick, dynamic events, often taking only a few seconds from the first shot to the last. There is a vast body of research on the use of deadly force involving shootings by police. The dynamics of police-involved shootings, including an understanding of the human factors, physiology, and biomechanical aspects of police-involved shooting incidents is a standard part of law enforcement firearms training, and knowledge of these topics is common among law enforcement firearms trainers and experts. In a shooting situation, people revert to what they have been trained to do. When you are under sudden stress and fear, your pupils dilate, your heart thumps, your lungs heave, your adrenalin surges, your stomach and bowels are in turmoil, your ability to distinguish time, colors and distance diminish, you revert without thinking to the habits you have learned in training. Actions become automatic, and the shooter may act without conscious thought.⁴

In this situation Cst. Smyth would have been experiencing all these physiological factors and resorted back to his training that he learned during his firearms qualifications. As a part of RNC regular training, members are instructed to shoot two rounds center of mass and then one to the head. This is consistent with Cst. Smyth’s actions during the shooting, as he continued to shoot until he had egressed from the room and the threat had stopped.

During the confrontation with Cst. Smyth, Donald Dunphy had been given the opportunity to comply with lawful commands but he failed to do so. He ignored Cst. Smyth’s authority and pleas to comply. Donald Dunphy’s decision to pick up the firearm and direct it towards Cst. Smyth eliminated any further de-escalation opportunities such as a safe opportunity to disengage. During the shooting, Cst. Smyth re-assessed after each shot was fired and the application of force ended once Donald Dunphy no longer presented a lethal threat.

Regarding shocking the consciousness of the court - it is the writers position that the actions of Cst. Smyth would not shock the sensibilities of an informed court given the totality of the circumstances, the potentially lethal actions of the suspect, the serious nature of the situation and the level of danger faced by the officer during the encounter.

³ Handgun Wounding Effectiveness- FBI DOJ Report

⁴ Adams, McTernan, and Remsburg (1980)

CONCLUSION

Based on the contents and analysis of this report, it is my opinion that:

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

Cst. Smyth's decision to use lethal force was necessary to defend his life against the imminent threat posed by Donald Dunphy.

Curriculum Vitae – Cpl. Wayne Knapman RCMP
Subject Matter Expert Use of Force

Service Background:

- Member of the Royal Canadian Mounted Police since September 1990.
- April 1991 and September 1997, North Vancouver B.C. performing general detachment duties, community policing, police mountain bike and special projects unit.
- September 1997 and April 2001 posted to Sheet Harbour and Tantallon, N.S. performing general detachment duties.
- 2002 to 2006, Halifax Major Crime Unit as a member of the High Risk Offenders Unit and Cold Case Unit.
- 2006 to 2009, Division Criminal Analysis Section as a Criminalist Analyst.
- 2009 to 2013 was the NCO i/c of the H Division Public and Police Safety Training Unit. This unit is responsible for the delivery of all Use of Force courses for approximately 1050 members. Courses included carbine, pistol, Conducted Energy Weapon, and Immediate Action Rapid Deployment and Police Defensive Techniques.
- 2013 to 2015, H Division Criminal Operations Reviewer
- 2015 to Present, H Division Emergency Response Team Leader
- Member has been active on Emergency Response Teams (ERT) since 1993 and has attended over 500 calls of service in this capacity. Presently in the role as the Assault Team Leader for the H Division ERT.
- Member of the National Public and Police Safety Training Committee.

Police Training & Certifications:

- Officer Survival Instructors Course Vancouver B.C., April 1994,
- Basic Emergency Response Course, Ottawa Ontario, April/May 1995
- Bush Tracking course, Chilliwack B.C., May 1996
- Sniper Course, Ottawa Ontario, June/ July 1996
- Bush Tracking course, Halifax N.S., 1999
- Police and Public Safety Instructors Course Aldershot N.S., April 2000
- Aircraft Assault Course, Halifax, February 2002
- Helicopter Underwater Egress Training, Halifax, March 2002
- Offshore Survival Introduction Training, Halifax, March 2002
- Armed Ship Boarding Course Halifax, May 2002
- Aircraft Assault Course, Montreal, November 2002
- Conducted Energy Weapon Users Course Sackville, N.S. May 2003
- Extended Range Impact Weapon Users Course Ottawa Ontario, December 2003
- CBRN PC 4 Gas Mask Instructors Course, June 2004
- Basic Firearms Instructors Course, Aldershot, May 2004
- Marine Operations Course, Miramichi N.B., October 2004
- Immediate Action Rapid Deployment Instructors Course Aldershot N.S., November 2005

- Conducted Energy Weapons Instructors Course, Aldershot N.S., September 2005
- Master Conducted Energy Weapon Instructors Course Edmonton Alberta, March 2008
- Marine Operations Advanced Course Halifax, Sept 2008
- Incident Management Intervention Model Instructors Trainers Course November 2009 Summerside, PEI
- PC4 Gas Mask Instructor, Halifax NS, October 2010
- ERT Sig Sauer P226 Instructor, Ottawa Ont., March 2011
- Force Science Analyst Course San Jose California, November 2011
- Extended Impact Weapon Instructor Course, Ottawa Ont., July 2012
- Carbine Instructor Trainer Course Halifax, October 2013

Relevant Experience as a Subject Matter Expert Use of Force:

I have been conducting use of force reviews since 2003 as well as reviewing Subject Behavior Officer Reports on behalf of the H Division Criminal Operations. Since 2008, I have been the Senior Use of Force Subject Matter Expert in the Division overseeing the program, mentorship and providing advice to senior management regarding use of force matters.

The following are relevant cases that I have reviewed and provided an expert opinion:

- North Vancouver March 1994, Regina vs. Siamek Zahedi. Provided testimony in a robbery case in BC Provincial Court. I was qualified as an expert in the function and use of a 9mm handgun.
- RCMP officer involved shooting Ess Road Enfield Nova Scotia, July 2003. I prepared a detailed use of force review and provided an expert opinion.
- Testified at the Attempted Murder Trial of Carline VandenElsen and Larry Finck March 2005, Halifax NS. Testified regarding the levels of force utilized by the Emergency Response Team members and explained the Incident Management Intervention Model to the jury.
- Officer involved shooting Halifax Regional Police Service, October 2007. A detailed review was conducted and provided an expert opinion to the investigators.
- Sudden Death of Howard Hyde Halifax Regional Police, November 2007. An operational download was conducted on the Conducted Energy Weapon used in the incident. A detailed review was conducted and provided an expert opinion to the investigators.
- December 2008. Officer involved fatal shooting of Paul Simon, Wagmatcook, N.S. I authored a detailed Use of Force review regarding this incident and provided an expert opinion to the investigators.

- Operational Review of the use of force used during a vehicle stop, Antigonish N.S., September 2009. Prepared a detailed Use of Force review regarding this incident, and provided an expert opinion to Senior Management.
- Internal Investigation, Inverness NS, April 2010. Prepared a detailed Use of Force review regarding this incident, and provided an expert opinion to Senior Management.
- Member of the National Core Working Group on the development of the RCMP Conducted Energy Weapon Program. Collaborated with other SMEs in the development of national standards, procedures and best practices, 2010.
- From 2011 to 2013, used as a Subject Matter Expert in the development of policy and training material for the RCMP Patrol Carbine. Travelled nationally with other SMEs delivering carbine instructor and instructor trainer courses.
- From 2011 to present, member of the National Core Working Group on the development of the RCMP Subject Matter Expert Use of Force Program. Collaborated with other SMEs in the development of a national standards, procedures and best practices.
- 2015, Member of the National Core Working Group for the development of a training package for the supervisor response to critical incidents.

APPENDIX II

